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*BY FRÉDÉRIC PRADELLES &
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The Two Sides of the Cartes Bancaires Ruling: Assessment of the Two-Sided Nature of Card Payment Systems Under Article 101(1) TFEU and Full Judicial Scrutiny of Underlying Economic Analysis

BY FRÉDÉRIC PRADELLES & ANDREAS SCORDAMAGLIA-TOUSIS ¹

The European Court of Justice recently delivered two seminal rulings in *Groupement des Cartes Bancaires v Commission* and *MasterCard v Commission*. These two judgments brought much awaited clarification to the application of Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) in two important areas. First, they spelled out the distinction between “by object” and “by effect” restrictions of competition. Second, they presented a novel analysis for the assessment of efficiencies under Article 101(3) TFEU in the context of multi-sided market. These clarifications will have important implications on the future assessment of two-sided markets under Article 101(1) TFEU. All the more, the Court in *Cartes Bancaires* made some important statements that have the effect of intensifying the level of judicial review of matters over which the Commission has traditionally enjoyed a “margin of appraisal,” such as for complex economic matters.

I. INTRODUCTION

Thursday, September 11, 2014, marked an important day for competition law as the European Court of Justice (“ECJ” or the “Court”) delivered two seminal rulings in *Groupement des Cartes Bancaires* (“CB”) v *Commission* (“*Cartes Bancaires*”)² and *MasterCard v Commission* (“*MasterCard*”).³ These two judgments brought much awaited clarification to the application of Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) by respectively spelling out the distinction between “by object” and “by effect” restrictions of competition under Article 101(1) TFEU and also by analyzing the assessment of efficiencies in the context of multi-sided markets under Article 101(3) TFEU.

Given that both cases concerned alleged infringements of EU competition law in the sector of card payment systems, these clarifications were brought in the context of an archetypical example of a two-sided market. Economists roughly define “two-sided” markets (or more generally multi-sided markets) as “markets in which one or several platforms enable interactions between end-users, and try to get the two (or multiple) sides ‘on board’ by appropriately charging each side. That is, platforms court each side while attempting to make, or at least not lose, money overall.”⁴ Accordingly, payment card systems are two-sided because (i) they serve two distinct groups of customers (cardholders and merchants) with a joint demand (in the sense that they operate only if both cardholders and merchants jointly agree to use a card for a transaction), and (ii) they have “network externalities” arising from the fact that more cardholders make the card payment system more valuable for merchants, and vice versa.⁵

Thus, two-sided markets have the specificity that the assessment of price substitutability of products on 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. Two-sided markets have in the past been assessed by the Commission, both under antitrust rules (e.g. trading services⁶), and most frequently under merger control (e.g., such as “ad networks”⁷).

For the above reasons, *Cartes Bancaires* and *MasterCard*, read in conjunction, lend themselves to drawing insightful conclusions for the future assessment of two-sided markets under Article 101 TFEU. All the more, with a view to ensuring compatibility with the requirements of Article 6(1) of the European Convention of Human Rights (“ECHR”), the Court in *Cartes Bancaires* made some important statements to the effect of intensifying the level of judicial review of matters over which the Commission has traditionally enjoyed a “margin of appraisal,” such as for complex economic matters. In this regard, economic assessments typically form the most contentious elements of competition analysis in two-sided markets.

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A. Factual Background

The Groupement des Cartes Bancaires (“CB Group”) was established by the main credit institutions operating in France to manage a system for bank card payments and withdrawals (the “CB system”). This system, which competes and cooperates with Visa and MasterCard in France, enables the use of bank cards for payments issued by CB members (issuing side) to all affiliated merchants and withdrawals from ATMs controlled by any of the members of CB Group (acquiring side).

The disputed measures consisted mainly of a series of proposed new fees that would be paid by CB Group members when issuing cards or joining the group and, in particular: (i) the so-called MERFA⁸ formula to determine the fees payable by card issuers, to be based on a series of parameters that would have ensured that members that mainly issue cards (as compared to acquiring merchants and installing ATMs) would have paid higher fees; (ii) a three-year membership fee per card issued; and (iii) a so-called “wake-up” fee applicable to members that were inactive or not very active before the new pricing measures. According to CB Group, those measures were aimed at combating “free-riding” on the investments made by the main member credit institutions and encouraging new competitors to acquire merchants and install ATMs.

In 2002, CB Group notified the measures to the Commission under Regulation 17/62 and, in 2004, CB Group decided not to implement those measures. The Commission found that CB Group’s 2002 notification aimed to conceal a “real content of an anti-competitive agreement” and subsequently issued two statements of objections, one in 2004 (sent to CB Group and to eleven major banks), which the Commission later withdrew, and one in 2006 (sent only to CB Group). This led to the Commission adopting an infringement decision in 2007, despite the fact that the CB Group had effectively never implemented the contested measures.⁹ The Commission found that the purpose of the measures was to keep the price of payment cards artificially high to the advantage of the major banks and to the detriment of new entrants. The

Commission ordered CB Group to abolish the measures concerned and to refrain from adopting measures with a similar object or effect in the future.

CB Group contested the Commission's decision before the General Court ("GC"). In 2012, the GC upheld the Commission's decision¹⁰ that the pricing measures had as their "object" the restriction of competition; the GC did not examine the pleas contesting the analysis in the decision of the effects of the measures. According to the GC, these measures hindered new entry on the market for the issuing of payment cards in France. CB Group appealed to the ECJ arguing that the GC had erred in applying the concept of restriction of competition "by object."

