EUROPEAN COMMISSION
Competition DG

CASE AT.40049 – MasterCard II

(Only the English text is authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003

Date: 22.01.2019

EUROPEAN
COMMISSION

Brussels, 22.1.2019
C(2019) 241 final

COMMISSION DECISION

of 22.1.2019

relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement

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(Text with EEA relevance)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1], and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission Decision of 9 April 2013 to initiate proceedings in this case,

Having given Mastercard Incorporated, Mastercard International Incorporated and Mastercard Europe SA the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004[2],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the hearing officer in this case,

Whereas:

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[1] OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

[2] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty (OJ L 123, 27.4.2004, p. 18).

1. INTRODUCTION

(1) This Decision concerns the cross border acquiring rules of the Mastercard card payment scheme. Mastercard Incorporated, Mastercard International Incorporated and Mastercard Europe SA (together referred to as "Mastercard"), operate the Mastercard card payment scheme. The period covered by this Decision is from 27 February 2014 to 8 December 2015. In that period, Mastercard maintained a set of cross-border acquiring rules, which created an obstacle to cross-border trade in acquiring services within the EEA.

(2) This Decision establishes that Mastercard's cross-border acquiring rules constituted an infringement of Article 101 of the Treaty on the Functioning of the European Union ("Treaty") and Article 53 of the Agreement on the European Economic Area ("EEA Agreement").

2. PROCEEDINGS IN THIS CASE

(3) On 9 April 2013, the Commission initiated proceedings in accordance with Article 11(6) of Regulation (EC) No 1/2003 and Article 2(1) of Regulation (EC) No 773/2004 against Mastercard.

(4) During the investigation, the Commission sent several requests for information to Mastercard pursuant to Article 18 of Regulation (EC) No 1/2003.

(5) Between April and May 2014, the Commission sent requests for information to more than 40 acquirers (bank of the retailer) concerning their activities in 10 Contracting Parties to the EEA Agreement ("Acquiring Survey")[3]. In May 2014, the Commission sent requests for information to 33 acquirers for the purpose of collecting acquiring margin data that the Commission's survey of merchants' costs of processing cash and card payments[4] could not deliver.

(6) On 9 July 2015, the Commission adopted a Statement of Objections in accordance with Article 27 of Regulation (EC) No 1/2003 and Article 10 of Regulation (EC) No 773/2004 concerning Mastercard's cross-border acquiring rules and inter-regional multilateral interchange fees.

(7) On 24 July and 3 August 2015, Mastercard was granted access to the non-confidential documents in the Commission's file. Between 17 February and 8 March 2016 a Data Room was organised, in which Mastercard's external counsel was granted access to confidential documents in the file, with the consent of the data providers. On 18 March 2016, the provisional non-confidential Data Room Report was released to Mastercard and on 22 April 2016 the final information requested by Mastercard was released, thereby making the Data Room Report final.

(8) On 21 April 2016, Mastercard replied to the Statement of Objections in writing. On 6 May 2016, Mastercard submitted an updated reply, which incorporated the information released by the Commission on 22 April 2016.

(9) On 31 May 2016, an Oral Hearing took place.

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[3] Austria, Belgium, France, Germany, Italy, Netherlands, Poland, Spain, Sweden and the United Kingdom

[4] The study was published on 18 March 2015 on DG Competition's website: http://ec.europa.eu/competition/sectors/financial_services/dgcomp_final_report_en.pdf. ID 1806

(10) On 3 December 2018, Mastercard submitted a formal offer of cooperation with the Commission ("Settlement Submission"), acknowledging that its cross-border acquiring rules amounted to a decision by an association of undertakings that restricted competition during the period covered by this Decision within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement. The Settlement Submission contains:

(a) the acknowledgement in clear and unequivocal terms of Mastercard's liability for the infringement of having created an obstacle to cross-border trade in the market for acquiring of card payment transactions in the EEA, the legal qualification of the restriction of cross-border trade as an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement and the duration of the infringement;

(b) the agreement to pay a maximum fine of […];

(c) the confirmation that Mastercard's rights of defence have been fully respected, in particular that Mastercard has been granted full access to the Commission's file and the evidence supporting the Commission's objections and that it has been given sufficient opportunity to make its views known to the Commission;

(d) the agreement to receive the final decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in English;

(e) an acknowledgment that, for the purposes of these proceedings only, the Settlement Submission prevails over Mastercard's reply to the Statement of Objections to the extent that anything acknowledged by Mastercard in its Settlement Submission is in direct conflict with the content of Mastercard's reply to the Statement of Objections.

3. THE PARTIES

(11) Mastercard is a worldwide payment organisation that is represented by Mastercard Incorporated, Mastercard International Incorporated and Mastercard Europe SA.

(12) Mastercard Incorporated has its registered office in Wilmington, State of Delaware, United States of America. It is the holding company of the fully owned subsidiaries Mastercard International Incorporated and Mastercard Europe SA.

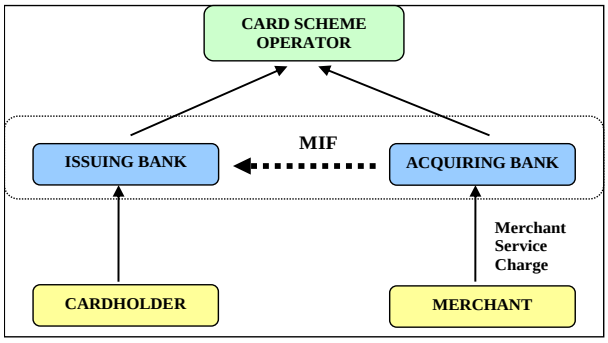
(13) Mastercard International Incorporated is a membership corporation that has its offices in Wilmington, State of Delaware, United States of America. Its members are banks and payment service providers that are card acquirers or card issuers, or both. Mastercard Europe SA is a fully consolidated subsidiary of Mastercard Incorporated.

(14) Mastercard Incorporated, Mastercard International Incorporated and its subsidiaries, including Mastercard Europe SA, form part of a single group under common control.

4. DESCRIPTION OF THE PRACTICE TO WHICH THIS DECISION RELATES

4.1. The Mastercard card payment scheme

(15) The Mastercard card payment scheme is a so-called “four-party” card scheme under which several financial institutions offer different services under common card brands, in this case the Mastercard or Maestro brands. Mastercard's card payment scheme is two-sided, with Mastercard acting as the platform, through which the issuers and acquirers interact.



(16) In such a card payment scheme, the issuing bank (the issuer) is the cardholder's bank. Issuers provide cardholders with payment cards, ensure the completion of payment transactions by authorising payments and transferring funds to the acquirer, and provide related services. The acquiring bank (the acquirer) is the merchant's bank that credits the merchant's bank account after receiving the funds from the issuer.

(17) According to MasterCard's Rules[5] a transaction that has been cleared and settled gives rise to an "interchange fee" to be paid by the acquirer to the issuer[6]. Issuers and acquirers can agree bilaterally on the interchange fee. If there is no such bilateral agreement a so-called Multilateral Interchange Fee ("MIF") applies.[7]

(18) Banks may both issue cards and acquire transactions. Transactions are called "on-us" transactions when an acquirer processes a card transaction made with a card issued by it or by a bank in the same group. Established banks in a country may have a substantial number of "on-us" transactions, on which, by definition, they do not pay any interchange fee to external issuers[8].

(19) Different MIFs apply depending on the transaction type (for example, face-to-face or at distance, with PIN code or with signature), the geographic scope of the transaction, and the card type (for example, debit or credit card, standard or premium card, such as Gold, World or Insignia). Historically Mastercard defined transactions as "domestic", when the cardholder and the merchant were established in the same country; intra-regional", when the cardholder was from one country within a specific region and the merchant was established in another country within the same region (Mastercard has defined five world-wide regions, of which “Europe” is one), or "inter-regional", when the cardholder and the merchant were established in different "regions"[9].

