



EUROPEAN COMMISSION
Competition DG

CASE AT.40049 – Mastercard II

(Only the English text is authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 9 Regulation (EC) 1/2003

Date: 29.04.2019

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Brussels, 29.4.2019
C(2019) 3033 final

COMMISSION DECISION

of 29.4.2019

**relating to a proceeding under Article 101 of the Treaty on the Functioning of the
European Union and Article 53 of the EEA Agreement**

Case AT.40049 – MasterCard II

(Text with EEA relevance)

(Only the English text is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to 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 Treaty¹, in particular Article 9(1) thereof,

Having regard to the Commission decision of 9 April 2013 to initiate proceedings in this case,

Having expressed concerns in the Statement of Objections of 9 July 2015,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

Whereas:

1. SUBJECT MATTER

- (1) This Decision is addressed to Mastercard Incorporated, Mastercard International Incorporated and Mastercard Europe SA (together "Mastercard") and concerns Mastercard's rules on inter-regional multilateral interchange fees ("MIF") applicable to card-based inter-regional transactions concluded at merchants located in the EEA with consumer debit and credit cards issued by an issuer located outside the EEA.

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 102, respectively, of the Treaty on the Functioning of the European Union ("Treaty"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The Treaty also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the Treaty will be used throughout this Decision.

- (2) In its Statement of Objections (“SO”) of 9 July 2015 the Commission came to the preliminary conclusion that Mastercard’s rules on inter-regional MIFs infringed Article 101 of the Treaty and Article 53 of the EEA Agreement.
- (3) While Mastercard disagrees with the preliminary conclusions reached by the Commission in the SO, it nevertheless has offered commitments under Article 9(1) of Regulation (EC) No 1/2003 to meet the concerns expressed by the Commission. This Decision makes those commitments binding on Mastercard.

2. THE PARTIES

- (4) Mastercard is a worldwide payment organisation that is represented by Mastercard Incorporated, Mastercard International Incorporated and Mastercard Europe SA.
- (5) Mastercard Incorporated has its registered office in Wilmington, State of Delaware, United States of America. It is the holding company of the fully owned subsidiaries Mastercard International Incorporated and Mastercard Europe SA.
- (6) Mastercard International Incorporated is a membership corporation that has its offices in Wilmington, State of Delaware, United States of America. Its members are banks and payment service providers that are card acquirers or card issuers, or both. Mastercard Europe SA is a fully consolidated subsidiary of Mastercard Incorporated.

3. PROCEDURAL STEPS

- (7) On 9 April 2013, the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003. The Commission adopted a SO on 9 July 2015, setting out its competition concerns relating to Mastercard's inter-regional MIFs. The SO constitutes a preliminary assessment for the purposes of Article 9(1) of Regulation (EC) No 1/2003.
- (8) On 21 April 2016, Mastercard replied to the SO in writing. On 6 May 2016, Mastercard submitted an updated reply to the SO. On 31 May 2016, an Oral Hearing took place.
- (9) On 26 November 2018, Mastercard submitted commitments ("the Commitments") to the Commission.
- (10) On 5 December 2018, the Commission published a notice in the Official Journal of the European Union pursuant to Article 27(4) of Regulation (EC) No 1/2003 ("Article 27(4) Market Test Notice"), summarising the case and the Commitments and inviting interested third parties to give their observations on the Commitments within one month following publication.
- (11) On 29 January 2019, the Commission informed Mastercard of the observations received from interested third parties following the publication of the Article 27(4) Market Test Notice.

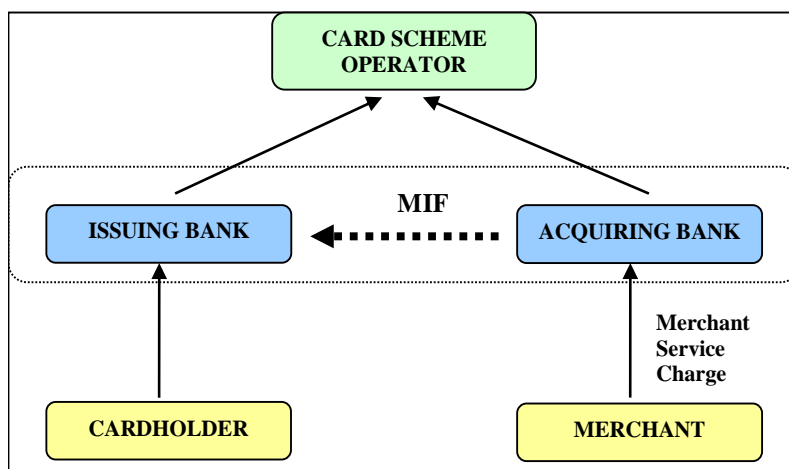
4. PRELIMINARY ASSESSMENT

4.1. Background

4.1.1. The Mastercard card payment scheme

- (12) The Mastercard payment card scheme (“Mastercard scheme”) is a “four-party” scheme, under which several financial institutions issue cards or acquire transactions

under common card brands, in this case the MasterCard and Maestro brands. The Mastercard scheme is two-sided, with Mastercard acting as the platform, through which the issuing banks (“the issuers”) and the acquiring banks (“the acquirers”) interact.



- (13) In such a card payment scheme, the issuing bank is the cardholder’s bank. Issuers provide cardholders with payment cards, ensure the completion of payment transactions by authorising payments and transferring funds to the acquirer, and provide related services. The acquiring bank is the merchant’s bank that credits the merchant’s bank account after receiving the funds from the issuer.
- (14) According to the MasterCard Rules², a transaction that has been cleared and settled gives rise to an "interchange fee" to be paid by the acquirer to the issuer. Issuers and acquirers can agree bilaterally on the interchange fee. If there is no such bilateral agreement, a so co-called multilateral interchange fee applies.
- (15) In the Mastercard scheme, different MIFs apply depending on the transaction type (for example on-line or in-store, with PIN or with signature), the geographic scope of the transaction, and the card type (for example debit or credit card, the specific brand such as Mastercard or Maestro and entry level, basic, enhanced or premium). As to the geographic scope of the transaction, Mastercard defines a transaction as:
 - (a) "Domestic", when the issuer of the card used and the merchant outlet are located in the same country;
 - (b) "Intra-regional", when the issuer of the card used is located in a different country from the merchant outlet but within the same region (Mastercard has defined five regions world-wide, of which the "European Region" is one);
 - (c) "Inter-regional", when the issuer of the card used and the merchant outlet are located in different regions.³