In particular, CB Group argued that the Commission had failed to assess the measures' objectives properly—i.e., the legitimate objective of avoiding free-riding in the CB system—as well as the measures' legal and economic context, mainly by misinterpreting the case law and ignoring the two-sided operation of the payment system. The Court, in line with Advocate General Wahl's opinion,¹¹ decided to set aside the GC judgment and to refer the case back to the GC for an analysis of the effects of the measures.

CB GROUP ARGUED THAT THE COMMISSION HAD FAILED TO ASSESS THE MEASURES' OBJECTIVES PROPERLY— I.E., THE LEGITIMATE OBJECTIVE OF AVOIDING FREE-RIDING IN THE CB SYSTEM—AS WELL AS THE MEASURES' LEGAL AND ECONOMIC CONTEXT, MAINLY BY MISINTERPRETING THE CASE LAW AND IGNORING THE TWO-SIDED OPERATION OF THE PAYMENT SYSTEM

B. Structure

The main novelty of *Cartes Bancaires*—its "first side"—is that the Court expressly endorses a restrictive interpretation of "by object" restrictions under Article 101(1), which, in turn, paves the way for the consideration of the two-sided nature of a system in the qualification of a "by object" or "by effect" restriction (see Section II, Subsection A below). The *MasterCard* ruling also provides a novel interpretation of Article 101(3) accommodating efficiencies in the specific context of two-sided markets (see Section II, Subsection B below). These two rulings go hand-in-hand in showing how the "bifurcated" architecture of Article 101, namely Articles 101(1) and 101(3), interacts to better accommodate the economic specificities of two-sided markets.

The "second side" of *Cartes Bancaires* consists of the Court's reiteration of the principle that the GC must generally undertake a "full judicial" review and cannot therefore use the Commission's "margin of assessment" for dispensing with an in-depth review of the law and facts. Exercising rigorous scrutiny over the GC's assessment, the Court exemplifies the expected standard of judicial review in the appraisal of complex economic matters (see Section III, Subsection A below). The Court thereby makes an implicit, yet strong, statement with a view to confirming the compatibility of the current level of EU judicial review with the requirements set out in Article 6(1) of the ECHR (see Section III, Subsection B below).

II. FIRST SIDE OF CARTES BANCAIRES: THE TWO-SIDED NATURE OF A SYSTEM AS A KEY ELEMENT OF THE ARTICLE 101 ANALYSIS

A. *An Essential Element of the Contextual Characterization Of Restrictions Under Article 101(1)*

1. The Restrictive Interpretation and Contextual Analysis of “By Object” Restrictions

Article 101(1) prohibits agreements that have as their “object or effect” the restriction of competition. If it is shown that an agreement has an anticompetitive object, anticompetitive effects are presumed and there is no need to show adverse effects on competition before concluding that Article 101(1) is infringed. How a practice is classified therefore entails serious consequences both for the companies involved¹² and for antitrust enforcers.

In *Cartes Bancaires* the Court for the first time expressly stated that the concept of restriction of competition “by object” must be interpreted restrictively.¹³ The Court referred to settled case law according to which “by object” restrictions of competition are those that are “regarded, by their very nature, as being harmful to the proper functioning of normal competition.”¹⁴ Only where conduct reveals a “sufficient degree of harm” to competition may the Commission find that there is no need to examine its effects, because such analysis would be redundant.¹⁵ The Court gave the example of a price fixing cartel— “[e]xperience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.”¹⁶

IN CARTES BANCAIRES THE COURT FOR THE FIRST TIME EXPRESSLY STATED THAT THE CONCEPT OF RESTRICTION OF COMPETITION “BY OBJECT” MUST BE INTERPRETED RESTRICTIVELY.

According to the Court, when assessing whether conduct can be considered “sufficiently harmful” to be a restriction “by object,” the Commission needs to take account of “all relevant aspects of the economic and legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market.”¹⁷ In doing so, it should have regard, in particular, “to the nature of the services at issue, as well as the real conditions of the function and structure of the markets.”¹⁸

This contextual analysis needed for the characterization of “by object” restrictions reiterates settled case law of the ECJ.¹⁹ The novelty in *Cartes Bancaires* lies however in that the Court specifies that the relevant economic or legal aspects are to be taken into account “whether or not such an aspect relates to the relevant market.” It follows that, unlike the previous case law cited that often dealt with one-sided markets, the Court in *Cartes Bancaires* seized the opportunity to extend the contextual analysis to all the relevant sides of multi-sided markets.

2. The Court’s Assessment

The Court found that the GC had failed to properly apply the core criterion for ascertaining the object of the CB Group measures, namely whether in themselves they “revealed a sufficient degree of harm to competition.”

First, the Court held that the GC erred in law by taking the view that a restrictive object could be inferred from the wording of the measures and the mere possibility that the measures might restrict competition.²⁰ Moreover, having acknowledged that the measures sought to establish a certain balance between the issuing and acquiring activities of the members of CB Group, the Court held that the GC was entitled “at the most [emphasis added] to infer from this that those measures had as their object the imposition of a financial contribution on the members which benefit from the efforts of other members for the purposes of developing the acquisition activities of the system.”²¹ This element could not, by its very nature, be considered harmful to the proper functioning of normal competition.

It follows that a “by object” type of analysis is not appropriate for a complex set of arrangements whereby an association of undertakings, like CB Group, decides that some new pricing measures are needed to rebalance the issuing and acquisition activities of its bank members with the objective of ensuring its continuation as a reliable and successful payment system in France. Probably such measures would have led some banks to change their contribution and/or issuing policies and prices. But that change was precisely what CB Group considered necessary to prevent the risks of implosion to be expected from the continuation of massive free-riding by those who, without having invested in the creation and development of the payment system, were happy to be admitted and actively use it.

