

The Application of Article 101(3) in the Context of Multi-Sided Markets Following *MasterCard*

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The recent judgment of the European Court of Justice (ECJ) of 11 September in Case C-82/12P, *MasterCard and Others v Commission* (the “*MasterCard* ruling”)² sets an important precedent for EU competition law on how efficiencies are to be assessed in the context of Article 101(3) of the Treaty on the Functioning of the European Union (“Article 101(3)”). While the ruling deals with a number of important legal issues, the present contribution focuses on the one perceived to be the most important - the analysis of efficiencies in the context of the so-called multi-sided markets. As indicated below, the *MasterCard* ruling brings a welcome clarification on the competitive assessment of multi-sided markets, and most importantly allows a broader range of efficiencies to be claimed. This has important implications for companies and antitrust enforcers, particularly given the expansive growth of e-economy and online multi-sided markets.

Relevant market for conducting the Article 101(3) balancing test in multi-sided markets

Article 101 TFEU adopts a “bifurcated” approach to narrow the scope of agreements caught by an antitrust prohibition. Accordingly, anticompetitive effects of agreements are analyzed under Article 101(1) TFEU (“Article 101(1)”) and pro-competitive effects have to be balanced against the anticompetitive effects under Article 101(3). In turn, Article 101(3) exempts from the prohibition of Article 101(1) agreements that (i) improve the production or distribution of goods or promote technical or economic progress (*i.e.*, lead to “efficiencies”), while (ii) allowing consumers a fair share of the resulting benefits, without (iii) imposing restrictions which are not indispensable to the attainment of these objectives or (iv) allowing the elimination of competition in respect of a substantial part of the relevant market. These four conditions are cumulative and exhaustive. The bifurcation of Article 101 entails that there is no balancing of overall effects under Article 101(1) and implies that Article 101(3) provides, in principle, the only framework for conducting an economic analysis of the consumer/welfare benefits that a particular agreement creates.

Under the Article 101(3) Guidelines (the “Guidelines”),³ to allow consumers a fair share of the benefits and exempt an anticompetitive agreement from prohibition, the net effect of an agreement must at least be neutral from the point of view of those consumers directly or likely affected by it (para. 85). When assessing the impact of efficiencies, restrictive and beneficial effects of the agreement must be balanced on a “market by market” basis. Efficiencies within a relevant market must outweigh the anticompetitive effects produced by the agreement within that same relevant market. Therefore, as a rule, in situations such

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² Judgment in *MasterCard and Others v Commission*, C-382/12P, EU:C:2014:2201.

³ Communication from the Commission - Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC), OJ C 101 of 27 April 2004.

as those present in two-sided markets, negative effects on consumers in one product market cannot be compensated by positive effects for consumers in another unrelated product market (so-called “cross-market efficiencies”).

The Guidelines provide only a limited exception to this rule where the two markets are related, provided that there is “*consumer commonality*”, i.e. that the “*group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same*” (para. 43). For example, in assessing the efficiencies in *Continental/United/Lufthansa/Air Canada*,⁴ the Commission took into account the benefits produced on routes connected to the route of concern because there was considerable commonality between passenger groups using them. The main advantage of requiring “*consumer commonality*” is that by limiting the possibility of a balancing across markets, the Commission avoids subjective evaluations and comparisons across different consumers. For instance, if two manufacturers of cars and trucks enter into a R&D agreement on the market for trucks which allows improved products for truck drivers but lead to higher prices and reduced R&D on the market for cars, balancing efficiencies across the markets would entail a subjective assessment on whether the interests of truck drivers should prevail over car drivers, or vice versa.

However, matching those who benefit to those who bear the costs may, at times, lead to undesirable results. This is particularly the case in so-called “two-sided” markets, a specific type of market in which a common platform sells two distinct but interdependent products or services to two different groups of consumers that provide each other with network benefits. In *MasterCard*, for instance, the platform under consideration was a payment cards system and the two sides of the market were cardholders and merchants. These two groups of consumers are interdependent to the extent that a cardholder will consider the potential use of a card (in shops, ATMs etc.) when deciding to subscribe to a new payment card system (the platform), while merchants will consider the number of potential cardholders when accepting a specific card. Solely taking into account efficiencies that can be generated by one group (e.g. cardholders) omits taking account of equally important efficiencies for the viability of the system that serve the interests of the other group (e.g. merchants).

