Commission prohibits MasterCard’s multilateral interchange fees for cross-border card payments in the EEA

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On 19 December 2007 the Commission adopted a decision prohibiting MasterCard’s multilateral interchange fees (MIF) for cross-border card payments with MasterCard and Maestro-branded consumer credit and debit cards between Member States of the European Economic Area (‘the cross-border MIF’) (2). The adoption of the MasterCard decision marks the end of a four-year in-depth investigation of the world’s second largest payment organisation. It almost coincides with the expiry of the Commission’s decision regarding VISA’s cross-border MIF (3) on 31 December 2007, which had been the Commission’s leading case on payment card MIFs during the preceding five years.

While no fines were imposed on MasterCard (4), the decision provides for daily penalty payments in the event of non-compliance. MasterCard has to withdraw its cross-border MIF by 20 June 2008, that is, six months after the notification of the decision. If MasterCard maintains its cross-border MIF or replaces it with measures of similar object or effect (5), the Commission can order MasterCard to pay 3.5% of its global daily turnover for the preceding business year for each day of non-compliance. MasterCard has appealed against the Commission’s decision to the Court of First Instance in Luxembourg (6).

1. MasterCard’s cross-border MIF

A multilateral interchange fee, or MIF, is an inter-bank fee. It is a charge levied on payment card transactions between the two types of banks involved in this transaction, that is, the cardholder’s bank or ‘issuing bank’ and the retailer’s bank or ‘acquiring bank’. In the MasterCard system — as in the Visa system (7) — the charge is paid by the acquiring bank to the issuing bank. An interchange fee is called ‘multilateral’ when it is determined centrally, either by common consent of bank delegates or by a manager in the payment organisation who takes decisions on the member banks’ behalf. This contrasts with ‘bilateral’ interchange fees which are agreed upon between pairs of banks. MasterCard’s cross-border MIF applies only ‘by default’ to a cross-border payment transaction, that is, in the absence of a bilateral agreement. Bilateral agreements are in practice exceptional.

MasterCard’s cross-border MIF applies only to a fraction of all MasterCard and Maestro payment card transactions in the European Economic Area (EEA) as most of these payments are domestic (8) and domestic payments are generally subject to country-specific ‘domestic MIFs’ (9). These domestic MIFs were not covered by the Commission’s decision.

MasterCard’s cross-border MIF has different levels for different types of cards (e.g. consumer and commercial cards) and for different types of transactions (chip & PIN, signature based or electronically authorised). For credit cards, the most common rates range between 0.8% and 1.2%.

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(2) Case COMP/34.579 Europay (Eurocard-MasterCard) http://ec.europa.eu/competition/antitrust/cases/index/by_nr_69.html#i34_579.

(3) In 2002, the Commission exempted a similar system proposed by Visa (see IP/02/1138) after Visa offered a substantial reform of its MIF. In particular, Visa offered to reduce the level of its fees progressively from an average of 1.1% to 0.7% by the end of 2007 and to cap fees at cost price for specific services. Visa also clarified fees and allowed banks to reveal information about the MIF to businesses. The exemption, however, expired on 31 December 2007 and Visa has been obliged to ensure that its system complies with EU competition rules since then. See the Commission Decision of 24 July 2002 (‘VISA II’), OJ L 318, 22.11.2002, p. 17.

(4) The MasterCard MIF was notified in 1992 and was granted immunity under Regulation 17/62 until 1 May 2004. Due to the specific circumstances of the case, the Commission did not use its powers to impose fines on MasterCard after 1 May 2004 but rather gave MasterCard time to comply with the remedy under the threat of periodic penalty payments.

(5) Non-compliance is also defined in the decision as involving a situation where MasterCard adopts measures of equivalent object or effect to its current cross-border MIF.

(6) MasterCard did not, however, request interim relief. The decision is therefore enforceable.


(8) In a press conference after the adoption of the Commission’s decision, MasterCard managers estimated that the cross-border MIF applies to 5% of MasterCard’s total transactions with payment cards in the EEA.