Given the absence of relevant precedents, the Court stated that the GC and the Commission could not consider such measures as restrictive by object “by [their] very nature” without properly proving it. Therefore, the GC had to examine its effects on competition before finding them restrictive under Article 101(1), especially so since it found that combating free-riding is in itself perfectly legitimate.

Most importantly, for the purpose of the analysis of two-sided markets, the Court also noted that by carrying out the market analysis solely on the issuing of payment cards in France, rather than considering also the market for payment systems, the GC had mixed up the definition of the relevant market and the contextual analysis needed to decide whether an agreement has as its object to restrict competition.²² It clarified that this assessment must take into account all relevant factors irrespective of whether they relate to the relevant market or not. As a logical consequence, the Court held that the balancing between issuing and acquiring activities, and ultimately determining whether the measures foreclosed new entrants, was to be performed in the context of examining the effects of those measures on competition under Article 101(1).

IT CLARIFIED THAT THIS ASSESSMENT MUST TAKE INTO ACCOUNT ALL RELEVANT FACTORS IRRESPECTIVE OF WHETHER THEY RELATE TO THE RELEVANT MARKET OR NOT.

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3. The Contextual Analysis of “By Effects” Restrictions

Where conduct does not reveal a “sufficient degree of harm” to form a “by object” restriction, the effects of the coordination must be considered and the Commission must show that competition has *in fact* been distorted to an appreciable extent. The *Cartes Bancaires* ruling deferred this assessment to the GC. However, the Court

in *MasterCard* did provide important guidance on how effects-based analysis is to be carried out in the context of two-sided markets. The Court indicated that the Commission had to examine the alleged restriction of competition “within its actual context” and that to establish a “by effects” restriction:

it is necessary [...] to take into account any factor that is relevant, having regard, in particular, to the nature of the services concerned, *as well as the real conditions of the functioning and the structure of the markets, in relation to the economic or legal context in which that coordination occurs, regardless of whether or not such a factor concerns the relevant market.*²³

This contextual and across-markets analysis for the assessment of possible “by effect” restrictions to competition naturally and accurately reflects the analysis needed for the qualification of the type of restriction as “by object” or “by effect.” The Court reiterates a consistent line of case law, according to which, in assessing whether a decision has a restrictive effect on competition, it is necessary to examine competition within the actual context in which it would occur in the absence of the agreement in dispute. However, just like in *Cartes Bancaires*, the Court does more than that. For the first time it expressly extends this contextual analysis to all the relevant sides of multi-sided markets.

4. Analysis and Implications

The Commission’s practice in recent years has shown an increasing reliance on “by object” analysis when applying Article 101(1); this analysis has often been done in a rather simplistic and formalistic way. Indicatively, over the last ten years, the Commission has issued 18 Article 101(1) (non-cartel) infringement decisions, in 16 of which competition was considered restricted “by object.”²⁵ This record suggests that the Commission—probably prompted by the desire to achieve procedural economies—opts for the “by object” box whenever possible to avoid a full effects analysis before considering efficiency benefits under Article 101(3). To avoid such analysis the Commission has sought to create new categories of “by object” infringements that in the past would most likely have been treated as restrictions “by effect” (e.g., integrated airline alliances such as *AA/BA/IB*²⁶ and *Continental/United/Lufthansa/Air Canada*²⁷). This has blurred the boundaries between “by object” and “by effect” restrictions.²⁸

THIS RECORD SUGGESTS THAT THE COMMISSION OPTS FOR THE “BY OBJECT” BOX WHENEVER POSSIBLE TO AVOID A FULL EFFECTS ANALYSIS BEFORE CONSIDERING EFFICIENCY BENEFITS UNDER ARTICLE 101(3).

The Court’s judgment has three very important consequences regarding the qualification of “by object” restrictions. First, it is now clear that the Commission must show likely effects on competition unless it is clear that the restriction at issue, by its very nature, harms competition. Second, showing that a certain measure is merely “capable” of restricting competition is insufficient to find a “by object” restriction, except in the case of clear-cut restrictions. Finally, agreements involving complex measures, such as the CB system, are not subject to the “by object” standard because the truncated analysis under the “by object” concept is not suitable for determining whether such measures are caught by Article 101(1). A proper effects-based analysis must be conducted.

Along these main implications, another notable contribution of *Cartes Bancaires* is the clarification that, when examining conduct in two-sided markets, competition rules cannot be applied to one side only (e.g., issuing of bank cards) with total disregard of the other (e.g., acquisition of merchants). Consideration must be given to the interactions between the issuing and acquisition activities of a payment system and the consequent “indirect network effects” (i.e., that the extent of merchants’ acceptance of cards and the number of cards in circulation each affects the other). Such analysis needs to be performed when considering whether the conduct at issue has an anticompetitive object or effect. The Court’s apparent rejection of the truncated contextual analysis for the determination of “by object” restrictions by looking into the effects²⁹ increases predictability and legal certainty in this very important area.

B. A Possible Element of Assessment of Efficiencies Under Article 101(3)³⁰

1. The Relevant Market for Conducting the Article 101(3) Balancing Test Pre-Mastercard

Unlike U.S. antitrust law, which applies the “rule of reason” to narrow the scope of agreements caught by an antitrust prohibition, Article 101 adopts a so-called “bifurcated” approach. Accordingly, anticompetitive effects of agreements are analyzed under 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 (ii) promote technical or economic progress (i.e., lead to “efficiencies”) while 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”),³¹ 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.³² This concretely means that the assessment of benefits flowing from restrictive agreements is, in principle, made within the confines of each relevant market to which the agreement relates, i.e., 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 as those present in two-

THE COURT’S APPARENT REJECTION OF THE TRUNCATED CONTEXTUAL ANALYSIS FOR THE DETERMINATION OF “BY OBJECT” RESTRICTIONS BY LOOKING INTO THE EFFECTS INCREASES PREDICTABILITY AND LEGAL CERTAINTY IN THIS VERY IMPORTANT AREA.