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5 MasterCard Rules dated 15 May 2014 (ID 1291). The MasterCard and Maestro Rules were combined in December 2013. Separate Maestro Rules no longer exist. Mastercard has explained that each rule indicates in the text which product it applies to: if a specific rule does not say that it applies to Mastercard cards only, then it also applies to Maestro cards (ID 89, reply to question 26.e.).

6 MasterCard Rules Chapter 8.3 (ID 1291); Annex 4 to Mastercard's reply request for information dated 26 April 2013: Interchange Manual, Chapter 1, under the heading "Basic Fee Types", ID 59.

7 MasterCard Rules, Chapter 8.3 and Chapter 8.4. (ID 1291)

8 See for example, ID 383, reply to question 25; ID 812, reply to question 25, ID 860, reply to question 25.

9 MasterCard Rules, Chapter 11 – 1.7.2.7. (ID 1291).

(20) Acquirers charge merchants a "Merchant Service Charge" ("MSC")[10]. The MSC is typically a percentage of the transaction value (ad valorem), although the fee for debit card transactions is sometimes a fixed fee or a combination of fixed and *ad valorem* fees.

(21) The level of the MIFs directly affects the MSCs because acquirers treat the interchange fees as a cost and take them into account when setting the level of the MSC. In 2013, MIFs paid by acquirers represented […] of their MSC revenues on average[11].

(22) For the purpose of this Decision, a "debit card" means a card that enables the payer to initiate a debit card transaction excluding those with prepaid cards.

(23) A payment card is referred to as a "credit card" when the amount of the transaction is not debited immediately from the cardholders' account. Instead, the amount of the transaction is debited to the cardholder – in full or in part – on a specific date of the month agreed between the issuer and the cardholder. The issuer and the cardholder may also agree a credit facility, with or without interest.

(24) A "commercial card" is a card issued to an undertaking, a public sector entity or a self-employed natural person, which is intended for business expenses and where the transactions are charged directly to the undertaking, public sector entity or self-employed natural person. All other cards are defined as "consumer cards".

4.2. Mastercard's cross-border acquiring rules

(25) "*Cross-border acquiring*" (or, in MasterCard's Rules, "*Central Acquiring*"[12]) takes place when the acquirer is located in a different country than the merchant. Cross-border acquiring is allowed under MasterCard's Rules[13]. However, according to the MasterCard Rules the cross-border acquirer is obliged to ensure that it "*does not disadvantage the Cardholder, the Merchant, or the Issuer involved*"[14]." In particular, until 9 December 2015, unless the acquirer had agreed bilaterally with the issuer on the interchange fee, a cross-border acquirer was obliged to apply the applicable domestic MIFs of the country of the merchant[15].

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10 The MSC is also referred to as "merchant fees", "discount rates" or "disagios".

11 The weighted average was calculated on the basis of the value of Mastercard transactions; see ID 1894 and ID 1899, replies to questions 5 and 28.

12 ID 55, page 17, paragraph 67.

13 MasterCard Rules (ID 1291). According to Mastercard, the MasterCard and Maestro Rules were combined in December 2013 and separate Maestro Rules no longer exist. Mastercard has explained that each rule indicates in the text which product it applies to: if a specific rule does not say that it applies to Mastercard cards only, then it also applies to Maestro cards (See e.g. ID 89, reply to question 26.e.) MasterCard Rules, Chapter 11 - 1.7.2.4: Centrally Acquired Merchants (, ID 1291). Mastercard has explained that to acquire transactions cross-border, the acquirer must either participate in Mastercard's "central acquiring program", have an individual licence to acquire transactions in each country it acquire transactions in or participate in the "SEPA Licencing Program" (, ID 55, reply to question 32 and). On 1 October 2014, according to Mastercard's new licencing structure for the EEA, all existing Mastercard licences granted to issuers and acquirers within the EEA have been extended to cover all 31 countries within the EEA. All new licences granted as of that date also cover the whole of the EEA. See ID 1303, page 4, reply to question 4 - Mastercard's rules were initially reviewed by the Commission in 2002 (Notice dated 13.4.2002 pursuant to Article 19(3) of Council Regulation No 17 (2002/C89/07)).

14 MasterCard Rules, Chapter 11 – 1.7.2.2. (ID 1291).

15 MasterCard Rules, Chapter 11, section 1.7.2.7. (ID 1291). Every card transaction gives rise to the payment by the acquirer of an interchange fee.

(26) Mastercard's cross-border acquiring rules are applicable to Mastercard card transactions at so-called Points of Sales ("POS") "face-to-face" transactions (when the card is present, for example in a shop), "at distance" transactions (when the card is not present, for example when the card number and authentication details are transmitted via internet, mail or telephone), and cash-back transactions, when a card is used to withdraw cash through merchants.

(27) This Decision concerns consumer debit and credit cards in card systems owned, operated or controlled by Mastercard (in particular Mastercard and Maestro branded cards) together referred to as "Mastercard cards". This Decision does not concern commercial cards.

5. THE PRODUCT AND GEOGRAPHIC MARKETS CONCERNED

(28) The market concerned by this Decision is the acquiring of card payment transactions. Acquiring of card payments is distinct from services for other means of payments, such as cash, credit transfers or direct debit payments. Card acquiring services are generally offered by either commercial banks or specialised acquirers.

(29) The finding of such a product market is in line with the Commission's established practice[16] and the case-law of the Court of Justice of the European Union[17].

(30) Since April 2014, the Single Euro Payments Area project ("SEPA") has focused on harmonising the principles, business practices, rules and technical standards relating to card payments, thereby facilitating cross-border acquiring in the EEA[18]. Since 9 December 2015, Regulation (EU) 2015/751 of the European Parliament and of the Council [19]has harmonised the conditions for card services in the EEA and contributed to lowering barriers to cross-border acquiring.

(31) Many acquirers now operate in several Contracting Parties to the EEA Agreement, either serving merchants through local branches or providing cross-border services to predominantly larger merchants that are present in many Contracting Parties to the EEA Agreement and demand centralised services.

(32) For the purpose of this Decision it is not necessary for the Commission to take a position as regards the product and geographic market concerned as Mastercard's cross-border acquiring rules restricted competition by object.

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16 Commission Decision of 26 February 2014 in case COMP/AT.39398- VISA MIF, Commission Decision of 24 July 2002 in case IV/29.373, *Visa II*, OJ L 318, 22.11.2002, p. 17, paragraph 43, Commission Decision of 17 October 2007 in case COMP/38606 *Groupement Cartes Bancaires (CB)*, C 183, 5.8.2009, p. 12, paragraphs 165-170, Commission Decision of 3 October 2007 in case COMP/37860 *Morgan Stanley*, C 303, 13.12.2006, p. 2, paragraphs 39-47, Commission Decision of 19 December 2007 in case COMP/34.579, COMP/35.518, COMP/38.580 *MasterCard* a.o., C 264, 6.11.2009, p. 8–11, paragraph 278. See also decisions in other sectors: Commission Decision of 20 April 1999 in case IV/M.1455 *Gruner + Jahr/Financial Times/JV;* Commission Decision of 7 July 2005 in case M.3817 *Wegener/PCM/JV.*

17 Judgment of the Court of Justice of 11 September 2014, *MasterCard and Others* v. *Commission*, C-382/12, ECLI:EU:C:2014:2201, paragraph 240; Judgment of the General Court of 24 May 2012, *MasterCard Incorporated, e.a.* v. *Commission*, T-111/08, ECLI:EU:T:2012:260, paragraphs 21-23, 168-182 (in particular paragraphs 172 and 173); Judgment of the General Court of 14 April 2011, *Visa Europe* v. *Commission*, T-461/07, ECLI:EU:T:2011:181, paragraphs 16-19, 91, 110-111, 143-144, 149.