(9) In at least eight Member States, namely Belgium, Ireland, Italy, the Czech Republic, Latvia, Luxembourg, Malta and Greece, MasterCard’s member banks have adopted the cross-border MIF as the domestic MIF.
and for debit cards between EUR 0.05 + 0.40% to EUR 0.05 + 1.05% (10). Cross-border MIF levels were traditionally set by a pan-European body of bank delegates and — from September 2006 onwards — by a MasterCard manager.

2. Article 81(1) EC — Theory of harm

The Commission concludes in its decision that MasterCard’s cross-border MIF infringes Article 81 of the Treaty by inflating the cost of card acceptance for merchants and shoppers, without leading to objective efficiencies or related benefits to consumers. The price banks charge to merchants for acquiring services — that is, for contracting with merchants so that they may accept payment cards as a means of payment — is to some extent pre-determined by MasterCard’s cross-border MIF. MasterCard’s cross-border MIF artificially inflates the base on which all acquiring banks set their charges to merchants and at the same time shares out the profits between acquiring and issuing banks with the latter obtaining the fees and hence guaranteed revenues per card transaction (11).

In the absence of this MIF, merchants (and ultimately their customers) would incur lower cost for payment card acceptance at shops. Merchants could then exert countervailing power over acquiring banks by playing one acquirer off against the other and by contracting with the acquirer that offers the best price for its services without being constrained by multilaterally agreed interchange fee costs. This competitive process would lead overall to lower interchange fees and — in extremis — to no interchange fees at all. In the extreme hypothesis where no interchange fees at all are paid by acquiring banks to issuing banks in a scheme such as MasterCard’s, each bank would set its prices according to its individual profit-maximising strategy based on its competitive position. In the current situation, merchants are typically unable to negotiate a price below the invisible floor of the MIF. The decision therefore concludes that MasterCard’s MIF is an instrument that has the effect of restricting price competition between acquiring banks within the meaning of Article 81(1) EC (12).

A considerable part of the Commission’s decision is dedicated to analysing whether the MasterCard MIF is necessary for the viability of the MasterCard scheme.

In line with its VISA II decision (13) the Commission takes the view in the MasterCard decision that the only provision necessary for the operation of an open payment card system such as MasterCard’s, apart from technical arrangements on message formats and the like, is the obligation on the creditor bank to accept any payment validly entered into the system by a debtor bank and a prohibition on ex post pricing by one bank to the other. A mechanism such as a MIF that shifts profits between acquiring and issuing banks is not objectively necessary for the banks’ cooperation, as issuing and acquiring services can be remunerated directly by the respective consumer groups.

The decision demonstrates the viability of the MasterCard scheme in the absence of the cross-border MIF, amongst others, by providing examples of five other domestic payment card schemes that operated for decades without any MIF in Europe. These schemes are Pankkikortti in Finland, Bancomat in Luxembourg, Dankort in Denmark, PIN in the Netherlands and BAX in Norway. The Commission’s analysis also draws from publicly available data from the Australian Reserve Bank, which empirically analysed the impact on the market of its regulation of MasterCard’s and Visa’s MIFs in Australia (14). The empirical strand of the Commission’s objective analysis takes up around 25 pages of the decision and is based on the standard set out by the Court of First Instance in its O2 (15) and Métropole (16) case law.

One other important aspect of the Commission’s analysis under Article 81(1) EC is that it considers the MasterCard payment organisation to be an ‘association of undertakings’ and the MIF to be a ‘decision’ by such an association.

In Europe, the MasterCard payment organisation consists of several thousand members which are financial institutions. This organisation is managed in a decentralised manner by boards of bank delegates and by managers. In May 2006


(11) The Commission’s quantitative analysis indicates that the ‘floor effect’ of MasterCard’s cross-border MIF may account for up to 70% of the price charged to merchants for accepting MasterCard’s credit cards in Member States where the cross-border MIF also applies to domestic transactions.

(12) The decision gives grounds for the possibility of a restriction ‘by object’ but ultimately leaves this open as a restriction can sufficiently be demonstrated based on the effects of the MIF.


