MasterCard loses the MIF battle

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The European Court of Justice has put an end on a long lasting legal debate between U.S. based MasterCard and the EU’s competition authority, the EU Commission on September 11, 2014(case C-382/12 P).

The organization of debit and credit card systems relying on collectively set interchange fees provoked administrative, regulatory and judicial actions all over the world. In this brief comment I summarize the backgrounds of the judgment of the European Court of Justice that will have an impact all over Europe and potentially also overseas.

The world’s second biggest card company behind Visa, MasterCard’s business model includes a mechanism through which banks indirectly determine a minimum price that merchants must pay for accepting the organization's payment cards. This mechanism comprises a complex network of multilaterally agreed inter-bank fees which is commonly referred to as “interchange fees”. The fee is paid by acquiring banks, i.e. the banks which process merchants’ transactions to card issuing banks, i.e. the bank of the customer. A multilateral interchange fee (MIF) is when these are collectively agreed by the banks. The advantage is that there is no need for dozens of bilateral agreements between banks.

![Diagram source: Kemp Little Consulting, 2012.](image)

These fees set by credit-card companies vary significantly across countries. The EU investigation focused on cross-border transactions within the EU, for instance, transactions between the merchant's bank in Germany to the cardholder's bank in Italy.
In December 2007, the Commission prohibited MasterCard's MIFs, mainly because they inflated the base on which banks charge prices to merchants. MIF accounts for a significant part of the final price merchants pay to banks for accepting MasterCard's payment cards. MasterCard was treated like an association of undertakings (banks) even after the company's listing at the New York Stock Exchange in 2006. This meant practically that its seemingly unilateral decision of fees was in effect a sort of agreement among its member banks. This meant that there was no need to prove a single or joint dominant position on the part of MasterCard (or Visa, subject to another Commission investigation).

This restriction of price competition was found to infringe Article 101 of the Treaty on the functioning of the EU (TFEU). The Commission argued that MIF set a minimum price which merchants must pay to their acquiring banks for accepting payment cards. Agreeing on minimum prices among competitors is seen as a hard core cartel. However, taking into account the broader market circumstances, the Commission did not rely on the by object prohibition, but rather established the existence of direct or indirect effects by setting a floor price. Conduct falling under the European ‘by object’ category is vaguely analogous to the U.S. per se infringements. Justifications that MIF generated benefits to consumers and were necessary for a smooth functioning of the system were refused by the Commission. This is an important point, in the light of another ECJ decision handed down the same day. The ECJ quashed another General Court judgment questioning that fees charged by French payment-card association Groupement des Cartes Bancaires were anticompetitive by their very nature, or “by object.” (case C-67/13 P). So, the General Court will have to review the case again.

Despite the allegedly serious effects, no fine was imposed on MasterCard since it had notified the payment scheme under the previous competition structure before 2004 which enabled an individual exemption to be obtained following a notification to the Commission.

The General Court upheld the Commission's decision in a judgment adopted in May 2012 (T-111/08). The judges pointed out that inter-bank fees constitute a restriction of competition by effect. MIF was not objectively necessary to operate the MasterCard payment system and therefore the theory of ancillary restraint, bringing a restriction outside the scope of Article 101 TFEU, could not be applied. The first instance judgment also confirmed that banks, in the framework of a card scheme, cannot restrict competition in the market by agreeing on certain charges jointly to the detriment of consumers.

To comply with the Commission decision, following negotiations with Commission officials, MasterCard offered in 2009 unilateral undertakings to reduce its cross-border MIFs for debit and credit cards and to adopt certain measures to make the market in card payments more transparent. The Commission believes that reducing the MIF will reduce costs for merchants, and ultimately consumers, thereby encouraging consumer spending.

MasterCard turned to the ECJ claiming that the Commission committed errors of law and fact. In its 266 paragraphs long judgment the ECJ sided with the Commission, the lower court and with its advocate general Mengozzi.
The final ruling will not have too much impact on how MasterCard operates today, since it has complied with the Commission decision over the couple of years. Still, the judgment may have wide ranging effect in many Member States. Investigations by various national competition authorities, i.e. the UK, Italy, and France relating to interchange fees applied to purely domestic transactions had been suspended awaiting the outcome of the appeal.

The Visa and MasterCard system was also subject to an investigation in Hungary. A 2009 decision imposed modest fines on the two card companies and some of the largest banks operating in the country. Due to a different fact pattern the Competition Council was also able to prove that companies establishing the system for Hungarian transactions in the mid-90’s acted intentionally to restrict competition. The court in Budapest reviewing the decision also suspended the procedure to wait for EU courts` ruling in the EU Commission case.

Furthermore, the judgment may provide new impetus for EU legislators to adopt regulation capping credit and debit card fees in Europe. Antitrust enforcement may not be the most efficient tool to fix this problem. Administrative procedures and subsequent court reviews last much too long. If the investigations do not result in commitments, antitrust decision can address problems ex post instead laying down the rules of the game in a detailed manner ex ante. Lastly, some of the competition agencies also lack the sectors specific skills and insights needed to adopt and monitor effective measures.

What about Visa? Following the expiry of a previous exemption decision, the Commission began its investigation into Visa’s MIFs for consumer debit and credit cards in 2008. The Commission accepted undertakings offered by Visa EUROPE in relation to debit card transactions in 2010. Among other things, Visa capped its yearly weighted average cross-border MIFs applicable to transactions with its consumer debit cards at 0.2%. After the General Court’s judgment it issued its statement of objections concerning Visa’s credit card system. In February this year, the Commission adopted a decision making binding additional commitments from Visa Europe. Visa agreed to reduce to 0.3% the maximum weighted average MIF for consumer credit cards. This covers intra-EEA transactions, national transactions in those EEA countries where Visa Europe sets consumer credit MIF rates directly, and for transactions with merchants located in the EEA with Visa credit cards issued outside the EEA but within the Visa Europe territory. There is still an ongoing Visa case involving primarily the inter-regional MIFs.