18 ID 1276.

19 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 L 123, 19.5.2015, p. 1).

6. MASTERCARD'S MARKET POSITION IN THE RELEVANT PERIOD

(33) Mastercard was the second largest card scheme in the EEA after Visa in terms of consumer card issuing (about […] cards) and value of transactions (more than […]). It was significantly larger than other card payments schemes, including American Express, China Union Pay) and Japan Credit Bureau. In several Contracting Parties to the EEA Agreement, Mastercard was the market leader followed by Visa.[20]

(34) Card payments are characterised by important network effects. Mastercard had an important acceptance network in the EEA, comparable in size to that of Visa, with […] merchants accepting Mastercard cards and […] accepting Maestro cards in 2015.[21] In 2014/15, Mastercard had an average around […] members covering both issuing and acquiring in the EEA.[22]

(35) Mastercard's wide presence, large cardholder and licensee base and its strong merchant acceptance network reinforces its strong market position in the EEA.

7. ASSOCIATION OF UNDERTAKINGS

(36) Article 101 of the Treaty and Article 53 of the EEA Agreement apply to decisions by associations of undertakings if the activities of the association, or the activities of the undertakings belonging to the association, produce the results which Article 101 of the Treaty and Article 53 of the EEA Agreement aim to suppress[23].

(37) Although Article 101 of the Treaty and Article 53 of the EEA Agreement distinguish between "*agreements between undertakings*", "*concerted practices*" and "*decisions by an association of undertakings*" undertakings cannot escape the competition rules simply on account of the form in which they coordinate their conduct. Article 101 of the Treaty and Article 53 of the EEA Agreement apply to all forms of coordination between undertakings, including by means of a collective structure or a common body, such as an association[24].

(38) In 2002 MasterCard Incorporated was converted into a stock corporation whose shares were held by Mastercard's member banks. On 25 May 2006 MasterCard

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20 RBR: Payment cards issuing and acquiring in Europe 2018, Volume I: Western Europe and Volume II: CEE. Mastercard's reply to the RFI of 20 July 2017 [ID2770], and Mastercard 2015 data on consumer cards issued and value of transactions, Mastercard's reply to the RFI of 3 August 2018 [ID003215]

21 RBR: Payment cards issuing and acquiring in Europe 2018, Volume I: Western Europe and Volume II: CEE. Mastercard's reply to the RFI of 20 July 2017 [ID2770]

22 Mastercard's reply to RFI of 20 July 2017 [ID2770] and Mastercard email of 19 July 2018 [ID03021].

23 Judgment of the Court of 15 May 1975, *Frubo* v. *Commission*, C-71/74, ECLI:EU:C:1975:61, paragraph 30; judgment of the Court of 29 October 1980, *Heintz van Landewyck and Others* v. *Commission*, C-209/78 to C-215/78, C-218/78, ECLI:EU:C:1980:248, paragraph 88; Judgment of the Court of 8 November 1983, *NV IAZ and Others* v. *Commission*, C-96/82 to C-102/82, C-104/82, C-105/82, C-108/82 and C-110/82, ECLI:EU:C:1983:310, paragraph 20; Judgment of the Court of 2 October 2003, *Eurofer* v. *Commission*, C-179/99 P, ECLI:EU:C:2003:525, paragraph 23; and most recently in the Judgment of the Court of 22 October 2015, *AC Treuhand AG* v. *Commission*, C-194/14 P, ECLI:EU:C:2015:717, paragraph 29.

24 Judgment of the Court of Justice in *MasterCard*, paragraph 62-63, and case law quoted. See also judgements in Judgment of the Court of 14 July 1972, *Imperial Chemical Industries* v *Commission*, C-48/69, ECLI:EU:C:1972:70, paragraph 64; Judgment of the Court of 8 July 1999, *Commission* v *Anic Partecipazioni*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 112; and Judgment of the Court of 23 November 2006, *Asnef-Equifax and Administración del Estado*, C-238/05, ECLI:EU:C:2006:734, paragraph 32.

Incorporated was floated on the New York Stock Exchange though the Initial Public Offering (the "IPO"). Since then its shares have been publicly traded. MasterCard International Incorporated has always been a membership corporation, both before and after the IPO in 2006[25].

(39) In the Commission's 2007 *MasterCard* Decision, the Commission found that, following the IPO, MasterCard remained an association of undertakings within the meaning of Article 101 of the Treaty and Article 53 of the EEA Agreement[26].

(40) This was confirmed by the Union Courts[27]. In particular, the General Court found that Mastercard continued to be an association of undertakings after the IPO since the commonality of interests remained and the banks retained decision-making powers as regards aspects other than the MIFs.[28] This was endorsed by the Court of Justice which found that Mastercard could not maintain that it could not be qualified as an association of undertakings "*since it is apparent … that, when those decisions are taken, those undertakings intend or at least agree to coordinate their conduct by means of those decisions and that their collective interest coincides with those taken into account when those decisions are adopted, particularly in circumstances where the undertakings pursued, over several years, the same objective of joint regulation of the market within the framework of the same organisation, albeit under different form"*[29].

(41) In relation to the operation of the cross-border acquiring rules, subsequent changes to the decision-making powers and the governance of Mastercard and the ownership of Mastercard Incorporated described by Mastercard did not alter the qualification of Mastercard as an association of undertakings.[30].

(42) In particular, the further dilution of the banks' ownership in MasterCard Incorporated is not decisive since the banks did not control MasterCard Incorporated when the previous *MasterCard* Decision was adopted in December 2007. However, Mastercard took account, amongst other things, of the banks' interests, in setting the level of the MIFs. After the IPO, Mastercard continued to collect information about, amongst others, market and economic conditions and certain costs incurred by issuing banks[31] Mastercard held "market information gathering meetings" which were one of Mastercard's ways of gathering knowledge on the characteristics of card payments in a particular country, by listening to issuers and acquirers, as well as other stakeholders, active in that country[32]. In parallel, banks were providing their views to Mastercard through the European Advisory Board[33].

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25 Commission's 2007 *MasterCard* decision, paragraphs 73 and 74, and footnotes.

26 Commission's 2007 *MasterCard* decision, paragraphs 350 ff.

27 Case T-111/08 *MasterCard Incorporated e.a.*, paragraphs 245-259; Case C-382/12 P *MasterCard Inc. and Others*, paragraphs 62-76.

28 See Case T-111/08 *MasterCard Incorporated e.a.*, in particular paragraph 250.

29 See Case C-382/12 P *MasterCard Inc. and Others*, in particular paragraph 76.

30 ID 55, pages 2-3, 5-6, 11-15; ID 89, pages 2, 6-10, 14-15, 19.

31 Mastercard's reply to the request for information of 26 April 2013 (submitted by Mastercard on 14 June 2013), ID 55, page 14, paragraphs 54 and 55, reply to question 22.

32 Mastercard's reply to the request for information of 27 February 2014 (submitted by Mastercard on 7 April 2014), ID 89 page 19, reply to question 15a.

33 Mastercard's reply to the request for information of 26 April 2013 (submitted by Mastercard on 14 June 2013) ID 55, page 6, paragraph 16, second bullet point, reply to question 7

(43) At the same time, there was a commonality of interests between Mastercard and its members (banks and payment service providers) with respect to the cross-border acquiring rule because the MIFs were not ultimately paid by the banks or Mastercard, but usually passed on to the merchants. The Commission takes the view that Mastercard remained the standing body of an association of undertakings that acted in the common interest of its members (banks and payment service providers) when setting the level of the MIFs and adopting network rules applicable to the MIFs in the case of cross-border acquiring. The cross-border acquiring rules protected the levels of the MIFs, and, accordingly, the level of revenues for issuers. For Mastercard, the levels of the MIFs are a key parameter of competition used to attract issuers[34]. Moreover, the cross-border acquiring rules limited the pressure from cross-border competition for acquirers[35].

