

Summary of Commission Decision**of 19 December 2007****relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement
(Case COMP/34.579 — MasterCard, Case COMP/36.518 — EuroCommerce, Case COMP/38.580 —
Commercial Cards)***(notified under document C(2007) 6474)***(Only the English text is authentic)****(Text with EEA relevance)**

(2009/C 264/04)

On 19 December 2007, the Commission adopted a decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (the Decision). In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003 ⁽¹⁾, the Commission herewith publishes the names of the parties and the main content of the Decision, having regard to the legitimate interest of undertakings in the protection of their business interests. A non-confidential version of the Decision is available on the Directorate-General for Competition's website at the following address:

<http://europa.eu.int/comm/competition/antitrust/cases/index/>

1. INTRODUCTION

(1) The Decision finds that the MasterCard payment organisation and the entities representing it, that is MasterCard Incorporated, MasterCard International Incorporated and MasterCard Europe SPRL, have infringed Article 81 of the Treaty and Article 53 of the EEA Agreement by in effect setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the European Economic Area, by means of the Intra-EEA fallback interchange fees for MasterCard branded consumer credit and charge cards and for MasterCard or Maestro branded debit cards.

2. CASE DESCRIPTION**2.1. The proceedings**

(2) The procedure was initiated on the basis of a complaint submitted on 30 March 1992 by the British Retail Consortium (BRC), a trade association representing UK retailers. In its complaint the BRC alleged that each of Europay International SA and Visa restricted competition by its arrangements on cross-border interchange fees.

(3) The BRC complaint was withdrawn when a similar complaint was filed by EuroCommerce, a retail, wholesale and international trade representation in the European Union, on 23 May 1997. This complaint addresses certain practices and rules of MasterCard and Visa, in particular multilaterally agreed interchange fees.

(4) In the time between 22 May 1992 and 1 July 1995 Europay notified the network rules of the Europay payment card association including those on multilateral interchange fees.

(5) On 22 November 2002 the Commission opened an *ex-officio* investigation regarding Visa's and MasterCard's respective intra-EEA interchange fees for commercial cards.

(6) On 25 July 2003 MasterCard informed the Commission of its intention to initiate proceedings under Article 232 of the EC Treaty (failure to act) unless the Commission took a formal position with respect to MasterCard's intra-EEA interchange fees.

(7) On 24 September 2003 and 21 June 2006 the Commission sent two Statements of Objections to MasterCard Europe SPRL, the legal successor of Europay, as well as to MasterCard International Inc. and MasterCard Incorporated addressing the organisation's network rules and decisions on intra-EEA interchange fees.

(8) On 14 and 15 November 2006 MasterCard exercised its right to be heard in an oral hearing. The hearing was also attended by EuroCommerce and nine third parties.

(9) On 23 March 2007 the Commission sent a letter to MasterCard (letter of facts) providing MasterCard with access to documents collected since MasterCard had access to the file in July and August 2006 and setting out possible conclusions the Commission intended to draw from the new facts in the Decision.

⁽¹⁾ OJ L 1, 4.1.2003, p. 1.

(10) On 13 December 2007 the Advisory Committee gave a favourable opinion on the draft Commission Decision.

the multilateral interchange fee the merchant fees set by acquiring banks would be lower.

2.2. The facts

(11) MasterCard operates an international 'open' or 'four-party' point of sales (POS) payment system. MasterCard's payment cards system enables consumers to use plastic cards for payment transactions at POS, which is — most often — a payment terminal in a merchant outlet. Such a system involves five main groups of players: (i) cardholders; (ii) merchants; (iii) the scheme owner (here: MasterCard); (iv) card issuing banks; and (v) acquiring banks. Issuers issue cards to cardholders and acquirers recruit merchants for payment card acceptance.

(12) The Decision deals with MasterCard's network rules and decisions of its member bank delegates and the organisation's management on Intra-EEA fallback interchange fees and SEPA fallback interchange fees. These multilateral interchange fees (MIFs) are retained for each payment card transaction. Under the MasterCard organisation's network rules the acquiring banks pay interchange fees to the issuing banks. When the cardholder uses his or her card to buy from the merchant, the merchant receives from the acquiring bank the retail price less a merchant service charge. The issuing bank pays the acquiring bank the retail price minus an interchange fee. In addition to the interchange fee from the acquiring bank, the issuing bank receives from the customer the value of the payment plus any annual fee, any interest payment on debt outstanding, late payment fees, etc.

