



## **OBSERVATORY ON COMPETITION LAW ENFORCEMENT**

### **Interchange Fees, Mastercard and Single Market:**

The recipe for the restriction of competition

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The European Commission recently closed an investigation that had been going for six years. The target of this investigation was Mastercard, the second largest card scheme in the European Economic Area (EEA).

The investigation started over a possible violation of Article 101 of the Treaty on the Functioning of the European Union. Such violation was confirmed last month, resulting in a fine of over 570 million euros imposed on Mastercard.

For a better understanding of the Commission's decision, it is mandatory to explain the content of Article 101, which defines the following: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are prohibited as incompatible with the internal market. Any violation of this rule is automatically considered as void. Nonetheless, the violations may escape this prohibition if the requirements established in the third paragraph of the Article are fulfilled.

Mastercard's business model is, not only but also, based on the charge of an interchange fee. Every time a consumer uses his/hers Mastercard card to pay for a product either online or in person, the retailer's bank (issuing bank) is obligated to pay an interchange fee to the consumer's bank (acquiring bank). It happens that the first bank, naturally, charges this fee to the retailer and the retailer includes it in the final price of the product, this meaning that consumers pay this fee even if they do not use their cards as payment method.

The violation we are considering here is not the charging of the fee, as it is necessary for the functioning of the whole card system. The problem is related to the fact that Mastercard implements different rules, therefore different interchange fees, in the various countries of the internal market. In addition, Mastercard imposes that the retailers must always pay the interchange fee of their location.



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Until December 2015, interchange fees varied considerably from one country to another in the EEA. As a result, retailers in high-interchange fee countries could not benefit from lower interchange fees offered by an acquiring bank located in another Member State. Under these circumstances there was no other choice but to take measures in order to introduce caps (Interchange Fee Regulation).

The effects produced by Mastercard rules through the years were explicitly infringing European competition law, mainly Article 101 TFEU, on three different levels:

- In the first place, the imposition that Mastercard created that the retailers must pay the interchange fee defined in the country where they are located resulted in an artificial segmentation of the Single Market which is especially prohibited by Article 101 TFEU.
- In second place emerges the question of limited cross-border competition caused by these infamous rules. On a national level these rules did not create any kind of problems since the value of the fee did not vary, but when it comes to the entire Single Market it is not that simple. If banks from different countries cannot compete when it comes to the fees in question, then the competition between banks, and, in a way, even between retailers, is being limited.
- Lastly comes the raise of prices to the consumer. As we analyzed before, if the retailer could not access lower fees, then the higher fee would incorporate the retail price paid by the consumer (bear in mind that the retailer could use services from foreign banks but would always pay the fee of its own location, despite the location of the bank that operated the interchange).

In 2015 the violation ceased, with Regulation (EU) 2015/751 on interchange fees for card-based payment transactions. It created caps to the interchange fees that could be demanded, putting an end to the problem of substantially different fees in the EEA.

Even with this solution, Mastercard had to be held responsible the restrictions created by its strategy. Therefore, the Commission decided to set a fine based on the Commission's 2006 Guidelines on fines. In addition, it must be noted that Mastercard when approached with the problem cooperated with the Commission by acknowledging the facts and the infringements of EU competition rules, because of this cooperation the final value of the fine was reduced on 10%.



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Bearing all this in mind, we must consider that this decision was clearly the right thing to do. Even knowing that Mastercard won't have to change its behavior (because the violation ceased on 2015), this decision reveals its importance on a way that it strengthens the position of Article 101 TFEU on the context of European Competition Law.

It seems that the decision of the Commission on this Antitrust case is based not only on the treaty but also on European case law<sup>1</sup>. This case is developed around the question of vertical agreements (this kind of agreements are not as dangerous as the horizontal ones but are still prohibited by the Article 101 TFEU) and there is no possible justification for the impositions made by Mastercard.

If we use an economical approach or a competitive concerned one to analyse these impositions, we are still going to get a negative result when balancing the pros and cons. It is impressive how the strategy of one single company can interfere with the free competition on the single market, dividing it and harming the consumers, even those who don't use cards as their method of payment. That is why these kinds of decisions reveal themselves as essential for the development of the single market.

In conclusion, both the result of the investigations and the value of the fine indicate the still growing concern of the Commission regarding economic efficiency and the protection of the European consumers, and the urge to guarantee the functioning of the Single Market and the protection of its fundamental freedoms.

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<sup>1</sup> Judgment of the Court, Case C-382/12 P.