² MasterCard Rules, dated 15 May 2014 (ID 1291), with the latest update on 18 December 2018, Chapter 8.3 “Interchange and Service Fees” and Chapter 12, Rule 1.7.3.7 “Interchange Fee Requirements”. Available at: <https://www.mastercard.us/content/dam/mccom/global/documents/mastercard-rules.pdf>

³ MasterCard Rules, Chapter 11, with the latest update on 18 December 2018, Chapter 12 “Europe Region”, available at: <https://www.mastercard.us/content/dam/mccom/global/documents/mastercard-rules.pdf>

- (16) Acquirers charge merchants a "Merchant Service Charge" ("MSC")⁴. The MSC is typically a percentage of the transaction value (ad valorem), although the fee for debit card transactions is sometimes a fixed fee or a combination of fixed and ad valorem fees. The acquirer keeps part of the MSC, part is passed on to the issuer (the interchange fee) and a part is paid to the scheme (scheme fees collected by Mastercard). The level of the MIF directly affects the MSCs because acquirers treat the interchange fees as a cost and take them into account when setting the level of the MSC. Interchange fees are a significant price component of the MSCs.
- (17) This Decision concerns those inter-regional transactions where the merchant outlet is located in the EEA while the issuer of the card used is based outside the EEA ("the inter-regional transactions").
- (18) For the purposes of this Decision, a "debit card" means a card that accesses a consumer deposit and includes "prepaid cards"⁵, while a "credit card" means a card that is used to defer payment of debt or incur debt and defer its payment, including "charge cards"⁶.
- (19) For the purposes of this Decision, "consumer card" transactions" are transactions made using a card-based payment instrument issued to natural persons, which is not limited in use to business expenses, while "commercial card" transactions are transactions with a card-based payment instrument other than consumer card transactions.
- (20) In this Decision, in-store transactions when the cardholder is present in a shop are referred to as "card-present" or "CP" transactions. On-line transactions when the card number and authentication details are transmitted via internet, mail or telephone are referred to as "card-not-present" or "CNP" transactions.

4.2. Relevant market

- (21) In the SO, the Commission took the preliminary view that the relevant product market for the purposes of these proceedings is the market for acquiring card payments. Services for acquiring card payments are distinct from services for other means of payments, such as cash, credit transfers or direct debit payments. Services for acquiring card payments are generally offered by either commercial banks or specialised acquirers. The finding of such a product market is in line with the Commission's established practice⁷ and the case-law of the Court of Justice of the European Union⁸.

⁴ The MSC is also referred to as "merchant fees", "merchant service charges", "discount rates" or "disagios".

⁵ "Prepaid card" means a card used to access funds in a Mastercard prepaid account or a card where monetary value is stored on a chip.

⁶ "Charge card" means a type of Mastercard consumer credit card that is non-revolving and requires the total outstanding balance to be paid in full in each statement cycle.

⁷ Commission Decision of 26 February 2014 in case COMP/AT.39398 - VISA MIF (Commission's 2014 Visa decision), Commission Decision of 24 July 2002 in case IV/29.373, *Visa II* (OJ L 318, 22.11.2002, p. 17) (Commission's 2002 Visa decision), recital 43, Commission Decision of 17 October 2007 in case COMP/38606 *Groupeement Cartes Bancaires (CB)* (OJ C 183, 5.8.2009, p. 12), (Commission's 2007 *Groupeement Cartes Bancaires* decision) recitals 165 to 170, Commission Decision of 3 October 2007 in case COMP/37860 *Morgan Stanley* (C 303, 13.12.2006, p. 2), (Commission's 2007 *Morgan Stanley* decision) recitals 39 to 47, Commission Decision of 19 December 2007 in case COMP/34.579, COMP/35.518, COMP/38.580 *MasterCard* a.o. (OJ C 264, 6.11.2009, p. 8), (Commission's 2007

- (22) In its previous practice⁹, confirmed by the Court of Justice of the European Union¹⁰, the Commission has found that the geographical scope of the market for acquiring card payments is national. That conclusion has been based on the strong divergences in the pricing of services for acquiring card payments in different countries, the considerable differences in the market structure and the fact that cross-border acquiring remains limited. In the SO, the Commission took the preliminary view that it might be appropriate to revise those previous findings, to the extent that no essential barriers to offering acquiring services appear to exist throughout the EEA at present. Many acquirers operate in several Contracting Parties to the EEA Agreement, either serving merchants through local branches or providing cross-border services to at least larger merchants that are present in many Contracting Parties to the EEA Agreement and demand centralised services. Such factors could indicate that the geographic scope of the market may currently be larger than national.
- (23) In the SO, the Commission considered that the exact scope of the geographic market could be left open because it would not change the Commission's preliminary view that Mastercard's rules on inter-regional MIFs restrict competition.

4.3. Position of the parties on the relevant market

- (24) In the SO, the Commission took the preliminary view that Mastercard was the second-largest card scheme in the market for acquiring card payments within the EEA, after Visa, in terms of the value of consumer card transactions. It was also significantly larger than other card payments schemes, including American Express, China Union Pay, Japan Credit Bureau and Diners/Discover. In several Contracting Parties to the EEA Agreement Mastercard was the market leader, followed by Visa.¹¹
- (25) In the SO, the Commission also took the preliminary view that card payments were characterised by important network effects and that Mastercard had an important merchant acceptance network in the EEA, comparable in size of that of Visa, but

MasterCard decision) recital 278. See also decisions in other sectors: Commission Decision of 20 April 1999 in case IV/M.1455 *Gruner + Jahr/Financial Times/JV*; Commission Decision of 7 July 2005 in case M.3817 *Wegener/PCM/JV*.

⁸ Judgment of the Court of Justice of 11 September 2014, *MasterCard and Others v. Commission*, C-382/12, ECLI:EU:C:2014:2201, paragraph 240; Judgment of the General Court of 24 May 2012, *MasterCard Incorporated, e.a. v. Commission*, T-111/08, ECLI:EU:T:2012:260, paragraphs 21, 22 and 23, and paragraphs 168 to 182 (in particular paragraphs 172 and 173); Judgment of the General Court of 14 April 2011, *Visa Europe v. Commission*, T-461/07, ECLI:EU:T:2011:181, paragraphs 16 to 19, and paragraphs 91, 110, 111, 143, 144 and 149.

⁹ Commission's 2002 *Visa* decision, recital 53, Commission's 2007 *Groupement cartes bancaires* decision, Commission's 2007 *Morgan Stanley* decision, Commission's 2007 *MasterCard* decision, recitals 318 to 329.