(44) Accordingly, Mastercard and its members constituted an association of undertakings and its decisions with respect to the cross-border acquiring rules amounted to decisions by an association of undertakings within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

8. LEGAL ASSESSMENT

8.1. General economic and legal context of cross-border acquiring rules

8.1.1. Economic context of cross-border acquiring rules

(45) Mastercard's cross-border acquiring rules acted as an additional barrier to cross-border trade in a market where interpenetration between Contracting Parties to the EEA Agreement was difficult because of other barriers to cross-border acquiring. Due to the difficulty for cross-border acquirers to negotiate lower bilateral interchange fees[36] and their lack of "on-us" transactions, cross-border acquirers also had a competitive disadvantage compared to well-established banks in the country of the merchant that were both issuers and acquirers.

(46) The restriction of cross-border acquiring locked in merchants and forced them to accept the domestic MIFs applicable in their "home" Member State. Even very large merchants were unable to negotiate a MSC below the MIFs. Merchants' lack of bargaining power was largely due to the two-sided nature of card payment systems, in particular the "must take" nature of Mastercard cards combined with the Honour All Cards Rule[37] and acquirers' practice of blending MSCs (charging the same MSC for transactions made with different payment card types or for different transaction types of the same payment card carrying different MIFs)[38].

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34 ID 89, reply to question 10b.

35 See ID 1274, page 30 and 33; ID 1275; ID 55, page 3, and ID 89, page 4.

36 Bilaterally agreed domestic interchange fees are often lower than the domestic MIFs that apply to cross-border acquirers, putting the latter at a competitive disadvantage through higher fee costs when setting their MSCs.

37 MasterCard Rules, 5.10.1 "Honor All Cards" stipulates the following: "*A Merchant must honor all valid Cards without discrimination when properly presented for payment. A Merchant must maintain a policy that does not discriminate among customers seeking to make purchases with a Card*". (ID 1291).

38 See further replies to question 42 of the Acquiring Survey; ID 59-151; ID 59-207; the Case T-111/08 *MasterCard Incorporated e.a.*, paragraph 158; ID 1291; ID 510, reply to question 31; ID 1841, reply to question 31; in reply to the Acquiring Survey 67% reported blending MSCs with respect to Mastercard transactions; 65% reported blending MSCs for transactions with Mastercard cards and Visa or domestic

(47) Lastly, because merchants did not know if the consumer would carry a Visa or a Mastercard card, and because of the "*must-take*" nature of both cards, almost all merchants accepted both Visa and Mastercard cards[39]. Merchants could not therefore threaten to move to another card scheme. This limited their bargaining power even further.

8.1.2. Legal context of cross-border acquiring rules

(48) The Commission has previously dealt with a restriction of competition similar to Mastercard's cross border acquiring rules. On 26 February 2014 the Commission adopted a Decision accepting Visa Europe's commitments proposal[40] concerning similar conduct (the Commission's 2014 *Visa Europe* Decision). Visa's commitments, among other matters, enabled its cross-border acquirers to apply a capped cross-border interchange fee of 0.20% for consumer debit and 0.30% for consumer credit card transactions, to their cross-border acquired domestic transactions. Visa's commitments as regards cross-border acquired transactions entered into force on 1 January 2015, facilitating acquiring competition.

(49) Mastercard's cross-border acquiring rules were liable to undermine competition for cross-border acquiring,[41] and were also in conflict with the declared aim of the SEPA to foster an internal market in payments and the regulatory provisions adopted at the end of 2015, namely the new Payment Services Directive and the Regulation on interchange fees for card-based payment transactions (see recital (51))[42].

(50) SEPA is a self-regulated initiative of the European banking industry to move from separate national payment areas to an integrated Euro payment area. SEPA initially focused on credit transfers and direct debits, but with the near completion of their migration by 2014, attention was turned to the harmonisation of card payments[43]. SEPA for cards aims at harmonising the principles, business practices and rules, as well as the technical standards.

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schemes. Cross-border acquirers are accounted for twice: once in their "home" Member State and once in the Member State where they offer acquiring services cross-border.

39 The price structure on the acquiring side (low fixed costs for joining the card scheme and transaction-based MSCs) encourages merchants to accept both Mastercard and Visa. On the other hand, the price structure (fixed monthly or annual card fees) encourages cardholders to hold mostly one card. The number of payment cards per capita was 1.53 on average in 2015 in the Union, see ECB's Statistical Data Warehouse (http://sdw.ecb.europa.eu/reports.do?node=1000001403) [ID2847]. To the extent the cardholder has several cards they often have different functions, which are not perfectly interchangeable to the cardholder, for example, one is a debit and the other a credit card.

40 Commission Decision of 26 February 2014 in case COMP/39.398 - Visa MIF (OJ C 79, 12.3.2011, p. 8).

41 See in this respect Judgment of the Court of First Instance of 11 March 1999, *Thyssen Stahl AG v. Commission*, T-141/94, ECLI.EU:T:1999:48, paragraph 302, relating to the importance of preserving competition, even where it is limited, with reference to the ECSC Treaty provisions equivalent to Article 101 of the Treaty.

42 The Commission issued on 24 July 2013 the proposals for a new payment Services Directive and a Regulation on interchange fees for card-based payment transactions.

43 http://www.ecb.europa.eu/press/pr/date/2014/html/pr140429.en.html (ID 1276)

(51) Regulation (EU) 2015/751 was adopted on 29 April 2015 and, Directive (EU) 2015/2366 of the European Parliament and of the Council[44] was adopted on 25 November 2015. Regulation (EU) 2015/751 is of direct relevance for this case.

(52) As of 9 December 2015, Regulation (EU) 2015/751 capped interchange fees in the EEA at 0.20% of the transaction value for consumer debit cards and at 0.30% of the transaction value for consumer credit cards for all transactions where both the payer's payment service provider and the payee's payment service provider are located in the EEA[45]. However, Regulation (EU) 2015/751 also allows Member States to maintain or introduce lower caps or measures of equivalent object or effect through national legislation[46].

(53) The caps laid down by Regulation (EU) 2015/751 apply to card transactions where the issuer and the merchant are located in the EEA. The caps apply also when card transactions are acquired cross-border in the EEA. Regulation (EU) 2015/751 enhances acquiring competition by stipulating that the capped interchange fees would be applicable to cross-border acquired domestic card transactions as well, creating an important incentive to provide cross-border acquiring services across Member States.

(54) Before 9 December 2015, under Mastercard's cross-border acquiring rules, unless the acquirer had agreed bilaterally with the issuer on the interchange fee, a cross-border acquirer was obliged to apply the applicable domestic MIFs of the country of the merchant.[47]

8.2. Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement

8.2.1. Principles

(55) Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement[48] prohibit as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Undertakings must determine independently the policy they intend to adopt on the market and the conditions which they intend to offer their customers[49].

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44 Directive (EU) 2015/2366 of the European Parliament and of the Council 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 L 337, 23.12.2015, p. 35). The revised Payment Services Directive puts in place comprehensive rules for payment services, with the goal of making cross-border payments within the Union as easy, efficient and secure as payments within a single country. In particular, the Directive sets security requirements for electronic payments and the protection of consumers' financial data, guaranteeing safe authentication.