THEREFORE, AS A RULE, IN SITUATIONS SUCH 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.

sided markets, negative effects on consumers in one product market cannot be compensated by positive effects for consumers in another unrelated product market.

The Guidelines provide only a limited exception to this rule where the two markets are related, provided that the “group of consumers affected by the restriction and benefiting from the efficiency gains are *substantially the same*”³³ (so-called “consumer commonality”). For example, in assessing the efficiencies in *Continental/United/Lufthansa/Air Canada*,³⁴ 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 this “consumer commonality” is that by limiting the possibility of a balancing across markets, the Commission avoids subjective evaluations and comparisons across different consumers.

However, as the U.K. Office of Fair Trading pointed out in its “101(3) Discussion Note,” matching those who benefit to those who bear the costs may, at times, lead to undesirable results.³⁵ 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 another (e.g., merchants).

Under the above-described Commission approach on the balancing of cross-market efficiencies, the definition of the relevant market limits the scope of the benefits that can be demonstrated by the parties, notwithstanding the multi-sided nature of a market. As a result, if the market definition is not consistent, parties may be unduly deprived of the benefits of 101(3). Commentators have pointed out that there is case law requiring the Commission to, at times, 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.”³⁶ This interpretation is hard to reconcile with a textual reading of the Guidelines. The *MasterCard* ruling therefore offered a good opportunity for the Court to clarify the framework of analysis under Article 101(3).

COMMENTATORS HAVE POINTED OUT THAT THERE IS CASE LAW REQUIRING THE COMMISSION TO, AT TIMES, TAKE INTO ACCOUNT THE BENEFICIAL EFFECTS OF THE AGREEMENT ON ANY MARKET, REGARDLESS OF A SPECIFIC LINK WITH THE RELEVANT MARKET.

2. The Broadened Relevant Market for Conducting the Article 101(3) Balancing Test Post-Mastercard

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 101.³⁷ 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 found also that the MIF was not “objectively necessary” for the operation of a payment card scheme and that there was no evidence showing that any objective advantages counterbalanced the disadvantages of the MIF for merchants and their consumers.

MasterCard appealed against the decision before the GC,³⁸ and subsequently before the ECJ. The Court, concurring with Advocate General Mengozzi’s opinion,³⁹ dismissed the appeal in full. Despite upholding the GC’s judgment, the ruling provides some useful guidance on the plea of efficiencies in the context of two-sided markets.

The appellants argued 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 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.⁴⁰

The Court clarified the analysis of efficiencies under Article 101(3). The Court held that, 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* [emphasis added], in particular where, [...], it is undisputed that there is interaction between the two sides of the system in question. To that end, it is necessary to assess, where appropriate, whether such advantages are of such a character as to compensate for the disadvantages which that measure entails for competition.⁴¹

The Court made therefore clear that the absence of “consumer commonality” that is 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

THE COURT MADE THEREFORE CLEAR THAT THE ABSENCE OF “CONSUMER COMMONALITY” THAT IS REQUIRED BY THE GUIDELINES IS NOT, IN ITSELF, AN OBSTACLE TO CROSS-MARKET EFFICIENCIES.

concerned. 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.⁴² 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.⁴³ On the facts, 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.

3. Analysis and Implications

Despite the Court’s 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 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;⁴⁴ (ii) the Court 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.

FOR COMPANIES OPERATING WITHIN THE PERIMETER OF MULTI-SIDED MARKETS, THE MASTERCARD RULING MARKS AN IMPORTANT BROADENING OF POSSIBLE EFFICIENCY DEFENSE ARGUMENTS

This development is in line with the treatment of two-sided markets in *Cartes Bancaires* to the extent that, for the “by object” characterization, the contextual assessment operates across both sides. *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.

III. SECOND SIDE OF CARTES BANCAIRES: MOVING TOWARDS A SYSTEM OF FULL JUDICIAL REVIEW OF COMMISSION DECISIONS

A. *The General Standard of Full Judicial Review Applied to “Complex Economic Matters”*

1. The Principle of Effective Judicial Review of Commission Decisions

Inspired by the French administrative tradition, Article 263(2) TFEU requires that judicial control over the legality of a Commission decision is to be performed on the basis of four specific grounds of review: (i) lack of competence, (ii) infringement of an essential procedural requirement, (iii) infringement of the Treaties or of any rule of law relating to its application, or (iv) misuse of powers. This so-called “review of legality” allows EU Courts to carry out a comprehensive review of both questions of law and fact, and assess whether the evidence

relied on by the Commission is precise and sufficient to establish the existence of the alleged infringement to the requisite legal standard.