(14) After MasterCard’s and Visa’s MIFs were reduced by roughly 50% in 2003 in Australia, MasterCard’s and Visa’s combined market shares and their sales volumes kept increasing despite MasterCard’s preceding claim that such a move could trigger a ‘death spiral’ for its scheme.

(15) Case T-328/03, O2 v Commission, judgment of 2 May 2006 (not yet reported).

MasterCard restructured its global operations, culminating in an Initial Public Offering (IPO) of the holding company MasterCard Incorporated. MasterCard argued in the administrative proceedings that from May 2006 onwards, when the decisions on the cross-border MIF were removed from the member banks and delegated to a manager in MasterCard Incorporated, the Commission could no longer apply Article 81 to its cross-border MIF. The MIF would, in MasterCard’s view, no longer be a decision by an association; it would be ‘imposed’ by a franchisor (MasterCard Incorporated) upon its franchisees (the member banks). The Commission disagreed and applied Article 81 EC to MasterCard’s MIF for both the periods before and after the IPO. The Commission’s case is that the governance changes in the organisation did not modify the decisive grounds for considering the organisation to be an association of undertakings.

The analysis under Article 81(1) EC also covers the effects of inter-system competition. As in its VISA II decision (20), the Commission expresses its concern that competition between Visa and MasterCard creates upward pressures on their respective MIFs. When open payment card systems such as MasterCard compete for banks to join their network or issue their cards instead of issuing the cards of other networks, they do so by increasing financial incentives for issuers by raising the interchange fees that issuers can earn. This leads to an upward spiral. The decision demonstrates this effect on the basis of empirical evidence from minutes of MasterCard board meetings (21). Finally, as the European Central Bank pointed out (22), the proceeds that banks can derive from MIFs also play a role in determining their strategies for rendering their card portfolios compliant with the requirements of the Single Euro Payments Area. The evidence indicates that interchange fees proceed have indeed become an artificial element of inter-system competition which increasingly works to the detriment of cost-efficient domestic card schemes in Europe that have operated for decades without a MIF. The decision points out that MasterCard’s MIF risks inflating merchant fees in countries where banks may decide to replace their domestic debit cards with Maestro cards.

3. Article 81(3) EC — Efficiencies and consumer benefits

The decision analyses in detail whether MasterCard’s cross-border MIF enhances the efficiency of the scheme to the benefit of consumers. The Commission’s analysis applies the standard set out in its Notice on Article 81(3) EC (23), which requires that efficiency claims must be substantiated so that the following can be verified: the nature of the claimed efficiencies; the link between the agreement and the efficiencies; the likelihood and magnitude of each claimed efficiency and how and when each claimed efficiency would be achieved.

MasterCard’s central claim is, in a nutshell, that its MIF helps the scheme to optimise system output by balancing the demands of cardholders and merchants. Cardholders would be less willing to pay for card usage than merchants for card acceptance. Costs would, however, be skewed towards the issuing side. By transferring revenues from the acquiring side to the issuing side, MasterCard’s MIF is said to alleviate a cost inequality and to achieve a balance between cardholder and merchant demand to maximise system output. This process is said in turn to lead to a number of objective efficiencies which MasterCard claims represent the technical and economic progress of payment card systems as compared to cash and cheque based payment systems.

3.1 MIFs may enhance efficiencies in a card scheme, but evidence is required

As in its VISA II decision (21), the Commission’s MasterCard decision does not dispute that an interchange fee agreement can in principle contribute to economic and technical progress within the meaning of Article 81(3) EC. For instance, in a payment card system characterised by network

externalities, interchange fees may help optimise the value of the network to its users (merchants and cardholders) (22).

Theoretical models such as the one written by William Baxter in 1983 (23) aim - based on certain assumptions - at calculating such 'optimal' allocation of issuing and acquiring costs using interchange fees. However, whether in practice a MIF should be by acquirers to issuers or vice versa, and at which level it should be set to enhance scheme output, cannot be determined in a general manner by economic theory alone. Rather, a causal link between the MIF and concrete efficiencies must in particular be demonstrated empirically. No presumption exists that MIFs in general enhance the efficiency of card schemes. A MIF may be used by banks to achieve efficiencies and to extract rents. The Commission’s conclusion on the efficiencies of a MIF therefore depends on the concrete evidence brought forward by the parties.