45 The caps of Articles 3 and 4 apply as of 9 December 2015. See Article 18(2) of Regulation (EU) 2015/751.

46 Recital 14 of Regulation (EU) 2015/751.

47 MasterCard Rules, Chapter 11, section 1.7.2.7. (ID 1291).

48 Article 53(1) of the EEA Agreement is modelled on Article 101(1) of the Treaty and contains the same prohibition, with the difference that Article 53(1) of the EEA Agreement refers to "*trade between contracting parties*" instead of to "*trade between Member States*" and to "*competition within the territory covered by the [EEA] Agreement*" instead of to "*competition within the internal market*".

49 Commission Guidelines on the application of Article 81(3) of the Treaty OJ C101, 27.4.2004, p. 97, paragraphs 14 and 15

(56) Without prejudice to the right of economic operators to adapt themselves intelligently, Article 101 of the Treaty and Article 53(1) of the EEA Agreement catches all forms of cooperation and of collusion between undertakings, including by associations. It is settled case-law that although Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement distinguishes between "concerted practices", "agreements between undertakings" and "decisions by associations of undertakings", the aim is to catch different forms of coordination between undertakings of their conduct on the market and to prevent undertakings from being able to evade the rules on competition simply on account of the form in which they coordinate that conduct[50].

(57) Restrictions of competition "*by object*" are restrictions that, in the light of the objectives pursued by the Union competition rules, by their very nature reveal a sufficient degree of harm to the proper functioning of competition. They have such a high potential for negative effects on competition that it is unnecessary to demonstrate any actual effect on the market[51].

(58) One of the objectives of the Union and the EEA is to achieve an internal market. By their very nature, decisions by associations of undertakings that partition the internal market along national borders or make the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting cross-border trade, reveal a sufficient degree of harm to competition to be restrictions of competition "*by object*"[52]. In such circumstances, there is no need to show their effects.[53]

(59) In order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition to be considered a restriction '*by object*', regard must be had to its content objective, and the economic and legal context, including the nature of the goods or services affected and the real conditions of the functioning and structure of the market or markets in question. In addition, although the parties' intention is not a necessary factor in determining that certain conduct is restrictive, nothing prevents competition authorities or courts from taking that factor into account[54].

(60) Both horizontal and vertical agreements have, in the case law, been considered to be restrictions "by object"[55]. This applies to decisions by associations of undertakings regardless of whether the decisions have vertical or horizontal effects.

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50 See Court of Justice judgement in case C-383/12, paragraphs 62 and 63.

51 Judgment of the Court of 11 September 2014,*Groupement des cartes bancaires (CB)* v. *Commission*, C-67/13P, ECLI:EU:C:2014:2204, paragraph 51 and 58.

52 Judgment of the Court of 6 October 2009, *GlaxoSmithKline Services Unlimited* v. *the Commission*, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECLI:EU:C:2009:610, paragraph 59 and case law cited.

53 Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited*, paragraph 61. See also Case C-382/12 P *MasterCard Inc. and Others*, paragraph 140, with reference to Case T-13/89 *Imperial Chemical Industries plc*, paragraph 311.

54 See Case C-67/13 P *Groupement des cartes bancaires (CB)*, paragraphs 49-54; Judgement of the Court of 14 March 2013, *Allianz Hungária Biztosító Zrt. and Others* v. *Gazdasági Versenyhivatal*, C-32/11, ECLI:EU:C:2013:160, paragraphs 35-37; and Judgement of the General Court of 10 December 2014, *Ordre national des pharmaciens and Others* v. *Commission*, T-90/11, ECLI:EU:T:2014:1049, paragraphs 307-310.

55 See for example Judgment of the Court of 13 July 1966, *Consten and Grundig - Verkaufs-GmbH* v. *Commission*, joined cases C-56/64 and C-58/6, ECLI:EU:C:1966:41; Judgment of the Court of 3 July

(61) Where it is established that a measure is covered by the prohibition in Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement, economic advantages or other benefits that may ensue from the measure can be considered in the context of Article 101(3) of the Treaty or Article 53(3) of the EEA Agreement[56].

8.2.2. Application to this case

8.2.2.1. Restriction of competition by object

(62) Mastercard's cross-border acquiring rules meant that acquirers offering card payment transaction acquiring services in Member States where the domestic MIFs were lower were prevented from seeking to offer cheaper services based on the MIFs in their "home" countries in Member States where the domestic MIFs were higher The merchants were also prevented from taking advantage of the internal market and benefiting from less expensive services from card acquirers established in low-MIF Member States.

(63) Therefore, the Commission concludes that Mastercard's cross-border acquiring rules created an obstacle to cross-border trade in the market for acquiring card payment transactions in the EEA. The rules shielded national markets from cross-border competition from acquirers established in other Member States. The rules reveal in themselves, and by their very nature, a sufficient degree of harm to competition to be considered a restriction of competition "*by object"*.

(64) The two-sided nature of Mastercard's card scheme (15) does not change the Commission's conclusion that the cross-border acquiring rules restricted competition "by object". The banks acting through Mastercard, as an association of undertakings, adopted the cross-border acquiring rules in order to restrict cross-border competition, thereby preferring to coordinate their conduct rather than competing. Such coordination was, by its very nature, incompatible with the proper functioning of competition, notwithstanding the two-sided nature of Mastercard's payment scheme and therefore amounted to a restriction of competition "by object".

8.2.2.2. Objective of the cross-border acquiring rules in context

(65) According to Mastercard, the rules were designed to ensure that an appropriate default rate applied for local transactions so as to compensate the issuer for services provided and the benefits that merchants received. Mastercard also argued that the cross-border acquiring rules were required to ensure that Mastercard could compete with other schemes operating on the basis of differential default MIFs for domestic transactions[57].

(66) However, the actual purpose of the cross-border acquiring rule was to shield the domestic MIF levels in individual Member States from cross-border competition, so that they remained at the same uniform level. In the light of the objective of the

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1985, *Binon & Cie* v. *Agence et messageries de la presse*, Case C-243/83, ECLI:EU:C:1985:284, paragraph 44; Case C-32/11 *Allianz Hungária Biztosító and Others*, paragraph 43. See also Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.04.2010, p.1,), recital 10 and Article 4(a).

56 See Case C-382/12P *MasterCard Inc. and Others*, paragraph 180.

57 ID 55, page 25

achievement of the internal market in payments those rules clearly restricted competition "*by object*".

(67) The fact that the cross-border acquiring rules may have pursued other, possibly legitimate, objectives does not preclude them being regarded as a restriction "*by object*"[58].

(68) Moreover, Mastercard acknowledges that there were no objective justifications for the cross-border acquiring rules during the relevant period[59]. In particular, the Commission considers that the interests pursued by the cross-border acquiring rules were not those of the public, but the private, commercial interests of Mastercard and its members.

8.2.3. Conclusion

(69) The Commission concludes that Mastercard's cross-border acquiring rules were, in themselves and by their very nature, harmful to competition and revealed a sufficient degree of harm to competition to be considered a restriction of competition *'by object*'. The restriction of competition was so likely to have negative effects on, in particular the price of acquiring services and the internal market, that it is unnecessary to prove those effects.

(70) The Commission therefore finds that Mastercard's cross-border acquiring rules amounted to a decision by an association of undertakings that had as its object the restriction of competition in the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

8.3. Appreciable restriction of competition

8.3.1. Principles

(71) Article 101 of the Treaty and Article 53 of the EEA Agreement apply to decisions by associations of undertakings which appreciably restrict competition within the internal market. An agreement that may affect trade between the Contracting Parties to the EEA Agreement and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition[60].

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58 Judgment in Case C-67/13 P *Groupement des cartes bancaires (CB)*, paragraph 70; Judgment of the Court of 20 November 2008, *Competition Authority* v. *Beef Industry*, C-209/07, ECLI:EU:C:2008:643, paragraph 21; Judgment of the Court of 8 November 1983, *NV IAZ International Belgium and others* v. *Commission*, Joined Cases 96/82-102/82, 104/82, 105/82, 108/82 and 110/82, ECLI:EU:C:1983:310.