¹⁰ Judgment of the General Court in *MasterCard* paragraphs 21, 22, 23, 172 and 173; Judgment of the General Court in *Visa Europe*, paragraphs 16 to 19, and 149; Judgment of the Court of First Instance of 23 February 1994, *CB and Europay v. Commission*, T-39/92 and T-40/92, ECLI:EU:T:1994:20, paragraph 104.

¹¹ Mastercard's reply to the request for information of 26 April 2013 (ID 55), Mastercard's reply to the request for information of 27 February 2014 (ID 89), and Mastercard's reply to the request for information of 01 July 2014, Question 8(a) & Question 9(a) (ID 1101).

significantly larger than that of other card payments schemes such as American Express, China Union Pay, Japan Credit Bureau and Diners/Discover.¹²

- (26) Therefore, in the SO, the Commission took the preliminary view that Mastercard's large share of consumer card transactions and its strong merchant acceptance network reinforced its strong market position in the EEA.

4.4. Practices raising competition concerns

- (27) This Decision concerns Mastercard's rules on inter-regional MIFs¹³ applicable to consumer card-based inter-regional transactions concluded at merchants located in the EEA with consumer debit and credit cards issued by an issuer located outside the EEA.

- (28) Mastercard sets rules on inter-regional MIFs¹⁴ that apply to inter-regional transactions concluded at merchants located in the EEA with consumer debit and credit cards issued by an issuer located outside the EEA. In the case of inter-regional transactions, the issuer and the acquirer can also set the interchange fees in bilateral agreements (including where the issuer is outside the EEA and the merchant is located in the EEA)¹⁵. However, Mastercard has explained that bilateral agreements "cover an insignificant share" of inter-regional transactions¹⁶.

4.4.1. Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement

4.4.1.1. Principles

- (29) Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement¹⁷ prohibit, as incompatible with the internal market, 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, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

¹² Mastercard's reply to the request for information from 20 July 2017, based on data from RBR: Payment cards issuing and acquiring in Europe 2016 (ID 2770).

¹³ Mastercard's rules on inter-regional MIFs are in place since 1992. On 22 May 1992, they were notified to the Commission under Council Regulation 17/62, First Regulation implementing Articles 85 and 86 of the Treaty (OJ 13, 21.02.1962, p. 204). At that time, although the rules on inter-regional MIFs were in place, Mastercard had not yet decided the level of the inter-regional MIF: Mastercard notified the Commission on 13 May 1993 that it had determined the level of the inter-regional MIF. The rules have not been materially changed since their entry into force.

¹⁴ MasterCard Rules, Chapter 8.3 "Interchange and Service Fees". Also, see page 336 where "Interregional Transaction" is defined.

¹⁵ MasterCard Rules, Chapter 8.3 "Interchange and Service Fees".

¹⁶ Mastercard's reply to the request for information of 26 April 2013, page 16, paragraph 64 (ID 55).

¹⁷ Article 53(1) of the EEA Agreement is modelled on Article 101(1) of the Treaty and contains the same prohibition, with the difference that Article 53(1) of the EEA Agreement refers to "trade between contracting parties" instead of to "trade between Member States" and to "competition within the territory covered by the [EEA] Agreement" instead of "competition within the internal market".

4.4.1.2. Application to this case

- (30) In the SO, the Commission took the preliminary view that Mastercard, as the representative of an association of undertakings, has infringed Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement by collectively setting rules on MIFs that apply to card-based inter-regional transactions with consumer debit and credit cards issued by an issuer located outside the EEA at merchant outlets located in the EEA. These include "card present" transactions and "card not present" transactions.
- (31) In the SO, the Commission took the preliminary view that Mastercard's rules on inter-regional MIFs constitute a decision by an association of undertakings that has as its object and effect an appreciable restriction of competition in the market for acquiring card payments within the EEA.
- (32) In the SO, the Commission came to the preliminary conclusion that Mastercard is an association of undertakings, as it fulfils the two conditions established by the Court of Justice in the *MasterCard* case¹⁸, namely the retention by the Mastercard scheme's members of certain important decision-making powers in respect of essential aspects of the operation of the Mastercard scheme, and the existence of a commonality of interests between Mastercard and its scheme members on the issue of the MIF.
- (33) In the SO, the Commission came to the preliminary conclusion that Mastercard's rules on inter-regional MIFs amount to horizontal price-fixing. The inter-regional MIFs fix a significant component of the price charged to merchants for acquiring services through the MSCs. The Commission came to the preliminary conclusion that the restriction of competition on price follows from the very substance of Mastercard's rules on inter-regional MIFs. The Commission also came to the preliminary conclusion that the objective of Mastercard's rules on inter-regional MIFs is to fix a part of the price charged to merchants and to restrict competition to the benefit of Mastercard and its members/licensees, primarily the issuers. Such price fixing is by its very nature harmful to competition and reveals in itself a sufficient degree of harm to competition to be considered a restriction of competition '*by object*'.
- (34) In the SO, the Commission also came to the preliminary conclusion that Mastercard's rules on inter-regional MIFs have the effect of restricting competition in the market for acquiring card payments within the EEA. According to the Commission's preliminary assessment, Mastercard's inter-regional MIFs apply directly to almost all inter-regional transactions made at merchants in the EEA. They determine a significant component of the price charged to merchants for acquiring services through the MSC, therefore limiting the acquirers' scope for reducing and differentiating their MSCs, and acquirers pass them on to merchants. Therefore, inter-regional MIFs have a direct impact on prices by inflating MSCs (see for reference recital (16)).
- (35) In the SO, the Commission came to the preliminary conclusion that the restrictive object and effect of Mastercard's rules on inter-regional MIFs appear to be further reinforced by the following factors, amongst others: inter-system competition that results in high MIFs (the higher the Mastercard MIF, the more attractive it becomes

¹⁸ Judgment in *MasterCard and Others v Commission*, C-382/12, EU:C:2014:2201, paragraph 67.

for an issuer to issue Mastercard cards), lack of downward pressure by acquirers on MIFs, and merchants' lack of countervailing bargaining power to constrain the level of MIFs. As regards acquirers, the Commission took the preliminary view that they appear to be indifferent to the MIFs because MIFs apply equally to all acquirers, which allows them to pass on the common MIF cost to the merchants.