3.2 Criteria to assess the efficiency of a MIF under Article 81(3) EC, first condition

The decision holds that there is no single decisive criterion — such as the level of a MIF — for assessing whether a MIF fulfils the first condition of Article 81(3) of the Treaty. Rather, the existence of objective appreciable efficiencies is assessed in relation to the MIF as such, the effects it produces on the market and the manner in which it is set. In assessing whether a MIF such as MasterCard’s contributes to technical and economic progress, the Commission follows a three-step approach:

i. Is the model underlying the MIF based on realistic assumptions?

ii. Is the methodology used to implement that model objectively verifiable and reasonable?

iii. Does the MIF indeed have the positive effect on the market to the benefit of both cardholders and merchants (and their customers) which the model claims?

As to the burden of proof, the decision requires that the efficiency claim must be founded on a robust and compelling analysis that relies in its assumptions and deductions on empirical data and facts.

As Commissioner Kroes underlined in her press conference after the adoption of the decision (24), it is not sufficient that a MIF simply increases the sales volumes of a scheme to the sole benefit of the member banks. Rather, a MIF should contribute to objective efficiencies such as, for instance, promoting more efficient payment means over less efficient ones.

In the case at hand MasterCard’s efficiency claim failed the above test.

First, the model underlying MasterCard’s MIF — the Baxter framework — is based on unrealistic assumptions, such as perfect competition among both issuing and acquiring banks and the capacity of merchants to sufficiently constrain the bodies setting a MIF if a MIF is set at an inefficient level. The usefulness of this model for setting MIFs is therefore severely limited (25).

Second, MasterCard could not establish a conceptual link between the problems allegedly addressed by its MIF and the methodology used by MasterCard to implement the model. For one thing, MasterCard’s methodologies lack a rigorous assessment of the willingness to pay on both sides of the system. The empirical basis of the direction and the amount of the MIF payment is therefore inadequate. The methodologies are conceptually unconvincing and sometimes even arbitrary.

Third, MasterCard failed to provide empirical evidence of the actual effect of its MIF on the market. While MasterCard claims that the use of a MIF helps maximise its system output relative to a situation with no MIF, this claim was not supported by empirical evidence. Statistics from the European Central Bank, on the contrary, indicate that precisely in countries where domestic card schemes operated without a MIF for decades, card usage per capita is among the highest in Europe (26). This raises the question whether a MIF can do more harm than good when it comes to spurring greater card usage in Europe. The Commission decision therefore requires empirical evidence of the actual effects of a MIF. Abstract models alone cannot suffice to demonstrate claimed objective efficiencies.

(22) Network externalities exist when the value of a product to any user is greater the larger the number of other users of the same product.
(25) The assumption of perfect competition in both issuing and acquiring banking industry, for instance, excludes any type of exercise of market power in this model.
3.3 Criteria to assess consumer benefit under Article 81(3) EC, second condition

In setting a MIF the member banks of a card scheme must guarantee a fair share of the benefits to all customers, not only to those that are on the side of the scheme which receives the MIF. In a scheme such as MasterCard’s, where the MIF is paid by the acquirer to the issuer, the efficiencies must in particular counterbalance the restrictive effects that disadvantage merchants (and subsequent purchasers).

The Commission therefore reviewed how MasterCard factually establishes the maximum level of the cross-border MIF which is ultimately ‘paid’ by merchants and their customers. This ‘cap’ is in practice determined through regular cost studies which MasterCard undertakes for most of its payment products. The decision states that some of the cost components of MasterCard’s methodology should be discounted as they do not relate to services that appear to sufficiently benefit merchants. For instance, costs incurred by card issuing banks which are not technologically necessary for executing a payment transaction and which are related to the provision of consumer loans should not be taken into account when setting a cap on the MIF (\(^\text{28}\)). Hence, without further evidence — which MasterCard failed to submit — the Commission could not simply assume that by pursuing its aim of maximising system output MasterCard was also creating objective efficiencies that benefit all customers, including those that ultimately bear the cost of a MIF (here: merchants and their customers).

