

Communication from the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.40049 — Mastercard II

(2018/C 438/04)

1. Introduction

- (1) According to Article 9 of the 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⁾, the Commission may decide — in cases where it intends to adopt a decision requiring that an infringement is brought to an end and the parties concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment — to make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission. According to Article 27(4) of the same Regulation, the Commission shall publish a concise summary of the case and the main content of the commitments. Interested parties may submit their observations within the time limit fixed by the Commission.

2. Summary of the case

- (2) On 9 July 2015, the Commission adopted a Statement of Objections ('SO') against MasterCard Europe SA; MasterCard Incorporated and MasterCard International Incorporated (together 'Mastercard').
- (3) The SO outlined the Commission's preliminary view that Mastercard's rules on multilateral interchange fees ('MIFs' ⁽²⁾) that apply to inter-regional transactions with consumer debit and credit cards issued by an issuer (cardholder's bank) located outside the EEA at merchant outlets located in the EEA infringe Article 101 of the TFEU and Article 53 of the EEA Agreement. These include 'card present' transactions (when the cardholder is present, for example in a shop) and 'card not present' transactions (when the cardholder is not present, for example when the card number and authentication details are transmitted via internet, mail or telephone).
- (4) The SO notes that Mastercard's rules oblige the acquirer (merchant's bank) to pay inter-regional MIFs to the issuer (cardholder's bank) for each inter-regional transaction at a merchant outlet in the EEA, and also that Mastercard's inter-regional MIFs amount to decisions of an association of undertakings within the meaning of Article 101(1) TFEU/Article 53(1) EEA.
- (5) As outlined in the SO, when a cardholder uses a payment card to buy goods or services from a merchant, the merchant pays a merchant service charge to its acquirer. The acquirer keeps part of this charge (the acquirer's margin), a part is passed on to the issuer (the MIF) and a part is passed to the scheme operator (in this case Mastercard). The SO further states that a large part of the merchant service charge is determined by the MIF. However, the Commission has in its past cases accepted MIFs which comply with a so called Merchant Indifference Test ('MIT') ⁽³⁾. According to the test, the interchange fee should not on average exceed the transactional benefits that merchants derive from accepting payment cards. Such a MIF ensures that merchants, on average, are indifferent between accepting card payments and other means of payments, creating a level playing field for competition between alternative payment instruments.

3. The main content of the offered commitments

- (6) MasterCard Europe SA; MasterCard Incorporated and MasterCard International Incorporated, as the parties subject to the proceedings, do not agree with the Commission's preliminary assessment. They have nevertheless offered commitments pursuant to Article 9 of Regulation (EC) No 1/2003, to meet the Commission's competition concerns. The commitments are briefly summarised below and published in full in English on the website of the Directorate-General for Competition at:

http://ec.europa.eu/competition/index_en.html

⁽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, respectively, 102 of the TFEU. The two sets of provisions are in substance identical. For the purposes of this notice, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82 of the EC Treaty when applicable.

⁽²⁾ Mastercard defines inter-regional MIFs as interchange fees set by Mastercard that apply, by default, to consumer credit and debit card inter-regional transactions ('IIFs').

⁽³⁾ For information on the Merchant Indifference Test see the executive summary of the Commission's 2015 Survey on the Cost of Cash and Card Processing, p. 3, available at http://ec.europa.eu/competition/sectors/financial_services/dgcomp_final_report_en.pdf.

- (7) Six months following the date on which Mastercard receives formal notification of the Commission Decision according to Article 9 of Regulation (EC) No 1/2003, Mastercard commits to Cap:
- (a) its Debit IIF for Inter-regional Card Present (CP) Transactions at 0,2 %; and
 - (b) its Credit IIF for Inter-regional Card Present (CP) Transactions, at 0,3 %; and
 - (c) its Debit IIF for Inter-regional Card Not Present (CNP) Transactions at 1,15 %; and
 - (d) its Credit IIF for Inter-regional Card Not Present (CNP) Transactions at 1,5 %.
- (8) These Commitments will remain in force for a period of five years and six months after notification of the commitment decision to Mastercard.
- (9) At the latest within 12 working days after notification of the commitment decision, Mastercard will notify each acquirer of Mastercard Inter-regional Transactions and will request that each acquirer, in turn, notify promptly their respective merchant customers that: (i) the Commitments have been adopted; and that (ii) the IIFs will be capped for all future Consumer debit and credit card Inter-regional Transactions for the duration of the Commitments. Also at the latest within 12 working days after notification of the commitments decision, Mastercard shall also publish in a clearly visible and easily accessible manner on Mastercard's European website all Debit and Credit IIFs applicable to Inter-regional CP and CNP transactions.
- (10) Mastercard shall not circumvent or attempt to circumvent these Commitments either directly or indirectly by any act or omission. In particular, as of the notification of the commitment decision, Mastercard will refrain from all practices which have the equivalent object or effect of IIFs. This includes specifically but not exclusively implementing programs or new rules whereby Mastercard transfers scheme or other fees charged to acquirers within the EEA to non-EEA issuers.
- (11) Subject to its commitment of non-circumvention, Mastercard may adopt appropriate consumer protection measures to ensure that consumers will not be adversely affected by the effects of changes to its IIFs in particular concerning matters such as fraud, currency conversion, refunds and charge backs.
- (12) Mastercard shall appoint a Monitoring Trustee to monitor Mastercard's compliance with the Commitments. Before appointment, the Commission shall have the power to approve or reject the proposed Trustee.
- (13) The current antitrust investigation (supra section 2) will remain open towards Mastercard pending further assessment by the Commission, possibly including any comments made in response to this Notice.

4. Invitation to make comments

- (14) Subject to market testing, the Commission intends to adopt a decision under Article 9(1) of Regulation (EC) No 1/2003 declaring the Commitments summarised above and published on the internet, on the website of the Directorate-General for Competition, to be binding.
- (15) In accordance with Article 27(4) of Regulation (EC) No 1/2003, the Commission invites interested third parties to submit their observations on the proposed Commitments. These observations must reach the Commission not later than one month following the date of this publication. Interested third parties are also asked to submit a non-confidential version of their comments, in which any information they claim to be business secrets and other confidential information should be deleted and replaced as required by a non-confidential summary or by the words 'business secrets' or 'confidential'.
- (16) Answers and comments should preferably be reasoned and should set out the relevant facts. If you identify a problem with any part of the proposed commitments, the Commission would also invite you to suggest a possible solution.

- (17) Observations can be sent to the Commission under reference AT.40049 — Mastercard II either by email (COMP-GREFFE-ANTITRUST@ec.europa.eu), by fax +32 22950128) or by post, to the following address:

European Commission
Directorate-General for Competition
Antitrust Registry
1049 Bruxelles/Brussel
BELGIQUE/BELGIË