Other examples of similar two-sided markets include yellow pages (advertisers and consumers), search engines (advertisers and users), and communication networks on the internet, such as Facebook and Skype. In these markets, assessing the price substitutability of products of one side of the platform in isolation of the other side would lead to flawed conclusions, insofar as an increase in the price on one side necessarily has implications for demand on the other side. Such an isolated assessment would fail to capture the effects of the constraints on a price increase and the indirect economic externalities from the interdependence of demand on both sides, ultimately leading to an overly narrow competitive assessment. By focusing on one group of consumers and not taking into account the interactions with the other side of the market, the probability of finding

⁴ Commission Decision of 23 May 2013 in Case COMP/39.595 – *Continental/United/Lufthansa/Air Canada*.

agreements to be anticompetitive increases given that the scope of possible efficiency arguments is reduced. It follows that the Commission's approach on the balancing of cross-market efficiencies, limits the scope of the benefits that can be demonstrated by the parties, notwithstanding the multi-sided nature of a market. As a result, parties may be unduly deprived of the benefits of Article 101(3).

This has led some commentators to question the Commission's approach described above. Relying on EU case law, they have pointed out that the Commission is at times required to take into account the beneficial effects of the agreement on any market, regardless of a specific link with the relevant market, *i.e.*, irrespective of "consumer commonality".⁵ This interpretation is hard to reconcile with a textual reading of para. 43 of the Article 101(3) Guidelines. The *MasterCard* ruling therefore offered a unique opportunity for the Court to clarify the framework of analysis under Article 101(3).

The *MasterCard* ruling – the broadening of the Article 101(3) balancing test in multi-sided markets

The judgment originates from a Commission decision of 2007 that found that the setting of the Multilateral Interchange Fee ("MIF") by the banks affiliated to the *MasterCard* network infringed Article 101.⁶ According to the Commission, the MIFs paid by banks providing merchants with services ("acquiring banks") to the banks issuing the cards ("issuing banks") had the effect of restricting competition insofar as they inflated the costs charged to merchants by their acquiring banks (so-called merchant service charges; "MSC"). This reduced price competition between acquiring banks to the detriment of merchants and their ultimate customers. The Commission also found that MIFs were not "objectively necessary" for the operation of a payment card scheme and that the appellants had failed to produce evidence showing that any objective advantages counterbalanced the disadvantages of the MIF for merchants and their consumers.

MasterCard and the banks affiliated to the system filed an appeal against the decision before the General Court ("GC"),⁷ and subsequently before the Court of Justice. The ECJ, concurring with Advocate General Mengozzi's opinion,⁸ dismissed the appeal in full. Despite upholding the GC's judgment, the ruling provides however some useful guidance on the plea of efficiencies in the context of multi-sided markets.

One of the various grounds of appeal put forward by the appellants was that the GC had failed to take account of the efficiencies flowing from the MIF to both merchants and cardholders – the two "sides" of credit card transactions. The applicants claimed that the Commission should have balanced the restrictive effects that the MIF had on merchants

⁵ See for instance the Judgement of 28 February 2002, *Compagnie générale maritime and others v Commission*, T-86/95, ECR, EU:T:2002:50, para. 343.

⁶ Commission Decision of 19 December 2007, Cases COMP/34.579 - *MasterCard*, COMP/36.518 - *EuroCommerce* and COMP/38.580 - *Commercial Cards*.

⁷ Judgment of 24 May 2012, *MasterCard and Others v Commission*, T-111/08, ECR, EU:T:2012:260.

⁸ Advocate General Mengozzi's Opinion in Judgment *MasterCard and Others v Commission*, C-382/12P, EU:C:2014:42.

against any efficiencies flowing from the MIF, and in particular those benefitting cardholders (namely, the avoidance of bearing much higher costs if the MIF were removed or reduced). In other words, the appellants claimed that the GC erred in law in focusing exclusively on the benefits to merchants, despite having recognized that efficiencies may be taken into account for any market and service and that the cardholder and merchant markets were related (para. 229).