In conclusion, to satisfy the second condition of Article 81(3) EC, the methodology used to implement a model for setting a MIF must not only be objective and reasonable (see above for Article 81(3) EC, first condition), but also sufficiently allow those scheme customers that are ultimately ‘paying’ the MIF to obtain a fair share of the benefits. This was not established for MasterCard’s MIF.

\(^{28}\) More specifically, in the consumer credit and charge cards segment it remained unproven that merchants benefit from bearing the financial burden of issuers for the provision by issuers to cardholders of a so-called ‘free funding period’, from writing off certain bad debts and from collecting certain debts from cardholders. In the debit cards segment it remained unproven that merchants benefit sufficiently if debit card interchange fees are inflated by including issuing banks’ costs of setting up and managing current bank accounts.

4. Context and importance of the decision

4.1 Sector inquiry into retail banking

The MasterCard decision follows the Commission’s sector inquiry into retail banking in 2005 and 2006, which found that interchange fee agreements might stand in the way of a more cost-efficient payment cards industry and of the creation of SEPA (\(^{29}\)). The inquiry’s interim report indicated that on average issuing banks pass through only 25% of the proceeds they obtain from a MIF by means of a reduction in cardholder fees and that issuing could largely remain profitable if banks issued credit cards without any proceeds from a MIF (\(^{30}\)). The report also unveiled differing bank views on the purpose of a MIF, with some banks describing MIFs as balancing mechanisms for network externalities and others as an issuer’s ‘fee for services rendered’ to acquirers and merchants.

4.2 SEPA

The MasterCard decision was long awaited by the industry and the European Central Bank (\(^{31}\)) because it was expected to bring more legal clarity to the Single Euro Payments Area (SEPA) project (\(^{32}\)). This industry-driven project will allow technical interoperability of cards across Europe, thereby enhancing the scope for cross-border card usage and competition to the benefit of financial institutions and their customers. The MasterCard decision supports the SEPA process at least in two respects.

First, the decision clarifies the Commission’s approach to MIFs after the expiry of the VISA II Decision on 31 December 2007. As Commissioner

\(^{29}\) Note, however, that the case files for the sector inquiry and the MasterCard decision were strictly kept apart for procedural reasons.

\(^{30}\) IP/07/114 and MEMO/07/40. For details of the pass-through calculations, see http://ec.europa.eu/competition/sectors/financial_services/inquiries/interim_report_1.pdf, page 12 and for the profitability analysis, see page 62 onwards.


\(^{32}\) The SEPA is defined by industry stakeholders as an area within Europe where customers can make and receive payments in euro which is not entirely identical to the euro area. Cards issued, for instance, in Sweden or the UK can be used by cardholders to make euro transactions in, say, France or Germany. When used in this way, such card payments are covered by the SEPA project. The aim of this project — which is a self-regulated initiative by the payment cards industry in Europe — is that as of January 2008 banks in the SEPA will begin to issue and acquire or otherwise process payment cards that are compliant with the minimum requirements set out in the European Payment Council’s SEPA Cards Framework.
Kroes underlined at her press conference on 19 December 2007 (25), the MasterCard decision does not declare MIFs illegal as such (30). The Decision, moreover, does not ‘regulate’ MasterCard’s MIF at a certain level. Rather, the decision provides for a flexible framework which leaves the initiative in the industry’s hands. Although much of the analysis in the MasterCard decision is case-specific, the approach used by the Commission to analyse a MIF under Article 81 EC is of general importance. For example, the Commission’s analysis of the Baxter framework is of interest beyond this individual case, as other card schemes operate with a MIF that is said to balance network externalities according to this framework.