(13) Intra-EEA fallback interchange fees and SEPA fallback interchange fees apply to cross-border card payments in the European Economic Area (EEA) and domestic card payments within several Member States of the EEA with MasterCard or Maestro branded payment cards. The fees are 'fallback' fees in the sense that they are only charged in the absence of specific bilateral agreements between an issuing and an acquiring bank on interchange fees.

3. LEGAL ASSESSMENT

Article 81(1) of the Treaty

(14) The MIF in MasterCard's scheme restricts competition between acquiring banks by inflating the base on which acquiring banks set charges to merchants and thereby setting a floor under the merchant fee. In the absence of

(15) The MasterCard's European Board (...) (*) and/or the Global Board (...) (*) decisions on the level and structure of Intra-EEA fallback interchange fees and the related network rules adopted by the Global Board of MasterCard International Inc. are decisions of an association of undertakings within the meaning of Article 81(1) of the Treaty. They remain decisions of an association also after the Initial Public Offering (IPO) of MasterCard Incorporated on 25 May 2006 and the related changes in the governance of the payment organisation in Europe with regard to the authority for setting the level of multilateral fallback interchange fees. The member banks of the MasterCard payment organisation agreed to the IPO and the ensuing changes in the organisation's governance in order to perpetuate the MIF as part of the business model in a form which they perceived to be less exposed to antitrust scrutiny. Even after the IPO of MasterCard Incorporated interchange fees in the MasterCard organisation are not 'unilaterally imposed'. MasterCard's member banks still share a common interest as regards the MIF because it yields guaranteed revenues for their issuing business. There is thus a continuing commonality of the banks' interests in a MIF after the IPO which is also reflected in the setting of interchange fee rates by MasterCard (...) (*). In setting interchange fee rates the Global Board cannot ignore the commercial interests of the banks without whom the system would not function, because it yields guaranteed revenues for their issuing business.

(16) An open payment card scheme such as MasterCard's can operate without a MIF as is evidenced by the existence of comparable open payment card schemes without a MIF.

Article 81(3) of the Treaty

(17) The conditions set out in Article 81(3) EC for an exemption from the prohibition of Article 81(1) EC are not fulfilled.

(18) In relation to the first condition of Article 81(3) (contribution to technical or economic progress), MasterCard has failed to demonstrate a causal link between its MIF and objective efficiencies. MasterCard alleges that the central efficiency of its MIF is to help the scheme to maximise system output by balancing cardholder and merchant demands.

(*) Business secret — information pertaining to MasterCard's interchange fee rules and procedure for determining the level of the interchange fee.

- (19) The Commission does not dispute in general that payment systems are characterised by indirect network externalities and that in theory a revenue transfer between issuing and acquiring banks may help optimise the utility of the network to its users. However, whether a collectively fixed interchange fee should flow from acquirers to issuers or vice versa, and at which level it should be set cannot be determined in a general manner by economic theory alone, as theories always rely on assumptions that may not sufficiently reflect market reality. Rather, any claim that a MIF creates efficiencies within the first condition of Article 81(3) of the Treaty must be founded on a detailed, robust and compelling analysis that relies in its assumptions and deductions on empirical data and facts. MasterCard in particular failed to provide empirical evidence for its central claim that the MIF maximises the scheme's 'output' and for a causal link to other objective efficiencies claimed. It was therefore not established that the restrictive effects of the MIF in the acquiring markets are duly offset by objective efficiencies. Despite repeated requests by the Commission MasterCard failed to submit any empirical evidence on the positive effects of its MIF on system output and related efficiencies.
- (20) The Commission does not share MasterCard's view that the competitive process and market forces automatically lead to a MIF that can safely be assumed to be efficiency enhancing. Neither the forces of inter-system competition nor acquiring banks or merchants exert sufficient constraints on the body in charge of setting the MIF in the MasterCard organisation.
- (21) The specific framework underlying MasterCard's MIF is a model written by William Baxter in 1983. This model is, however, severely limited by the fact that it takes consumer and merchant demand as given in that neither strategically reacts to possible actions by the other. The Baxter model also relies on the unrealistic assumption that there is no variation in the benefits that merchants perceive from accepting cards, in other words it regards merchants as homogeneous. Baxter's result finally relies on the unrealistic assumption of a perfectly competitive banking industry.
- (22) Moreover, the methodologies used by MasterCard for implementing this framework in practise are unconvincing as they do not sufficiently reflect the underlying theory. The methodologies suffer from considerable shortcomings as they establish an imbalance between card issuing and merchants acquiring solely on the basis of cost considerations while omitting to consider the banks' revenues, as well. Moreover, contrary to the merchant demand analysis, MasterCard does not even attempt to quantify the willingness to pay of cardholders and simply assumes the relative unwillingness of this customer group to pay for the convenience of using payment cards. There are also doubts as to the usefulness of MasterCard's proxy for quantifying the willingness to pay of merchants in the credit card segment.
- (23) Under the second condition of Article 81(3) of the Treaty consumers (that is merchants and their subsequent purchasers) must get a fair share of the benefits which result from the efficiencies of a MIF. While merchants may benefit through enhanced network effects from the issuing side, this does not necessarily offset their losses which result from paying inflated merchant fees. The Commission has therefore reviewed MasterCard's methodology for setting an upper limit to its interchange fee rates. However, MasterCard's cost based benchmarks include cost items that are neither intrinsic in the payment functionality of a card nor related to services that clearly benefit the customers that bear the expenses of this MIF. Without further evidence, which MasterCard failed to submit, it cannot therefore safely be assumed that by maximising system output MasterCard is equally benefiting its member banks' customers. MasterCard failed to demonstrate that efficiencies outweigh restrictions to merchants (as well as subsequent purchasers).
- (24) As to the third condition of Article 81(3) of the Treaty MasterCard has not proven to the requisite standard that its current MIF is indispensable to maximise system output.
- (25) Due to unrealistic assumptions underlying the conceptual underpinnings of MasterCard's MIF, due to the lack of evidence for a causal link between this MIF and objective efficiencies claimed and due to the fact that MasterCard's methodologies do not sufficiently reflect the underlying framework and operate with inflated cost benchmarks, the Commission concludes that such MIF does not fulfil the first three conditions of Article 81(3) of the Treaty.