- (36) The Commission's preliminary view was that merchants' lack of countervailing bargaining power might be due to several factors, in particular the must-take nature of Mastercard cards, the Honour All Cards Rule, the practice of blending of MSCs and the lack of competition between Mastercard and Visa in the acquiring market (see recitals (24) to (26) on the market position). It appears that the MIFs incentivise issuers to issue cards and card transactions have increased rapidly in the last years in the EEA. This results from the consumer demand to pay by card. If merchants do not accept cards, they fear that they will lose customers to other competing merchants who accept cards (business stealing) and cards therefore become a 'must-take' for merchants.
- (37) Mastercard's Honour All Cards Rule obliges merchants who accept Mastercard branded cards to accept all Mastercard branded cards, irrespective of which bank issued the card (honour-all-issuers element) and irrespective of the card product, for instance whether it is a debit or credit card, or a standard or a premium card (honour-all-products element). The same applies to Maestro branded cards. The Honour All Cards Rule therefore means that a merchant, which accepts 'ordinary' Mastercard cards for fear of business stealing, cannot refuse payments that carry a higher interchange fee, for example because the card is a premium card or the transaction is inter-regional and therefore carries a higher MIF. Blending is the practice of charging the same MSC for transactions made with different payment card types or for different transaction types of the same payment card carrying different MIFs. Blending renders the pricing structure non-transparent: if merchants are unaware of the fact that different card products and different transaction types carry different MIFs and come at different costs, they are not able to make an informed choice as to which cards to encourage and which to discourage.
- (38) Lastly, in the SO the Commission took the preliminary view that Mastercard's rules on inter-regional MIFs are not objectively necessary¹⁹.

4.4.2. *Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement*

4.4.2.1. Principles

- (39) Pursuant to Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement, an agreement is exempted from the prohibition of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement where it satisfies the following four cumulative criteria: (a) it contributes to improving the production or distribution of goods or services or to promoting technical or economic progress; (b) it allows consumers a fair share of the resulting benefit; (c) it does not impose restrictions that are not indispensable to the attainment of those objectives; and (d) it does not afford the

¹⁹ The Court of Justice of the European Union has confirmed that MIFs are not objectively necessary, General Court in *MasterCard*, paragraphs 74 to 120; Court of Justice in *MasterCard*, paragraphs 78 to 120.

undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

4.4.2.2. Application to this case

- (40) In the SO the Commission took the preliminary view that Mastercard's rules on inter-regional MIFs do not appear to meet the requirements for an exemption under Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement.
- (41) In view of the above (see recitals (27) to (40)), the Commission came to the preliminary conclusion in the SO that Mastercard's rules on consumer card-based inter-regional transactions give rise to competition concerns.

4.5. Effect on trade between Member States

- (42) In the SO, the Commission took the preliminary view that the decisions of an association of undertakings regarding Mastercard's rules on inter-regional MIFs are capable of appreciably affecting trade between Member States and the Contracting Parties to the EEA Agreement within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.
- (43) Mastercard's payment cards are an international means of payment that can be used by cardholders not only in the country where the cards are issued, but also at merchant outlets in other countries. The Commission took the view that Mastercard's MIF's affected trade between Member States on 19 December 2007 when it adopted a prohibition decision pursuant to Article 7 of Regulation (EC) No 1/2003 addressed to Mastercard²⁰.
- (44) Mastercard's rules on inter-regional MIFs fix a significant component of the price charged to merchants through the MSCs and apply to all inter-regional transactions with consumer Mastercard cards in the whole of the EEA²¹. They therefore by their very nature directly influence the pattern of trade between Contracting Parties to the EEA Agreement²² and affect, or are capable of affecting, trade between Contracting Parties to the EEA Agreement.
- (45) Accordingly, Mastercard's inter-regional MIFs, by their very nature, directly affect the pattern of trade between Contracting Parties to the EEA Agreement in the acquiring market²³. They consequently affect, or are capable of affecting, trade between Contracting Parties to the EEA Agreement.

²⁰ Commission's 2007 *MasterCard* decision, recital 662.

²¹ In case of inter-regional transactions the issuers of the payment cards are located outside the EEA. However, Article 101 of the Treaty applies irrespective of where the undertakings are located or where the agreement has been concluded provided that the agreement or practice is either implemented or produce effects inside the EEA. See point 100 of the Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty ("Guidelines on the effect on trade concept") (OJ C101, 27.4.2004, p.81). This is the case with respect to Mastercard's rules on inter-regional MIFs. They are implemented with respect to transactions taking place in the EEA, are applied by acquirers located in the EEA and create a restriction of competition on price in the EEA. In the SO, the Commission provisionally found that this is liable to harm European merchants and consumers that pay the inter-regional MIFs to issuers located outside the EEA.

²² See the Guidelines on the effect on trade concept: points 29, 61 and 64 with respect to horizontal practices and point 72 with respect to vertical practices.

²³ See, points 16, 25, 27, 32, 63 of the Guidelines on the effect on trade concept.

5. PROPOSED COMMITMENTS

- (46) The key elements of the Commitments offered by Mastercard on 26 November 2018²⁴ are set out in recitals (47) to (53).
- (47) Six months following the date on which Mastercard receives formal notification of this Decision, Mastercard commits to cap the MIFs for all consumer card-based payment transactions as follows:
- (a) Debit IIF²⁵ for Inter-regional Card Present (CP) Transactions at 0.2%; and
 - (b) Credit IIF for Inter-regional Card Present (CP) Transactions, at 0.3%; and
 - (c) Debit IIF for Inter-regional Card Not Present (CNP) Transactions at 1.15%; and
 - (d) Credit IIF for Inter-regional Card Not Present (CNP) Transactions at 1.50%.
- (48) At the latest within 12 working days from the notification of this 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 Inter-regional MIFs will be capped for all future consumer debit and credit card inter-regional transactions for the duration of the Commitments.
- (49) At the latest within 12 working days from the notification of this Decision, Mastercard will publish, in a clearly visible and easily accessible manner on Mastercard's European website, all inter-regional debit and credit MIFs applicable to inter-regional CP transactions and inter-regional CNP transactions subject to the Commitments. This obligation remains in force through the duration of the Commitments.
- (50) Mastercard shall not circumvent or attempt to circumvent the Commitments either directly or indirectly by any act or omission. In particular, as of the notification of this Decision, Mastercard will refrain from all practices which have the equivalent object or effect of inter-regional MIFs. 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.
- (51) 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 inter-regional MIFs in particular concerning matters such as fraud, currency conversion, refunds and charge backs.
- (52) Mastercard shall appoint a Monitoring Trustee to monitor Mastercard's compliance with the Commitments. Before appointment, the Commission will have the power to approve or reject the proposed Trustee.
- (53) The Commitments will remain in force for a period of five years and six months after notification of this Decision to Mastercard.