59 Judgment of the Court of 12 September 2000, *Pavlov and Others* v. *Stichting Pensioenfonds Medische Specialisten*, C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 87; Judgment of the Court of 19 February 2002, *J.C.J. Wouters and Others* v. *Algemene Raad van de Nederlandse Orde van Advocaten*, C-309/99, ECLI:EU:C:2002:98, paragraph 110; Judgment of the Court of 18 July 2006, *David Meca-Medina and Other* v. *Commission*, C-519/04P, ECLI:EU:C:2006:492, paragraph 45. In Case C-382/12 P *MasterCard Inc. and Others*, the Court of Justice rejected Mastercard's claim that it could rely on this case law, according to which decisions by a body exercising public authority may fall outside the scope of Article 101 of the TFEU. The Court did not find that the facts and legal issues were the same. See paragraphs 74 and 75. See also Advocate General's opinion of 30 January 2014, *MasterCard and Others* v, *Commission*, Case C-382/12 P, ECLI:EU:C:2014:42, paragraphs 34, 35 and 36.

60 See Judgment of the Court of 13 December 2012, *Expedia Inc.* v. *Autorité de la concurrence and Others*, C-226/11, ECLI:EU:C:2012:795, paragraphs 16, 17 and 37 and the case law quoted.

8.3.2. Application to this case

(72) In the Commission's view, Mastercard's cross-border acquiring rules constituted a restriction of competition "*by object*" and had an effect on trade.

(73) Mastercard's cross-border acquiring rules amounted to an appreciable restriction of competition.

(74) Since Mastercard's cross-border acquiring rules had as their object the restriction of competition, it is not necessary to show that they actually had restrictive effects on competition.

8.4. Objective necessity

8.4.1. Principles

(75) The compatibility with the competition rules of a restriction of competition that is directly related to and objectively necessary for achieving the main operation (that is to say, an ancillary restriction), will be examined with that of the main operation: if the main operation does not fall within the scope of the prohibition laid down in Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement, the same applies to the ancillary restriction[61]. The objective necessity test is relatively abstract and considers whether the restriction is necessary for the implementation of the main operation and proportionate to the underlying objectives of that operation[62]. The Commission may rely on alternatives that are less restrictive of competition than the restriction at issue. Such alternatives must be realistic and appropriate[63]. That the main operation would be commercially less successful in the absence of the ancillary restriction is not a relevant factor. Whether this is the case, and other efficiency considerations, may be taken into account under Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement[64].

8.4.2. Application to this case

(76) The cross-border acquiring rules were not objectively necessary for the operation of the Mastercard card scheme[65].

(77) Since the cross-border acquiring rules were not objectively necessary, there is no need to assess if they were proportionate to the objective of the main operation.

8.5. Effect on trade

8.5.1. Principles

(78) According to the case law of the Court of Justice, for a decision by an association of undertakings, or an agreement or concerted practice between undertakings to affect

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61 Judgment of the Court of First Instance of 18 September 2001, *Métropole Télévision and Others* v. *Commission*, T-112/99, ECLI:EU:T:2001:215, paragraphs 115 and 116.

62 See Case C-382/12 P *MasterCard Inc. and Others*, paragraph 107.

63 See Case C-382/12 P *MasterCard Inc. and Others*, paragraphs 108, 109 and 111.

64 See Case C-382/12 P *MasterCard Inc. and Others*, paragraphs 89, 90 and 91; Judgment of the Court of 15 December 1994, *Gøttrup-Klim* v. *Dansk Landbrugs AmbA*, C-250/92, ECLI:EU:C:1994:413; Case T-112/99 *Métropole Télévision and Others*, paragraphs 72 to 77 and 109.

65 The Union Courts have confirmed that MIFs are not objectively necessary for the functioning of Mastercard's scheme, see Case T-111/08 *MasterCard Incorporated e.a.*, paragraphs 74 to 120; Case C-382/12 P *MasterCard Inc. and Others*, paragraphs 78 to 120. Therefore a rule to protect those MIFs such as the cross-border acquiring rule is not objectively necessary either.

trade between Member States it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. Whilst Article 101 of the Treaty does not require that provisions have actually affected trade between Member States, it requires that it be established that the decision by an association of undertakings, or an agreement or concerted practice between undertakings are capable of having that effect[66]. The same principles apply to trade between Contracting Parties under Article 53(1) of the EEA Agreement.

(79) If the object of the decision, agreement or concerted practice is to restrict competition inside the Union, the effect on trade is more readily established[67]. The same principle applies when establishing that trade between the Contracting Parties to the EEA Agreement has been affected.

8.5.2. Application to this case

(80) The Commission concludes that Mastercard's cross-border acquiring rules were an obstacle to cross-border trade in the EEA. They contributed to maintaining the segmentation of the acquiring market along the national borders of Contracting Parties to the EEA Agreement and so by their very nature directly affected the pattern of trade between those countries in the acquiring market[68]. Mastercard's cross-border acquiring rules were applied by all the issuers and the acquirers of the Mastercard network, throughout the entire EEA. Mastercard's cross-border acquiring rules accordingly affected, or were capable of affecting, trade in the EEA.

8.6. Jurisdiction

8.6.1. Principles

(81) Union competition rules apply irrespective of where the undertakings are located or where the decision of an association of undertakings has been concluded, provided that the decision is implemented, or produces effects, inside the Union. To establish the applicability of Union law it is sufficient that a decision by an association of undertakings involving third countries, or undertakings located in third countries, is capable of affecting economic activity inside the Union or the EEA[69].

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66 See Judgment of the Court of 30 June 1966, *Société Technique Minière* v. *Maschinenbau Ulm*, C-56/65, ECLI :EU:C:1966:38, paragraph 7; Judgment of the Court of 11 July 1985, *Remia and Others* v. *Commission*, C-42/84, ECLI:EU:C:1985:327, paragraph 22; Judgment of the Court of First Instance of 15 March 2000, *Cimenteries CBR and others* v. *Commission*, joined cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, ECLI :EU:T:2000:77. See also Judgment of the Court of 28 April 1998, *Javico* v. *Yves Saint Laurent Parfums*, C-306/96, ECLI:EU:C:1998:173, paragraphs 16 and 17; and Judgment of the Court of First Instance of15 September 1998, *European Night Services and others* v. *Commission*, T-374/94, ECLI:EU:T:1998:198, paragraph 136.

67 See points 100 to 103 (and 104 to 109) of the Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.4.2004, p. 81).

68 See, points 16, 25, 27, 32, 63 of the Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.4.2004, p. 81).

69 Judgment of the Court of 31 March 1993, *A. Ahlström Osakeyhtiö and Others* v. *Commission (Wood pulp)*, 89/85, 104/85, 114/85, 117/85, 125-129/85, ECLI:EU:C:1988:447, paragraphs 13-18. See also Judgment of the Court of First Instance of 25 March 1999, *Gencor Ltd* v. *Commission*, T-102/98,

8.6.2. Application to this case

(82) Mastercard's cross-border acquiring rules produced effects inside the EEA and affected the conditions under which acquiring services were supplied within the EEA since the rules applied to cross-border acquiring activities within the EEA. Since trade between Contracting Parties to the EEA Agreement was affected, both Article 101 of the Treaty and Article 53 of the EEA Agreement apply to Mastercard's cross-border acquiring rules as set out in this Decision.

8.7. Applicability of Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement

8.7.1. Principles

(83) A decision by an association of undertakings that restricts competition may benefit from an exemption under Article 101(3) of the Treaty or Article 53(3) of the EEA Agreement if it satisfies the following four cumulative conditions:

(a) it contributes to improving the production or distribution of goods (or, by analogy, services) or to promoting technical or economic progress;

(b) it allows consumers a fair share of the resulting benefits;

(c) it does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives;

(d) it does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products (or, by analogy, services) in question.