4. REMEDY

- (26) As MasterCard's MIF restricts price competition between acquiring banks without fulfilling the first three conditions of Article 81(3) of the Treaty, the MasterCard payment organisation and the legal entities representing it are obliged to bring the infringement to an end within 6 months after notification of the Commission Decision by repealing the Intra-EEA fallback interchange fees, as well as the SEPA/Intra-Eurozone fallback interchange fees.
- (27) The remedy does not apply to MasterCard's MIF for commercial cards, a segment that the Commission will further investigate.

5. FINES AND PERIODIC PENALTY PAYMENTS

(28) As MasterCard's MIF was notified to the Commission and given the specific circumstances of the present case, no fine is imposed.

(29) If MasterCard fails to comply with the remedy after the 6-month transition period lapses, the Commission imposes provisional periodic penalty payments of 3,5 % of MasterCard Incorporated's daily consolidated global turnover in the preceding business year according to Article 24(1)(a) of Regulation (EC) No 1/2003.

6. DECISION

(30) From 22 May 1992 until 19 December 2007 the MasterCard payment organisation and the legal entities representing it (MasterCard Incorporated, MasterCard International Incorporated and MasterCard Europe SPRL) have infringed Article 81 of the Treaty and, from 1 January 1994 until 19 December 2007, Article 53 of the EEA Agreement by in effect setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the European Economic Area, by means of the Intra-EEA fallback interchange fees for MasterCard branded consumer credit and charge cards and for MasterCard or Maestro branded debit cards.

(31) The MasterCard payment organisation and the legal entities representing it shall bring to an end the infringement by formally repealing its intra-EEA and SEPA/intra-Eurozone fallback interchange fees within 6 months upon notification of the Decision. They shall moreover modify the association's network rules to reflect the

Commission Decision. They shall repeal all decisions taken by MasterCard's European Board and/or by MasterCard's Global Board (...) (*) on Intra-EEA fallback interchange fees on SEPA fallback interchange fees and on Intra-Eurozone fallback interchange fees.

(32) The MasterCard payment organisation and the legal entities representing it shall refrain from repeating the infringement through any act or conduct having the same or equivalent object or effect. They shall in particular refrain from implementing the SEPA/the Intra-Eurozone fallback interchange fees.

(33) Within 6 months after notification of this Decision the legal entities representing the MasterCard payment organisation shall communicate all changes of the association's network rules and the repeal of decisions to all financial institutions holding a license for issuing and/or acquiring in the MasterCard payment organisation in the European Economic Area and to all clearing houses and settlement banks which clear and/or settle POS payment card transactions in the MasterCard payment organisation in the European Economic Area.

(34) If the legal entities representing the MasterCard payment organisation fail to comply with any of the orders set out in the Decision, the Decision imposes a daily penalty payment on the legal entities representing the MasterCard payment organisation of 3,5 % of MasterCard Incorporated's daily consolidated global turnover in the preceding business year according to Article 24(1)(a) of Regulation (EC) No 1/2003. This penalty will be calculated as from the first day after the infringed order takes effect.