²⁴ Finalised commitments signed on 21 March 2019.

²⁵ 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").

6. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4)

(54) In response to the publication on 5 December 2018 of the Article 27(4) Market Test Notice, the Commission received 21 responses from interested third parties.

6.1. Summary of the main comments from third parties during the Market Test

(55) This section sets out the main observations submitted by the interested third parties.

6.1.1. MIF caps for card-present and card-not-present transactions

(56) Several respondents requested clarifications regarding the reasons why the caps for CNP transactions are higher than for CP transactions. Seven respondents considered that different caps for CP and CNP transactions add to the complexity of fees and scheme charges for card transactions. They also pointed out that Regulation (EU) 2015/751 of the European Parliament and of the Council²⁶ does not provide for such a differentiation. Two respondents considered that such a differentiation disadvantages on-line merchants. One respondent, on the other hand, welcomed higher caps for CNP transactions, as they allow issuers to set up the necessary fraud mitigation tools and better invest in the well-functioning of inter-regional transactions.

6.1.2. Non-circumvention

(57) Three respondents considered that the wording of the non-circumvention clause is too restrictive and suggested extending it to ensure that any new fees, including increased scheme fees, charged to acquirers are covered. In particular, one respondent raised concerns that the clause will not be sufficient to prevent circumvention of the Commitments, and suggested amending the clause to reflect the non-circumvention clause in relation to scheme fees in the Commission's 2010²⁷ and 2014 Visa decisions. One respondent referred to past scheme fee increases by card schemes stating that they compensated for reduced interchange fees and "encouraged the development and introduction of a mechanism to avoid circumvention of the offered caps", without proposing any specific change to the proposed wording of the non-circumvention clause. One respondent called for the Commission to be vigilant concerning other fees charged to merchants, in particular scheme fees, when implementing the non-circumvention clause. One respondent suggested that the non-circumvention clause should not be restricted to acquirers within the EEA and to non-EEA issuers. Three respondents welcomed the clause preventing Mastercard from adopting any measures with similar object or effect to inter-regional MIFs and, among those, one respondent welcomed the explicit mention of programs, rules or fee increases charged to acquirers.

6.1.3. Definitions

(58) One respondent asked whether card schemes could, in practice, re-define in-store transactions (card-present transactions) as card-not-present transactions in order to attract a higher interchange fee level. Another respondent proposed modifying the wording of the "Merchant Outlet" definition²⁸ to provide for an option to establish

²⁶ Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (OJ L 123, 19.5.2015, p. 1).

²⁷ Commission Decision of 8 December 2010 in case COMP/AT.39398 – Visa MIF (Commission's 2010 Visa decision).

²⁸ See clause 2.1 of the Commitments.

the location of the merchant outlet in the country where a travel agent involved in the transaction is located.

6.1.4. Duration and review of the Commitments

- (59) Five respondents considered that the five-year and six-month duration of the Commitments was too short. Amongst those, one respondent went as far as to request a permanent commitment. However, that respondent also acknowledged that the envisaged duration was substantial and would provide medium-term benefits for merchants. Another respondent suggested transferring the Commitments into a long-term agreement, either through a similar agreement with card schemes or in the form of a regulation similar to Regulation (EU) 2015/751.
- (60) One respondent considered the duration of the Commitments to be too long and requested the Commission to consider a shorter duration, in particular in the light of the fast technological developments taking place in the market.
- (61) One respondent requested clarification on the interplay of the duration of the Commitments offered with the review of Regulation (EU) 2015/751.

6.1.5. Scope of the Commission's preliminary investigation

- (62) Some respondents provided observations concerning issues which are beyond the scope of the Commission's investigation and, therefore, outside the scope of the case. In that regard, the main comments received concerned commercial cards and scheme fees.
- (63) In relation to commercial cards, five respondents considered that commercial cards should also have been included within the scope of the Commitments. In particular, it was argued that, since the entry into force of Regulation (EU) 2015/751, the number of commercial cards issued has increased, as well as their respective fees. In addition, one respondent argued that certain sectors (mainly travel and accommodation) have faced a significant increase in commercial card transactions related to individual consumer-based purchases.
- (64) Two respondents raised concerns about scheme fees not being included within the scope of the Commitments. A number of respondents also submitted that Mastercard and Visa could introduce new fees or increase the level of the fees, notably the scheme fees (preceding or following the implementation of the Commitments) as a way to circumvent the Commitments (see recital (57)).
- (65) One respondent was concerned that the higher caps applicable to card-not-present transactions may set a precedent for also increasing those caps within the EEA in the context of the review of Regulation (EU) 2015/751. Four respondents submitted suggestions to be considered in the context of the forthcoming review of Regulation (EU) 2015/751, which seek to extend the scope of that review to cover scheme fees, inter-regional interchange fees or commercial cards.

6.1.6. Other comments

- (66) Some respondents also raised concerns in relation to the following issues: the potential application of the Commitments to consumers in the United Kingdom in the future, the potential effects of the Commitments on issuing banks located outside the EEA (including reducing cardholder benefits and issuing banks switching to alternative card schemes) and the transparency of the Monitoring Trustee as well as its interactions with stakeholders.

7. PROPORTIONALITY OF THE COMMITMENTS

7.1. Principles

- (67) The principle of proportionality requires that the measures adopted by institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.²⁹
- (68) In the context of Article 9 of Regulation (EC) No 1/2003, application of the principle of proportionality requires the Commission to assess that the Commitments in question address the concerns expressed by the Commission in the SO and that the undertakings concerned have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must take into consideration the interests of third parties.³⁰

7.2. Application to this case

- (69) The Commitments adequately address the concerns identified by the Commission in the SO for the reasons set out in sections 7.2.1 to 7.2.7.

7.2.1. MIF caps for card-present and card-not-present transactions

- (70) When analysing MIF levels, regard should be had to the Merchant Indifference Test (MIT), a methodology originally developed in economic literature³¹ and then further developed by the Commission to assess efficient interchange fees. The Commission uses this methodology as a benchmark or proxy for assessing compliance with Article 101(3) of the Treaty so as to ensure that merchants benefit from card acceptance. This approach is reflected in the Commission's previous commitment decisions³² in determining ranges of MIFs that would likely benefit merchants.
- (71) According to the general framework of the MIT, the interchange fees should be such that, on average, the MSCs do not exceed the transactional benefits that merchants derive from accepting payment cards. Transactional benefits are defined as direct cost savings that accrue to a merchant when a card payment takes place (net of interchange fees) relative to a payment with an alternative payment method. Such transactional benefits accrued to a merchant are the direct benefits of a card payment relative to alternative payments.
- (72) In this context, transactional benefits of card payments compared to an alternative payment instrument have to be quantified and measured in monetary terms. The MIT compliant MSC should not exceed the level of the measured transactional benefits. In order to compute the MIF compliant with the MIT the average acquirer margin and the scheme fees paid by the acquirer are deducted from the MIT-compliant MSC.