Accordingly, EU Courts may partially or completely annul a Commission decision but have no “jurisdiction to remake the contested decision” as the “assumption of such jurisdiction could disturb the inter-institutional balance established by the [EU Treaties].”⁴⁵ The Commission is therefore vested with a so-called “margin of assessment.”⁴⁶ In essence, EU Courts, and the GC in particular that has exclusive jurisdiction to find and assess the facts, are not supposed to “replace” the Commission’s decision with a new one or re-examine its merits. The review of legality is supplemented by the EU Courts’ unlimited jurisdiction—under Article 31 of Regulation No 1/2003 and in accordance with Article 261 TFEU—that empowers them, in cases where a fine has been imposed, to carry out a review of legality to substitute their own appraisal for the Commission’s and, consequently, to cancel, reduce, or increase the fine or penalty payment imposed without having to annul the contested measure on the basis of article 263 TFEU.⁴⁷

In its preliminary observations in *Cartes Bancaires* the Court reminds some important principles on judicial review that the GC needs to abide by.⁴⁸ The Court recalls that the principle of effective judicial protection is a general principle of EU law, which has been given expression by Article 47 of the Charter.⁴⁹ Citing *Chalkor*,⁵⁰ the Court further notes that, when seized to adjudicate upon an action for annulment under Article 263 TFEU, “the GC must generally undertake, [...], a *full review* [emphasis added] of whether or not the conditions for applying [Article 101 TFEU] are met.”⁵¹

Further, the Court points out that in carrying out its “full review,” the GC cannot use the “margin of assessment” which the Commission enjoys “by virtue of the role assigned to it in relation to competition policy by the EU and FEU Treaties,” to dispense with an in-depth review of the law and the facts,⁵² “Full review” is therefore, *a contrario*, to be understood as the GC’s duty to carry out its own independent assessment of all relevant facts of the case, irrespective of the Commission’s “margin of assessment.”

While the above pronouncements—that are repeated verbatim in *MasterCard*⁵³—reiterate settled EU case law, it is the first time that the Court in such clear terms dissociates in a principled manner the intensity of the judicial review from the Commission’s “margin of assessment.” Moreover, in the absence of any fines, *Cartes Bancaires* stands for authority that the full review requirement stems autonomously from the control of legality alone and is therefore unrelated to the Court’s unlimited jurisdiction under Article 31 of Regulation 1. This is particularly the case given that the case law asserting the “full judicial review” requirement (e.g., *Chalkor*, *KME*) concerned cartel cases where the GC concurrently exercised its unlimited jurisdiction with respect to fines.

2. The Application of Full Judicial Review in Complex Economic Matters

The Court also illustrated how “full judicial review” is to be exercised in practice, in the context of economic assessments. As mentioned above, the Court noted that the Commission’s margin of assessment did not mean

that the GC had to refrain from reviewing the Commission's legal classification of information of an economic nature. In doing so, it expressly dissociated the intensity of review from the margin of assessment.

More specifically, the Court clarified that even though the GC cannot substitute the Commission's economic assessment for its own, the former being institutionally responsible for making those assessments, it is:

apparent from now [emphasis added] well settled case-law that not only must the EU judicature establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusion drawn from it.⁵⁴

In light of these principles, the Court examined whether the GC was correct to conclude that the measures had as their object the restriction of competition⁵⁵ and found that the GC had failed to fulfill its obligation to observe the "full review" standard.⁵⁶ The Court held that the GC's assessment was vitiated by a series of errors of law that taken together "indicated a *general failure* [emphasis added] of analysis" and revealed "*a lack of a full and detailed examination* [emphasis added] of the [submitted] arguments."⁵⁷

THE COURT HELD THAT THE GC'S ASSESSMENT WAS VITIATED BY A SERIES OF ERRORS OF LAW THAT TAKEN TOGETHER "INDICATED A GENERAL FAILURE OF ANALYSIS" AND REVEALED "A LACK OF A FULL AND DETAILED EXAMINATION OF THE [SUBMITTED] ARGUMENTS.

The Court found that the GC's characterization of the measures had been defective and that Article 101(1) had been misinterpreted and misapplied.⁵⁸ Most importantly, the Court noted that:

by simply reproducing on a number of occasions [...] the contents of the decision at issue, the General Court failed to review, [...], whether the evidence used by the Commission in the decision at issue enabled it correctly to conclude that the measures at issue, [...] displayed a sufficient degree of harm to competition [...], consequently whether that evidence constituted all relevant data which had to be taken into consideration for that purpose.⁵⁹

This clearly echoes the approach endorsed by the GC in the seminal *Airtours* judgment.⁶⁰

B. Implications on the Compatibility of EU Judicial Review With Article 6(1) ECHR

To the extent that the Court reiterates the principles previously set out in *Chalkor*, the Court's statements in *Cartes Bancaires*, in terms of content, are not ground-breaking. However, the unequivocal language the Court uses in asserting the GC's "full review" requirement, together with (i) the exemplarily rigorous scrutiny it exercises over the GC's actual assessment, and (ii) the reference to the "now well settled case-law," clearly signals the Court's willingness to deliver a strong message regarding the level of compatibility of the current standard of EU judicial review with the Article 6(1) ECHR requirements.

In view of the EU's forthcoming accession to the ECHR,⁶¹ the quest for compatibility of standards becomes imminent. To align judicial protection under Article 47 of the Charter to that afforded to Article 6(1) ECHR, the judicial body reviewing an administrative decision must have “full jurisdiction,” i.e., “the power to quash in all respects, on questions of fact and law, the decision of the body below.”⁶² The Court in *Cartes Bancaires* seeks to show that the EU Courts’ “full review” corresponds to the ECHR’s “full jurisdiction” requirement. In fact, it actively endorses the concept that “full review” is not just a mere theoretical contention, but reality.

THE COURT BALANCES THE NEED FOR AN EXHAUSTIVE REASSESSMENT OF THE FACTS AND THE COMMISSION’S “MARGIN OF ASSESSMENT” IN COMPLEX ECONOMIC MATTERS

The Court balances the need for an exhaustive reassessment of the facts and the Commission’s “margin of assessment” in complex economic matters.⁶³ The latter has traditionally benefitted from the more restrained review.⁶⁴ This judicial deference has evolved considerably over time and, in *Microsoft*, has even been extended to include technical matters.⁶⁵

The impetus towards a more intensive judicial review of Commission decisions originated from judgments in the field of merger control.⁶⁶ As of the landmark *KME* and *Chalkor* judgments⁶⁷ the ECJ seems to have established a trend of abstaining from the use of its traditional “manifest error of appraisal” language.⁶⁸ Whether this only served to pay lip service to the principles set out in *Menarini*, or marked the implicit reversal of the EU judiciary’s previous position vis-à-vis judicial review, remained unclear. Indeed in later judgments, like *Schindler*,⁶⁹ *Kone*,⁷⁰ and *Telefónica*,⁷¹ the Court appeared to be fairly easily satisfied with the GC’s full and unrestricted review, thereby still showing some degree of reminiscence to the abandoned manifest error mantra.