The ECJ rejected the appeal and upheld the GC judgment on the facts but clarified the analysis of efficiencies under Article 101(3). The Court held that, in the case of a two-sided system, in order to assess whether a measure that creates restrictive effects in regard to one of the two groups of consumers associated with that two-sided system leads to efficiencies *“it is necessary to take into account the system of which that measure forms part, including, where appropriate, all the objective advantages flowing from that measure not only on the market in respect of which the restriction has been established, but also on the market which includes the other group of consumers associated with that system, in particular where, [...], it is undisputed that there is interaction between the two sides of the system in question.”*⁹ The ECJ made therefore clear that the absence of “consumer commonality,” required by the Guidelines, is not in itself an obstacle to cross-market efficiencies.

Accordingly, in order for efficiencies in a separate but connected market to be taken into account, the agreement must in the first place have *“appreciable objective advantages”* for consumers in the market concerned.¹⁰ It follows that, when the restrictive effects are limited to one market only of a two-sided system, the advantages occurring on a separate, but connected market, cannot in themselves compensate for such effects absent the proof of *“appreciable objective advantages”* on the market of concern. The ECJ added that this condition applies in particular when, as in the *MasterCard* case, the consumers in one market *“are not substantially the same”* as the consumers in another market. Airline alliances are another example of this situation, as an agreement between carriers may reduce competition on some city pairs, but increase consumer benefits on other routes.

In *MasterCard*, if the benefits put forward by the parties had met the *“appreciable objective advantages”* threshold, *“all the advantages on both consumer markets in the MasterCard scheme, including therefore on the cardholders’ market, could, if necessary, have justified the MIF if, taken together, those advantages were of such a character as to compensate for the restrictive effects of those fees.”*¹¹ The ECJ held that the appellants failed to establish any such advantages in the merchant market and, as such, the restrictions that the MIF caused to the latter could not be offset by the advantages for cardholders in the related market.

Implications

⁹ See para. 237.

¹⁰ See para. 241.

¹¹ *Idem*.

Despite the ECJ rejection of the efficiency plea on its facts, *MasterCard* represents a decisive departure from the Commission policy and practice as articulated in its Article 101(3) Guidelines. With this ruling, the Court deviates from the Commission policy and practice in three fundamental respects: (i) in principle, the Commission, in examining possible efficiencies in two-sided markets, must take into account all the objective advantages flowing from both sides of the market;¹² (ii) the ECJ requires a minimum of efficiencies (i.e. *appreciable objective advantages*) in the side in which the restrictive effects of the agreement occur for the benefits in related markets to be relevant; and (iii) once this minimum is established, however, benefits in related markets are accounted for regardless of any consumer commonality. For companies operating within the perimeter of multi-sided markets, the *MasterCard* ruling marks an important broadening of possible efficiency defense arguments, increasing the chances of benefitting from an Article 101(3) exemption.

The development is in line with the other important ruling delivered on the very same day in Case C-67/13 P, *Groupeement des cartes bancaires (CB) v Commission*,¹³ that also concerned a two-sided payment system. There the Court held that to determine whether an agreement reveals a sufficient degree of harm to competition to be considered a restriction of competition “by object,” regard must be had to all relevant aspects of the economic or legal context in which that coordination takes place, “*it being immaterial whether or not such an aspect relates to the relevant market.*”¹⁴ *MasterCard* therefore naturally reflects this broadened approach onto the application of Article 101(3). Given that the Commission can rely on aspects of all sides of a multi-sided scheme to prove the existence of a distortion of competition under Article 101(1), it is only fair for an undertaking to be able to rely on pro-competitive effects stemming from various sides of that very same scheme.

¹² See para. 240.

¹³ Judgment in *Groupeement des cartes bancaires (CB) v Commission*, C-67/13 P, ECLI:EU:C:2014:2204.

¹⁴ See paras. 78-79.