(84) The burden of proof to show that these conditions are fulfilled lies on the undertaking invoking the benefit of the exemption, in this case Mastercard[70].

8.7.2. Application to this case

(85) The Commission concludes that Mastercard's cross-border acquiring rules did not meet the conditions for exemption provided for by Article 101(3) Treaty.

(86) The cross-border acquiring rules allowed Mastercard and the banks to maintain different domestic MIFs in different Member States. Mastercard has submitted that MIF differentiation creates efficiencies, since MIFs adapted to the MIT level within a specific relevant geographic market may be more efficient than a MIF set at another level. However, MIFs above the MIT level in a specific market do not create efficiencies and do not fulfil the conditions for exemption. Mastercard has not sufficiently substantiated its claim in this regard.

(87) Mastercard acknowledged in the Settlement Submission that it did not discharge its burden of proof to meet the conditions for an exemption under Article 101(3) TFEU.

ECLI:EU:T:1999:65, paragraph 90. In that case the General Court found that the relevant criteria to assess jurisdiction in the context of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p. 1, are if the conduct at issue has immediate, foreseeable and substantial effect in the Union.

70 See Article 2 of Regulation (EC) No 1/2003. Nevertheless, the facts relied on by an undertaking may be such as to oblige the Commission to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged, see joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited*, paragraph 83.

9. DURATION OF THE INFRINGEMENT

(88) Having regard to the Commission's 2014 *Visa Europe* Decision making binding commitments on Visa Europe, the Commission finds an infringement in this case from 27 February 2014. The Commission finds that the last date of the infringement was 8 December 2015, as Mastercard's amendment of its cross-border acquiring rules came into effect on 9 December 2015. Therefore, the period covered by the present Decision is from 27 February 2014 to 8 December 2015.

10. REMEDIES AND FINES

10.1. Remedies under Article 7 of Regulation (EC) No 1/2003

(89) Pursuant to Article 7(1) of Regulation (EC) No 1/2003, where the Commission finds an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement[71], it may by decision require the undertakings concerned to bring such infringement to an end. For this purpose the Commission may impose on the undertakings concerned behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. This authorises the Commission to require an undertaking to refrain from any conduct having the same or similar object or effect as the infringement.

(90) When the infringement has ended, remedies may only be imposed to prevent the infringement being committed again in the future.[72]

(91) Mastercard's cross-border acquiring rules infringed Article 101 of the Treaty and Article 53 of the EEA Agreement until 8 December 2015, as Mastercard's amendment of its cross-border acquiring rules came into effect on 9 December 2015. While the infringement has ended, it is imperative that Mastercard be required to refrain from any act or conduct with the same or similar object or effect in the future.

10.2. Fines under Article 23 of Regulation (EC) No 1/2003

(92) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines upon undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 101 of the Treaty or Article 53 of the EEA Agreement[73].

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71 Pursuant to Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area (OJ L 305, 30.11.1994, p. 6) "*the Community rules giving effect to the principles set out in Articles 85 and 86 of the EC Treaty [now Articles 101 and 102 of the TFEU] … shall apply mutatis mutandis*" in relation to the EEA Agreement.

72 Judgment of the Court of 6 March 1974, *Commercial Solvents Corporation and Others* v. *Commission*, C-6/73 and C-7/73, ECLI:EU:C:1974:18, paragraph 45; Judgment of the Court of 3 July 1991, *AKZO Chemie BV* v. *Commission*, C-62/86, ECLI:EU:C:1991:286, paragraph 155; Judgment of the Court of First Instance of 7 October 1999, *Irish Sugar plc* v. *Commission*, T-228/97, ECLI:EU:T:1999:246, paragraph 299.

73 See Judgment of the Court of 11 July 1989, *SC Belasco and Others* v. *Commission*, C-246/86, ECLI:EU:C:1989:301, paragraph 41; Judgment of the Court of First Instance of 11 December 2003, *Ventouris Group Enterprises SA* v. *Commission*, T-59/99, ECLI:EU:T:2003:334, paragraph 54. Order of the Court of 25 March 1996 in *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and Others v. Commission*, C-137/95P, ECLI:EU:C:1996:130, paragraph 55.

(93) In fixing the amount of any fine, pursuant to Article 23(2) of Regulation (EC) No 1/2003, the Commission shall have regard to all relevant circumstances, in particular to the gravity and duration of the infringement. In setting the fine to be imposed, the Commission will take into account the principles laid down in its Guidelines on fines[74]. The Guidelines on fines provide for a two-step methodology: first, the Commission will determine a basic amount for Mastercard as an association of undertakings, and second, it may adjust that basic amount upwards or downwards[75].

10.3. The intentional or negligent nature of the infringement

(94) At least with the adoption of the Commission's 2014 *Visa Europe* Decision, Mastercard was aware, or should have been aware, that the cross-border acquiring rules infringed the competition rules and it was reasonably foreseeable for Mastercard that it would be held responsible for an infringement if it continued to apply its cross-border acquiring rules[76]. The Commission therefore concludes that as of that point in time Mastercard committed an infringement intentionally, or at least negligently.

10.4. Calculation of the fine

10.4.1. Basic amount of the fine

(95) The basic amount of the fine is to be set by reference to the value of sales, that is, the value of the undertaking's sales of the goods or services to which the infringement directly or indirectly relates in the relevant geographic area in the EEA in a given year (normally, the last full year of the infringement)[77]. When the infringement by an association of undertakings relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales of its members[78].

(96) Depending on the gravity and scope of the infringement, the basic amount will be a proportion (of up to 30% of the value of sales), multiplied by the number of years of the infringement (expressed as a multiplier factor which reflects the exact number of days of the infringement)[79].

(97) An additional amount of between 15% and 25% of the value of sales may be added in order to deter undertakings from entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered, the Commission will have regard to a number of factors, in particular the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented[80].

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74 Commission Guidelines on the method of setting fines pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ C210, 1.9.2006, p. 2).

75 Points 9, 10 and 11 of the Guidelines on fines.

76 See Section 10.

77 Point 13 of the Guidelines on fines.

78 Point 14 of the Guidelines on fines.

79 Points 19 to 24 of the Guidelines on fines.

80 Point 25 of the Guidelines on fines.

10.4.1.1. Value of sales

(98) Mastercard's cross-border acquiring rules restricted competition between acquirers within the Mastercard scheme with respect to acquiring services for domestic transactions with consumer debit and credit cards at merchants' Points of Sales. This is the service to which the infringement directly or indirectly relates. Acquiring services within the Mastercard scheme are provided by the acquiring members of the scheme. Mastercard does not offer acquiring services.

(99) Since Mastercard remained a standing body of an association of undertakings[81] and the infringement relates to the activities of its acquiring members, the value of sales to be taken into account for the calculation of the fine to be imposed is the value of sales of the acquiring members[82].

(100) For their acquiring services, acquirers charge merchants a MSC. The MSC corresponds to the value of sales to be taken into account for the purpose of calculating the fine[83]. However, Mastercard does not have any data about the MSCs charged to merchants for domestic transactions in the EEA. On average MIFs accounted for […] of the MSCs[84]. It is therefore reasonable to use the MIFs applied to the transactions affected by the infringement as a proxy for the MSCs[85]. Information about the value of those MIFs during the period of infringement is readily available to Mastercard.

(101) Normally, the Commission will take into account the value of sales during the last business year of the infringement[86]. However, in this case the infringement lasted from 27 February 2014 to 8 December 2015 and there is no such full last business year. Therefore it is appropriate to take the turnover generated during the period of the infringement, referred to in the Commission practice as the actual sales, to create a representative full business year for the purposes of calculating the fine. This has been done by dividing the actual sales by the number of days that correspond to the infringement period and multiplying by 365.