²⁹ See for instance, Judgment of the Court of First Instance of 19 June 1997, *Air Inter v. Commission*, T-260/94, ECLI:EU:T:1997:89, paragraph 144 and Judgment of the Court of First Instance of 23 October 2003, *Van den Bergh Foods v. Commission*, T-65/98, ECLI:EU:T:2003:281, paragraph 201.

³⁰ Judgment of the Court of 29 June 2010, *Commission v. Alrosa*, C-441/07 P, ECLI:EU:C:2010:377, paragraphs 41 and 61.

³¹ In particular, in the article jointly authored by Professor Jean-Charles Rochet and Jean Tirole, "Must Take Cards and the Tourist Test", No 496, IDEI Working Papers from Institut d'Economie Industrielle (IDEI), Toulouse. Available at: http://idei.fr/doc/wp/2008/must_take_cards.pdf

³² See the Commission's 2010 *Visa* decision and the Commission's 2014 *Visa* decision.

- (73) Economic theory indicates³³ that the MIFs which comply with the MIT should allow merchants and their customers to benefit from increased card use and to increase the acquirers' scope for reducing and differentiating their MSCs. Furthermore, to the extent that the MIFs are passed on to the cardholders by the issuers, they also ensure that cardholders are properly guided in their decision to choose the most efficient payment instruments.
- (74) By ensuring that merchants, taken together, are indifferent between accepting and handling card payments and alternative means of payments, a MIT-compliant MIF creates a level playing field for competition between alternative payment instruments, while it prevents card schemes from exploiting the reluctance of merchants to turn down card payments as they are afraid that their competitors would steal their customers if they refused to accept card payments. In this context, a MIF that is above the MIT-compliant level would not appear to create benefits for merchants and consumers that would outweigh the possibly anti-competitive object and effect of the MIFs and a fair share of the resulting benefits would not be passed on to consumers, the merchants and their subsequent purchasers.
- (75) In order to perform the MIT taking into account the specificities of inter-regional transactions, the Commission conducted a market investigation requesting data from Mastercard, Visa, certain competitors and merchants.
- (76) The MIT-compliant MIF caps were calculated by comparing the merchants' costs of accepting payments made by debit and credit cards to those of accepting payments made with alternative means of payment. The relevant alternative means of payment are composed of payment instruments which must not, and do not, include a MIF component.
- (77) In order to compute the merchants' costs for credit and debit cards and the relevant alternative means of payments for CP and CNP inter-regional transactions, the Commission has relied on merchants' cost data collected in the context of the Cost of Cash and Cards study³⁴ and further complemented by data specific to inter-regional transactions gathered from the respondents to the market investigation. The main merchants' cost categories that appear to be relevant, both for CP and CNP transactions, are³⁵: labour costs; costs of equipment used in processing payments; costs of services purchased from third parties; losses and revenues associated with the use of certain payments instruments such as the cost of fraud and theft. While the Cost of Cash and Cards Study focused on CP transactions, the data on merchants' costs for accepting card payments gathered in that study is also relevant for the application of the MIT for CNP transactions.
- (78) Following the market investigation, the Commission applied the MIT to debit CP and CNP and to credit CP and CNP inter-regional transactions and, as explained in

³³ See recital(70).

³⁴ Survey of merchants' costs of processing cash and card payments, final results March 2015 ("The Cost of Cash and Cards Study"). The study aims at measuring merchants' costs of processing cash and card payments in the context of domestic transactions for the purpose of applying the MIT, in the framework of efficiency justifications brought forward by payment card schemes under Article 101(3) of the Treaty.

Available at: http://ec.europa.eu/competition/sectors/financial_services/enforcement_en.html

³⁵ As a matter of principle when applying the MIT, these costs do not include the MIF cost associated with the acceptance of cards.

recitals (79) to (83), different parameters were used depending on the type of transactions. That analysis takes into account that in inter-regional transactions there are the following main groups of payment service providers: four-party card payment schemes; three-party card payment schemes³⁶; other means of payments that can be funded by bank transfers, such as e-wallets (digital wallets³⁷), e-payments or bank transfer payments.

- (79) On the basis of the information collected, in the specific and current context of the inter-regional transactions and for the purpose of this Decision, the Commission has identified two distinct comparators for CP and CNP transactions that comply with the requirements as set out in the Cost of Cash and Cards study,³⁸ so that i) they are used by consumers and accepted by merchants and ii) have no MIFs attached to their use. On that basis, the Commission has indications that:
- (a) for inter-regional CP transactions cash remains a valid alternative to cards. Cash is a legal tender and the most common alternative to inter-regional CP payments with debit and credit cards that involves no MIF³⁹;
 - (b) for inter-regional CNP transactions cash could not be considered a valid alternative⁴⁰. Other alternatives, that are means of payments funded via bank transfers (which are outside the domestic payment systems of the EEA Contracting Parties and the Single European Payment Area, SEPA⁴¹; “non-SEPA bank transfers”), were identified as plausible payment alternatives for the purposes of the MIT⁴².

³⁶ A three-party card payment scheme is a payment card scheme in which the scheme itself provides acquiring and issuing services and card based payment transactions are made from the payment account of payer to the payment account of a payee within the scheme. Regulation (EU) 2015/751, Article 2(18).

³⁷ An e-wallet or digital wallet refers to an electronic device or online service that allows an individual to make electronic payment transactions. This can include payments for purchasing items on-line with a computer or using a smartphone to pay something at a store. A card or an individual's bank account can be linked to the digital wallet. Under the Mastercard Commitments, when the payment is made in a shop, it is considered a CP transaction regardless of the payment instrument used (see clause 2.1 of Mastercard Commitments).

³⁸ The Cost of Cash and Cards Study, paragraph 75.

³⁹ The Cost of Cash and Cards Study, paragraph 75.

⁴⁰ The Cost of Cash and Cards Study does not examine CNP transactions. However, it states that the choice of a comparator to cards in the CNP context would require an in-depth examination of the payment means available, without taking a final view on this. See paragraph 104 of the Cost of Cash and Cards Study.