Lately, the amount of the case law on marginal review has been significantly reduced, possibly due to the gradual criminalization of EU competition law.⁷² In this regard, *Cartes Bancaires* and *MasterCard* are the latest examples of this trend, as they reinforce the methodological convergence between the ECHR case law and that of EU Courts: what ultimately matters is not the abstract description or statement on the part of the Court as to the type of control⁷³ (e.g., comprehensive or deferential, strong, or weak), but rather the way in which that review is actually exercised.⁷⁴

IV. CONCLUSIONS

Both *Cartes Bancaires* and *MasterCard* rulings have brought clarity on how two-sided markets are to be assessed in the future under Article 101.

First, *Cartes Bancaires* brings much awaited clarification of the notion of “by object” restrictions. The Court confirmed that the Commission needs to abandon its simplistic use of the “by object” restriction notion in cases that are not obviously harmful to competition and focus on the

BOTH CARTES BANCAIRES AND MASTERCARD RULINGS HAVE BROUGHT CLARITY ON HOW TWO-SIDED MARKETS ARE TO BE ASSESSED IN THE FUTURE UNDER ARTICLE 101.

actual effects of the conduct.

Second, *Cartes Bancaires* for the first time explicitly qualifies the two-sided nature of a system as part of the contextual analysis for assessing whether a conduct can be considered “sufficiently harmful” to be a restriction “by object.” As discussed above, this has important implications and increases predictability and legal certainty for undertakings operating as platforms in multi-sided markets.

Third, *MasterCard* sets an important precedent for EU competition law on how efficiencies are to be assessed in the context of Article 101(3). It not only clarifies the scope of the facts that are relevant to the competitive assessment, but also allows a broader range and type of (cross-market) efficiencies to be claimed, provided “appreciable objective advantages” in the market in which the restrictive effects occur.

Fourth, in both judgments the Court reiterates that, in reviewing Article 101 decisions, EU Courts need to exercise full and comprehensive judicial control and that the GC cannot invoke possible “complex economic assessments,” such as those often present in the analysis of “two-sided” markets, to avail itself of a limited review. This narrowed judicial deference reveals the Court’s intent to fully align the standard of judicial review to the “unlimited jurisdiction” standard required under Article 6(1) ECHR.

Finally, from a more general enforcement perspective, *Cartes Bancaires* and *MasterCard* align law with economic theory. Economic literature has convincingly shown that “[m]ulti-sided platforms are more complicated than single sided firms. Analyses or policy rules that ignore this complexity are prone to commit serious errors.”⁷⁵ Favoring a more contextual and economics-based analysis therefore leads to a sounder future legal and economic assessment of multi-sided markets. ▲

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² *Groupement des Cartes Bancaires (CB) v Commission*, C-67/13 P, EU:C:2014:2204, not yet reported.

³ *MasterCard and Others v Commission*, C-382/12 P, EU:C:2014:2201, not yet reported.

⁴ J.-Ch. Rochet & J. Tirole, *Two-Sided Markets: A Progress Report*, IDEI Working Paper, n. 275 (November 2005).

⁵ See Interim Report I - Payment Cards - Sector Inquiry under Article 17 Regulation 1/2003 on retail banking - 12 April 2006, 2006/04/12, p. 6, available at http://ec.europa.eu/competition/sectors/financial_services/inquiries/interim_report_1.pdf.

⁶ E.g., see S. Greenaway, *Competition between stock exchanges: findings from DG Competition’s investigation into trading in Dutch equities*, COMPETITION POLY NEWSLETTER, p. 69; European Commission Press Release IP/00/1164, *Commission Plans to Clear Certain Visa Provisions, Challenges Others* (Oct. 16, 2000). See also the Commission Decisions COMP/34579 – *MasterCard 1* [2007]; COMP/38606 *Groupement des Cartes Bancaires “CB”*[2007]; and the Commission investigation in COMP/40049 - *MasterCard II* [2013]. See also

Working document of the Commission—Applicability of Article 81 of the EC Treaty to multilateral interbank-payments in SEPA Direct Debit (Text with EEA relevance) 2009/10/30, *available at* http://ec.europa.eu/competition/sectors/financial_services/SEPA_working_document.pdf.

⁷ Commission Decision COMP/M.4731 - *Google/DoubleClick* [2008].

⁸ Mécanisme de Régulation de la Fonction Acquéreur.

⁹ Commission Decision COMP/AT.38606 – *Groupement des Cartes Bancaires* “CB” [2007].

¹⁰ *CB v Commission*, T-491/07, EU:T:2012:633.

¹¹ See Opinion of Advocate General Wahl, *Groupement des Cartes Bancaires (CB) v Commission*, C-67/13 P, EU:C:2014:1958.