Second, the decision supports the SEPA by preventing the payment card aspects of the project from leading to permanent price increases to the detriment of consumers. In several Member States (such as in the Nordic and the Benelux countries) cost-efficient domestic payment schemes operate without a MIF. If banks replaced their existing debit cards with, for instance, MasterCard’s Maestro cards, then MasterCard’s MIF would determine the cost of card acceptance in the euro area.

4.3 Coordination within the European Competition Network

In the MasterCard investigation coordination within the European Competition Network was particularly intensive. Several competition authorities in the network are at present investigating the domestic MIFs of MasterCard, Visa and domestic card schemes. As such MIFs apply to entire Member States and as an effect on trade between Member States is therefore likely, Article 81 EC is being applied in these investigations. The Commission and national competition authorities have therefore taken steps to ensure smooth coordination between the ECN members through regular meetings. This approach guaranteed consistent application of the same legal framework in analysing MIFs, but may not necessarily lead to an identical outcome in all cases since market situations differ and, sometimes, different concepts underlie the domestic MIFs.

In April 2005 the Spanish competition tribunal shattered the domestic interchange fee regime in three judgments addressed to the country’s three card schemes: Euro 6000, ServiRed and Sistema 4B (34). Merchants and banks in the end settled their dispute over the fees in an agreement that was subsequently turned into a time-bound commitment decision under Spanish and EU competition law which foresees gradual decreases in the fees. In September 2005 the Office of Fair Trading in the United Kingdom decided that MasterCard’s domestic MIF for consumer credit cards was illegal under domestic and EU competition law. On appeal, the decision was set aside for procedural reasons. The authority subsequently started a new investigation, this time addressing both MasterCard’s and Visa’s domestic MIFs for credit and debit cards. This administrative procedure is still pending. In December 2006 the Polish competition authority adopted a decision prohibiting MasterCard’s and Visa’s domestic MIFs for credit and debit card payments in Poland (35). The decision applied both domestic competition law and Article 81 EC and is currently under appeal. Several other authorities within the ECN are also in the process of reviewing MIFs (36).

5. Conclusion

The Commission’s MasterCard decision of 19 December 2007 sets out a new framework for assessing multilateral interchange fees in four-party payment card schemes such as MasterCard’s. The decision further develops the Commission’s policy on MIFs (25). It follows the Commission’s VISA II exemption decision of 2002 which expired on 31 December 2007.

The order on MasterCard to withdraw its MIF within six months leaves MasterCard with several options. One is for MasterCard to determine in the network rules that card payments are to be settled ‘at par’ in the absence of a bilateral agreement on

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(30) The Commission’s sector inquiry into retail banking has shown that there are many diverging concepts for MIFs in the European Union. Those based on the Baxter framework are the most common as they are propagated by MasterCard and Visa.


(35) Case DDF3-580/1/01/DL/EK.

(36) Generally, around the world, multilateral interchange fees charged by Visa and MasterCard are being scrutinised by competition authorities, competition tribunals and — exceptionally — by central banks such as in New Zealand, Australia, Israel and Canada. In the United States, agreements on multilateral interchange fees both in the Visa and the MasterCard networks are subject to class actions by merchants.

(37) For more information on the history of this policy, see S. Ryan, E. Martinez Rivero and A. Nijenhuis in Faull & Nikpay, The EC Law of Competition, March 2007, Chapter 11, 11.34.
interchange fees (38). Another is for MasterCard to introduce an entirely new MIF provided that MasterCard can demonstrate adequately that any such new MIF fulfils the cumulative conditions of Article 81(3) of the Treaty. The decision sets out the analytical approach which the Commission will follow in analysing such a MIF. The current adverse effects of MasterCard’s cross-border MIF would have to be addressed in some form.

It is expected that the Commission’s decision will guide national competition authorities in applying Article 81 EC to domestic MIFs in card schemes such as MasterCard’s. Ongoing coordination within the European Competition Network between competition authorities will ensure that the card payments industry obtains sufficient legal certainty to operate a business model that complies with European competition law.

(38) In a situation of at par clearing the claims of issuing and acquiring banks are established at the face value of a payment transaction without taking into account an interchange fee. Several card schemes in Europe clear at par.