⁴¹ The aim of the single euro payments area (SEPA) is to ensure that making electronic payments throughout the entire euro area is as easy as making cash payments, and that there are no extra charges when making an electronic payment in euros in another Member State. To that end, Regulation (EC) No 924/2009 of the European Parliament and of the Council on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001 (OJ L266, 9.10.2009, p.11) has equalised charges for transactions in euro, which has resulted in lower fees for consumers. SEPA and Regulation (EC) No 924/2009 do not apply to inter-regional transactions, where transaction costs are substantially higher than for SEPA transactions. See also the Final Report of the Commission's Study on the extension of Regulation 924/2009 to currencies of Member States outside the euro area (in particular pages 13 and 50), available at https://ec.europa.eu/info/sites/info/files/180328-study-cross-border-transaction-fees-extension_en.pdf.

⁴² In collecting data from payment providers, the Commission has received data specific for payments funded via bank transfers. The calculations are therefore based purely on the costs of payments via bank transfer.

- (80) The use of different comparators for CP and CNP is the most important factor that indicates higher MIT-compliant MIF caps for CNP than for CP. This reflects the fact that, in the context of inter-regional CNP transactions, alternative means of payment funded via non-SEPA bank transfers carry significant costs for merchants.
- (81) Different merchants and thus different sectors bear different costs for handling payment transactions. Therefore, in order to reflect the relative importance of different sectors in inter-regional transactions, the Commission has computed the relative weights for the sectors that are most relevant in the inter-regional context based on the data gathered from Mastercard and Visa during the market investigation (observed transactions with Mastercard and Visa cards) and applied them in the MIT analysis. The relative importance of certain sectors (and the associated merchant costs) may vary depending on the purchasing channel, that is whether the transaction takes place on-line (CNP) or in the merchant's shop (CP), on the geographic scope of the transaction, and on the value of debit or credit transactions. In particular, when looking at Mastercard's and Visa's inter-regional transactions, the accommodation sector (NACE code I.55) is relatively more important than it is for domestic transactions, while the retail trade sector (NACE code G.47, except for motor vehicles and motorcycles) is relatively less important than it is for domestic transactions. Therefore, the Commission has adapted the weights by increasing the weight allocated to the accommodation sector and decreased the weight allocated to the retail trade sector in the computation of the MIT-compliant MIF.
- (82) The Commission has computed the average transaction values for CP inter-regional debit and credit transactions and for inter-regional CNP debit and credit transactions based on the data gathered from Mastercard, Visa and competitors, since the merchants' cost of handling transactions also varies depending on the transaction value.
- (83) Further, the Commission has estimated the levels of acquirer margins⁴³ in the inter-regional CP and CNP transactions context.
- (84) The differences between debit and credit CP and CNP inter-regional transactions explained in recitals (77) to (83) lead to different MIT-compliant MIF caps. The application of each of these parameters has resulted in higher caps for CNP than for CP, notably due to the use of different comparators between CP and CNP.
- (85) For each type of inter-regional transaction (that is CP and CNP, debit and credit), the MIF caps proposed by Mastercard do not clearly appear to be in excess of the requirements of the MIT.⁴⁴ In the light of the elements set out in recitals (79) to (83), the evidence on the file indicates that for inter-regional CP transactions, a per transaction MIF of 0.2% for debit cards and 0.3% for credit cards could make merchants, taken together, indifferent between accepting a cash payment and a card payment. For inter-regional CNP transactions, the evidence on the file indicates that a per transaction MIF of 1.15% for debit cards and of 1.5% for credit cards could

⁴³ For MIT analysis, the acquiring margin is defined as the difference between the MSC and the MIF. See for reference the Cost of Cash and Cards Study, paragraph 12, footnote 6.

⁴⁴ This assessment is based on an analysis of the replies of Mastercard, Visa, competitors and merchants to the Commission market investigation (see recital (75)) as well as the data gathered in the context of the Cost of Cash and Cards Study (see recital (77)).

make merchants, taken together, indifferent between accepting a non-SEPA bank transfer or an e-money transfer and a card payment.⁴⁵

- (86) Importantly, the Commitments only cap the MIF rates and do not prevent Mastercard from introducing lower MIF rates.
- (87) The Commitments therefore deal with the preliminary competition concerns identified by the Commission in an efficient manner, as they provide a direct and tangible benefit to merchants and ultimately consumers in the form of MIFs that are substantially lower than the currently applicable levels.

7.2.2. *Non-circumvention*

- (88) The Commission considers that Clause 8 of the Commitments contains a far-reaching non-circumvention clause, which prohibits Mastercard from engaging in any conduct that would directly or indirectly, by act or omission, have the equivalent object or effect of inter-regional MIFs. This includes, but is not limited to, the introduction of fees which are legally or economically equivalent to inter-regional MIFs. This is similar to the 2010 and 2014 Visa commitments. In the same way as in those commitments, new fees or increased scheme fees equivalent to inter-regional MIFs are covered by the non-circumvention clause.
- (89) With regard to the argument that the non-circumvention clause should not be restricted to acquirers within the EEA and to non-EEA issuers⁴⁶, the example provided in the non-circumvention clause is not exhaustive and the scope of the clause is broad enough to cover fees which may have an equivalent object or effect to inter-regional MIFs.
- (90) A breach of the Commitments could lead to the application of a number of measures provided for in Regulation (EC) No 1/2003, namely reopening of the proceedings pursuant to Article 9(2), imposition of a fine pursuant to Article 23(2)(c), or the imposition of periodic penalty payments pursuant to Article 24(1)(c).

7.2.3. *Definitions*

- (91) As regards the comment on whether card schemes could re-define card-present transactions as card-not-present transactions, the Commission considers that the current definitions of “Card-Based Payment Instrument” and “Card Present Transactions” (clause 2.1 of Mastercard’s Commitments) exclude such manipulations as they clearly specify under which conditions card-present transactions take place. Nevertheless, if such manipulation were to occur, this would be considered a breach and circumvention of the Commitments (see recital (90)).
- (92) As regards the definition of “Merchant Outlet”, the Commission considers that Mastercard’s Commitments provide for the possibility to allocate the place of the merchant outlet in the country of the travel agent (clause 2.1 of Mastercard’s Commitments).

⁴⁵ See replies of Mastercard, Visa, competitors and merchants to the Commission market investigation and the data gathered in the context of the Cost of Cash and Cards Study. Specifically concerning the inter-regional CNP transactions, the Commission gathered information from competitors and merchants on costs of alternative payment means funded via bank transfers (see recital (79)(b)).