(102) The value of sales relevant for the determination of the basic amount is, accordingly, […].

10.4.1.2. Gravity

(103) In order to determine the proportion (up to 30%) of the value of sales to be considered as the basic amount, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the

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81 See Section 7.

82 Point 14 of the Guidelines on fines.

83 For the purpose of calculating the fine the full value of sales of the services or goods affected by the infringement should be taken into account, and not only the surcharge on which undertakings may have agreed. See for examples Judgment of the Court of 8 December 2011, *KME Germany and Others* v. *Commission*, C-272/09 P, ECLI:EU:C:2011:810, paragraph 53; Judgment of the Court of First Instance of 6 May 2009, *Outokumpu Oyj and Other* v. *Commission*, T-122/04, ECLI:EU:T:2009:141, paragraph 82; Judgment of the Court of 1 February 2018, *Kühne + Nagel International AG and Others v. Commission*, C-261/16 P, ECLI:EU:C:2018:56, paragraph 90.

84 See recital (21)

85 Interchange fees on so-called "on-us" transactions have not been included.

86 Point 13 of the Guidelines on fines.

undertakings concerned, the geographic scope of the infringement and whether the infringement has been implemented[87].

(104) The infringement is the result of a decision by an association of undertakings. The cross-border acquiring rules restricted cross-border trade and hindered the achievement of the internal market. This is a serious infringement of Article 101 of the Treaty. Moreover, the infringement had a wide geographic scope, covering the entire EEA.

(105) Taking into account the factors in recital (104) and the market position of Mastercard as discussed in section 6, the proportion of the value of sales to be taken into account in the determination of the basic amount is set at 11%.

10.4.1.3. Duration

(106) As stated in recital (88), the period covered by this Decision is from 27 February 2014 to 8 December 2015. For the purpose of calculating the fine, the value of sales will, accordingly, be multiplied by 1.78.

10.4.1.4. Conclusion with respect to the basic amount

(107) The resulting basic amount is […].

10.4.2. Aggravating or mitigating circumstances

(108) The Commission may take into account circumstances that result in an increase (aggravating circumstances) or decrease (mitigating circumstances) in the basic amount of the fine[88].

10.4.2.1. Aggravating circumstances

(109) The Commission may increase the basic amount where the undertaking or association of undertakings continue or repeat the same or a similar infringement after the Commission or a National Competition Authority has made a finding of an infringement of the competition rules of the Treaty[89]. On 19 December 2007, the Commission adopted a prohibition decision pursuant to Article 7 of Regulation (EC) No 1/2003 addressed to Mastercard finding that the intra-regional MIFs infringed Article 101 of the Treaty. The decision was upheld by the Union Courts. This Decision also concerns conduct that relates to MIFs, determining applicable MIFs in cross border transactions, which constitutes an infringement of Article 101 of the Treaty. Accordingly Mastercard has previously been found guilty of an infringement of a similar nature[90]. The first finding of infringement did not prevent Mastercard from entering into similar conduct. The basic amount of the fine is therefore increased by 50%.

(110) The fact that the Commission did not impose any fine on Mastercard in 2007 does not prevent the Commission from increasing the basic amount of the fine having regard to the previous infringement[91].

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87 Point 22 of the Guidelines on fines.

88 Points 27, 28 and 29 of the Guidelines on fines.

89 Point 28 of the Guidelines on fines.

90 Commission Decision of 5 December 2001 2003/569/EC in Case IV/37.614/F3 PO/*Interbrew and Alken-Maes* (OJ L200 8.7,2003, p. 1), recital 314.

91 Judgment of the Court of First Instance of 8 July 2008, *BPB plc* v. *Commission*, T-53/03, ECLI:EU:T:2008:254, paragraph 387.

10.4.2.2. Mitigating circumstances

(111) There are no mitigating circumstances.

10.4.3. Specific increase for deterrence

(112) The Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect. To that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates[92].

(113) No specific increase for deterrence will be applied in this case.

10.4.4. Application of the 10% turnover limit

(114) Pursuant to Article 23(2) of Regulation (EC) No 1/2003, where the infringement by an association of undertakings relates to the activities of its members, the fine shall not exceed 10% of the sum of the total turnover of each member active on the market affected by the infringement.

(115) The infringement relates to the acquiring services of Mastercard's acquiring members. The 10% of turnover limit will therefore be based on the total turnover of Mastercard's acquiring licensees active in the EEA.

(116) The fine represents less than 1% of the sum of the total turnover of Mastercard's acquiring members active in the EEA for the year 2017.

10.4.5. Reduction for cooperation

(117) On 3 December 2018 Mastercard submitted a Settlement Submission to the Commission, acknowledging the infringement and agreeing to pay a fine. Mastercard co-operated with the Commission by acknowledging an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement and waiving certain procedural rights, resulting in administrative efficiencies.

(118) The Commission concludes that, in order to reflect that Mastercard has effectively co-operated with the Commission beyond its legal obligation to do so, the fine that otherwise would have been imposed should, pursuant to point 37 of the Guidelines of fines, be reduced by 10%.

10.4.6. Conclusion: final amount of the fine

(119) The final amount of the fine to be imposed on Mastercard pursuant to Article 23(2) of Regulation (EC) No 1/2003 should be EUR 570 566 000.

10.5. Article 23(4) of Regulation (EC) No 1/2003

(120) Article 23(4) of Regulation 1/2003 provides that when a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine. That provision also allows the Commission, under certain circumstances, to require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association or, if that is insufficient, by any of the members of the association which were active on the market on which the infringement

92 Point 30 of the Guidelines on fines.

occurred. The financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total turnover in the preceding business year.

11. CONCLUSION

(121) In the light of the considerations set out in this Decision, the Commission concludes that:

(1) Mastercard Europe SA, Mastercard Incorporated and Mastercard International Incorporated should be held responsible for an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement in relation to the cross-border acquiring rules;

(2) the undertakings referred to in point (a) should refrain from any act or conduct having the same or similar object or effect as the infringement;

(3) a fine should be imposed on the undertakings referred to in point (a).

HAS ADOPTED THIS DECISION:

Article 1

Mastercard Europe SA, Mastercard Incorporated and Mastercard International Incorporated infringed Article 101 of the Treaty and Article 53 of the Agreement on the European Economic Area by adopting decisions regulating the applicable multilateral interchange fee in respect of cross-border acquiring in the card payments sector in the EEA.

The duration of the infringement was from 27 February 2014 until 8 December 2015.

Article 2

For the infringement referred to in Article 1, the following fine is imposed:

Mastercard Europe SA, Mastercard Incorporated and Mastercard International Incorporated, jointly and severally liable: EUR 570 566 000.

The fines shall be paid in euros, within three months of the date of notification of this Decision, to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: European Commission – BUFI/AT.40049

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where Mastercard Europe SA, Mastercard Incorporated or Mastercard International Incorporated lodge an appeal, they shall cover the fine by the due date, either by providing an

acceptable financial guarantee or making a provisional payment of the fine in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council[93].

Article 3

Mastercard Europe SA, Mastercard Incorporated and Mastercard International Incorporated shall refrain from any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

Article 4

This Decision is jointly addressed to:

Mastercard Europe SA, Chaussée de Tervuren 198/A, 1410 Waterloo, Belgium;

Mastercard Incorporated, 2000 Purchase Street, Purchase New York 10577-2509, USA;

Mastercard International Incorporated, 2000 Purchase Street, Purchase New York 10577-2509, USA.

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the Agreement on the European Economic Area.

Done at Brussels, 22.1.2019

For the Commission

Margrethe VESTAGER
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

93 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 80).