¹² For companies, the characterization of a restriction “by object” in non-cartel situations has serious consequences. It shifts the burden of proof leaving Article 101(3) as the only avenue to escape prohibition. The efficiency defense of Article 101(3) is rarely invoked successfully in “by object” cases and as such the pressure to accept conditions on the arrangements in order to settle with the Commission and avoid an infringement decision has grown in recent years. Moreover, “by object” restrictions are now presumed to appreciably restrict competition and are automatically excluded from the safe harbor of the *De Minimis Notice* (Communication from the Commission—Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union, of 25.6.2014, C(2014) 4136 final, (Point 13)). See also *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11, EU:C:2012:795.

¹³ See *Groupement des Cartes Bancaires (CB) v Commission*, C-67/13 P, ¶58. See for a similar interpretation, opinion of Advocate General AG Trstenjak, *GlaxoSmithKline Services and Others v Commission and Others*, C-501/06 P, EU:C:2009:610, ¶101.

¹⁴ *Groupement des Cartes Bancaires (CB) v Commission*, C-67/13 P, C-67/13 P, ¶50.

¹⁵ *Id.*, ¶¶52, 58, 69.

¹⁶ *Id.*, ¶51.

¹⁷ *Id.*, ¶¶53 and 78.

¹⁸ *Id.*, ¶¶53 and 78.

¹⁹ See, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, ¶¶46-51; *Pierre Fabre Dermo-Cosmétique*, C-439/09, EU:C:2011:649, ¶35; *GlaxoSmithKline Services and Others v Commission and Others*, C-501/06 P, EU:C:2009:610, ¶58; and *Beef Industry Development and Barry Brothers*, C-209/07, EU:C:2008:643, ¶¶15 and 21.

²⁰ *Groupement des Cartes Bancaires (CB) v Commission*, C-67/13 P, ¶¶65-71.

²¹ *Id.*, ¶75.

²² *Id.*, ¶77.

²³ *MasterCard and Others v Commission*, C-382/12 P, EU:C:2014:2201, ¶177.

²⁴ *Id.*, ¶165. See also Opinion of Advocate General Mengozzi, *MasterCard and Others v Commission*, C-382/12 P, EU:C:2014:4, ¶52 and relevant case-law cited in footnote 50.

²⁵ In the period from 01/05/2004 to 13/11/2014, the Commission found anticompetitive practices to restrict competition “by object” in the following cases (including Article 9 commitment decisions): COMP/39398 - *Visa MIF* [2014]; COMP/39612 - *Perindopril (Servier)* [2014]; COMP/39685 - *Fentanyl*

[2013]; COMP/39226 – Lundbeck [2013]; COMP/39839 - *Telefónica and Portugal Telecom* [2013]; COMP/39595 - *Continental/United/Lufthansa/Air Canada* [2013]; COMP/39736 - *Siemens/Areva* [2012]; COMP/39847 - *Ebooks* [2012]; COMP/39596 - *BA/AA/IB* [2010]; COMP/39510 - *Ordre National des Pharmaciens en France (ONP)* [2010]; COMP/38606 - *Groupement des cartes bancaires “CB”* [2007]; COMP/38698 – *CISAC* [2008]; COMP/38662 - *GDF/ENEL* [2004]; COMP/36623, COMP/36820, COMP/37275 - *SEP et autres/Peugeot SA* [2005]; COMP/38549 - *Barème d’honoraires de l’Ordre des Architectes belges* [2004]; COMP/37980 - *Souris – Topps* [2004]. The only decision in which the Commission judged the practice anticompetitive by its effects on competition was adopted in COMP/37860 - *Morgan Stanley/Visa International and Visa Europe* [2007]. In COMP/34579 – *Mastercard I* [2007], the Commission admitted that it could not reach a “definite conclusion” as to whether the alleged practice concerns a restriction by object (see recital 407 of the decision).

²⁶ Commission Decision COMP/39596 – *BA/AA/IB* [2010].

²⁷ Commission Decision COMP/AT.39595 – *Continental/United/Lufthansa/Air Canada* [2013].

²⁸ See Opinion of Advocate General Wahl, *Groupement des Cartes Bancaires (CB) v Commission*, C-67/13 P, EU:C:2014:1958, ¶¶47 et seq.; See also speech of Alexander Italianer, in *Competitor Agreements under EU Competition Law*, 40th Annual Conference on international Antitrust Law and Policy at Fordham, New York (26 September 2013): “[A]part from cases like price-fixing, output limitations and the like, the line between restrictions by object and those by effect is not always bright. Reading its more recent rulings one may wonder whether the Court, whilst finding a restriction by object, may not have gone rather far towards analysing the effects of the agreement when it looked at the market structure, the functioning of the market, the degree of concentration, the market power of the firms involved, etc.” Available at http://ec.europa.eu/competition/speeches/text/sp2013_07_en.pdf.

²⁹ See e.g., *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, ¶¶46-51

³⁰ The present section reflects the main findings of the recently published paper of one of the co-authors (together with Claire-Marie Carrega) in the December 16, 2014 issue of CPI Europe Column entitled ‘The application of Article 101(3) in the context of multi-sided markets following the MasterCard ruling’.

³¹ Communication from the Commission - Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC), OJ C 101 of 27.4.2004.

³² *Id.*, ¶85.

³³ *Id.*, ¶43.

³⁴ Commission Decision of 23 May 2013 in Case COMP/39.595– *Continental/United/Lufthansa/Air Canada*.

³⁵ OFT, *Article 101(3) – A discussion of narrow versus broad definition of benefits* (Discussion note for OFT breakfast roundtable) 8 (2010).

³⁶ See for instance the judgment of 28 February 2002, *Compagnie générale maritime and others v Commission*, T-86/95, EU:T:2002:50, ¶343.

³⁷ Commission Decisions COMP/34.579 - *MasterCard*, COMP/36.518 - *EuroCommerce* and COMP/38.580 - *Commercial Cards*.