⁴⁶ Clause 8.1 states that the non-circumvention obligation “[...] 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.”

7.2.4. *Duration and review of the Commitments*

- (93) Respondents did not provide any facts or evidence that would justify either extending or reducing the duration of the Commitments. In addition, the duration of the Commitments and the review of Regulation (EU) 2015/751 are two separate issues. The duration of the Commitments has to be assessed on its merits, irrespective of the review clause in Article 17 of Regulation (EU) 2015/751. Furthermore, inter-regional MIFs are not included within the scope of Regulation (EU) 2015/751.
- (94) The Commission considers that the five-years and six-month duration of the Commitments is sufficient to address adequately the concerns expressed in the SO. Given that the Commitments provide for an implementation period of six months, the “net” duration of the Commitments will effectively be five years. This is in line with the Commission’s practice in previous commitment cases⁴⁷ and slightly longer than in the commitments in the previous MIF cases⁴⁸. A longer period would go beyond what is necessary to protect competition in such a fast-moving sector.

7.2.5. *Scope of the Commission’s investigation*

- (95) The comments received regarding commercial cards and scheme fees go beyond the scope of this case and therefore also beyond the Commitments. As stated in recitals (1) and (30), the scope of this case and the practices raising concerns are limited to Mastercard’s rules on *inter-regional MIFs* applicable to card-based inter-regional transactions concluded at merchants located in the EEA with *consumer* debit and credit cards issued by an issuer located outside the EEA. Commercial cards are not part of the investigation. Similarly, scheme fees, which are charged by Mastercard to issuers and acquirers, are not part of the investigation.
- (96) The concern that higher caps applicable to inter-regional card-not-present transactions may set a precedent in the context of the review of Regulation (EU) 2015/751 is also outside the scope of this case which must be assessed on its own merits. The Commission may carry out a review of Regulation (EU) 2015/751 in accordance with Article 17 of that Regulation and separately from this case. Accordingly, the suggestions for the review of Regulation (EU) 2015/751 which were raised by respondents, such as a proposal to extend its scope to include scheme fees, inter-regional interchange fees or commercial cards, are also not within the scope of this case.

7.2.6. *Other comments*

- (97) Regarding the question on the application of the Commitments to consumers in the United Kingdom in the future, it should be recalled that the Commitments are applicable to inter-regional transactions. These are defined in the Mastercard Commitments as “*a transaction at a Merchant Outlet located in the EEA with a Consumer Credit Card or Consumer Debit Card issued by an Issuer based outside of the EEA*” (see clause 2.1). In this regard, the Mastercard Commitments define the EEA as “*those countries participating in the European Economic Area as of the*

⁴⁷ For commitment cases with a duration of five years see for example: Commission Decision of 4 May 2017 in case COMP/AT.40153 – E-book MFNs and related matters (Amazon); Commission Decision of 10 December 2015 in case COMP/AT.39767 – BEH Electricity; Commission Decision of 29 April 2014 in case COMP/AT.39939 – Samsung Enforcement of UMTS Standard Essential Patents; and Commission Decision of 25 July 2013 in case COMP/AT.39847 – E-books.

⁴⁸ See the Commission’s 2014 Visa decision that included a duration of four years (clause 9.2).

Commencement Date or joining thereafter for the duration of each such country's participation in the EEA during the term of these Commitments" (see clause 2.1).

- (98) Regarding the potential effects of the Commitments on issuing banks located outside the EEA, the Commission's competition concerns set out in the SO, which the Mastercard Commitments address, concern the acquiring of card-based payment transactions within the EEA.
- (99) Finally, in relation to the transparency of the Monitoring Trustee and its interactions with stakeholders, the Commission refers to the appendix to the Commitments (also publicly available) where the functions, duties and obligations of the Monitoring Trustee are laid out. In particular, one of the duties of the Monitoring Trustee is to promptly report in writing to the Commission, if it concludes on reasonable grounds that there has been a failure to comply with the Commitments (clause 1.7.3 in the appendix to the Commitments). These provisions are in line with the general practice of the Commission regarding the monitoring of commitments. Furthermore, a model text for trustee mandates is published on the Commission's DG Competition website⁴⁹.

7.2.7. *Conclusion on proportionality*

- (100) Mastercard has not offered less onerous commitments in response to the SO that also address the Commission's concerns adequately.
- (101) The need to ensure increased deterrence through the imposition of fines has been removed by the submission of the Commitments, which will be made legally binding and enforceable through this Decision. While this effectively removes the risk of recidivism, it produces positive effects for market operators and consumers.
- (102) The Commission has taken into consideration the interests of third parties, including those of the interested third parties that responded to the Article 27(4) Market Test Notice.
- (103) Overall, the observations received in response to the Article 27(4) Market Test Notice did not allow the Commission to identify new competition concerns and contained no points such as to make the Commission reconsider the concerns it expressed in the SO. In view of the results of the market test, the Commission maintains the position that it took in the Article 27(4) Market Test Notice, namely that the Commitments are adequate to meet the competition concerns expressed in the SO.
- (104) This Decision accordingly complies with the principle of proportionality.

8. CONCLUSION

- (105) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes the Commitments binding to meet the Commission's concerns expressed in the SO. Recital 13 of the Preamble to the Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement.

⁴⁹

See http://ec.europa.eu/competition/mergers/legislation/trustee_mandate_en.pdf.

- (106) The Commission's assessment of whether the Commitments are adequate to address its concerns is based on the SO, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of the Article 27(4) Market Test Notice.
- (107) In the light of the Commitments, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.
- (108) The Commission retains full discretion to investigate and open proceedings under Article 101 of the Treaty and Article 53 of the EEA Agreement as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The Commitments in the Annex shall be binding on Mastercard Europe SA, Mastercard Incorporated, and Mastercard International Incorporated.

Article 2

There are no longer grounds for action by the Commission in this case.

Article 3

This Decision shall apply for a period of five years and six months from the date of notification of this Decision to Mastercard Europe SA, Mastercard Incorporated, and Mastercard International Incorporated.

Article 4

This Decision is addressed to:

Mastercard Europe SA

Chaussée de Tervuren 198/A

1410 Waterloo

Belgium

Mastercard Incorporated

2000 Purchase Street

Purchase New York 10577-2509

USA

Mastercard International Incorporated

2000 Purchase Street

Purchase New York 10577-2509

USA

Done at Brussels, 29.4.2019

For the Commission

Margrethe VESTAGER

Member of the Commission