³⁸ *MasterCard and Others v Commission*, T-111/08, EU:T:2012:260.

³⁹ Opinion of Advocate General Mengozzi, *MasterCard and Others v Commission*, C-382/12 P,

EU:C:2014:42.

⁴⁰ *MasterCard and Others v Commission*, C-382/12 P, EU:C:2014:2201, ¶229. The applicants essentially claimed that the Commission should have balanced the restrictive effects that the MIF had on merchants against any efficiencies flowing from the MIF and, in particular, those benefitting cardholders (the avoidance of bearing a much higher cost if the MIF were removed or reduced).

⁴¹ *Id.*, ¶237.

⁴² *Id.*, ¶241.

⁴³ Accordingly, 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” (*id.*, ¶241).

⁴⁴ See *MasterCard and Others v Commission*, C-382/12 P, EU:C:2014:2201, ¶240: “the General Court was, in principle, required, when examining the first condition laid down in Article 81(3) EC, to take into account all the objective advantages flowing from the MIF, not only on the relevant market, namely the acquiring market, but also on the separate but connected issuing market.”

⁴⁵ *SIV and Others v Commission*, T-68/89, EU:T:1992:38, ¶¶319-320.

⁴⁶ Sometimes interchangeably referred to as “margin of appreciation,” “margin of discretion.” See H. Schweitzer, *Judicial Review in EU Competition Law*, RESEARCH HANDBOOK ON EU ANTITRUST LAW (D. Geradin & I. Lianos, eds.), footnote 4.

⁴⁷ See, *KME Germany and Others v Commission*, C-272/09 P, EU:C:2011:810, ¶103 and *Chalkor v Commission*, C-386/10 P, EU:C:2011:815, ¶63.

⁴⁸ *Groupement des Cartes Bancaires (CB) v Commission*, C-67/13 P, ¶¶41-47.

⁴⁹ *Id.*, ¶43.

⁵⁰ *Chalkor v Commission*, C-386/10 P, EU:C:2011:815.

⁵¹ *Groupement des Cartes Bancaires (CB) v Commission*, C-67/13 P, ¶44.

⁵² *Id.*, ¶45.

⁵³ *Groupement des Cartes Bancaires (CB) v Commission*, C-67/13 P, ¶155.

⁵⁴ *Id.*, ¶46.

⁵⁵ *Id.*, ¶47.

⁵⁶ *Id.*, ¶91.

⁵⁷ *Id.*, ¶89.

⁵⁸ *Id.*, ¶¶55, 59, and 71.

⁵⁹ *Id.*, ¶90.

⁶⁰ *Airtours plc v Commission*, T-342/99, EU:T:2002:146.

⁶¹ Article 52(3) of the Charter of Fundamental Rights of the European Union, (2010/C 83/02).

⁶² *Menarini Diagnostics S.R.L. v Italy*, Appl. no. 43509/08, [2011], ¶59; For an extensive analysis on the concept of “full jurisdiction” see A. Scordamaglia-Tousis, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights*, WOLTERS KLUWER 109-110 (2013).

⁶³ As indicated by Judge N. Forwood, “‘complexity’ refers more to the nature of assessment that needs to be made, rather than its technical or evidential difficulty” in N. Forwood, *The Commission’s “More Economic*

Approach – Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review, in EUROPEAN COMPETITION LAW ANNUAL 2009: THE EVALUATION OF EVIDENCE AND ITS JUDICIAL REVIEW IN COMPETITION CASES, p. 267 (Ehlermann & Marquis, eds. 2010).

⁶⁴ Namely, “whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of appraisal or misuse of powers.” See for instance *Visa Europe and Visa International Service v Commission*, T-461/07 EU:T:2011:181, ¶70 and *Aalborg Portland and Others v Commission*, C-204/00 P, ¶279.

⁶⁵ *Microsoft v Commission*, T-201/04, EU:T:2007:289, ¶¶87-89.

⁶⁶ See, *Commission v Tetra Laval*, C-12/03 P, EU:C:2005:87; *Airtours plc v Commission*, T-342/99, EU:T:2002:146 and *Schneider Electric SA v Commission*, T-310/01, EU:T:2002:254.

⁶⁷ *KME Germany and Others v Commission*, C-272/09 P, EU:C:2011:810, ¶106 and *Chalkor v Commission*, C-386/10 P, EU:C:2011:815, ¶67.

⁶⁸ See for instance R. Wesseling & M. Van der Woude, *The lawfulness and Acceptability of Enforcement of European Cartel Law*, 35(4) WORLD COMPETITION 580 (2012).

⁶⁹ *Schindler Holding Ltd and Others v Commission*, C-501/11 P, EU:C:2013:522, ¶¶157-158 and 166.

⁷⁰ *Kone and Others v Commission*, C-510/11 P, EU:C:2013:696, ¶¶27, 43-44, 55-56, and 92-93.

⁷¹ *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062, ¶59.

⁷² Opinion of Advocate General Mengozzi, *MasterCard and Others v Commission*, C-382/12 P, EU:C:2014:42, ¶119.

⁷³ *MasterCard and Others v Commission*, C-382/12 P, EU:C:2014:2201, ¶¶158-159.

⁷⁴ Opinion of Advocate General Mengozzi, *MasterCard and Others v Commission*, C-382/12 P, ¶125: “[...] abstract statements of the criteria defining the scope of the review that the GC intends to carry out is not in itself open to criticism, if it proves to be the case that that Court has in fact carried out a thorough review, both in law and in fact, in light of the evidence adduced in support of the pleas relied on before it.

⁷⁵ David S. Evans & Richard Schmalensee, *The Antitrust Analysis Of Multi-Sided Platform Businesses*, January 30, 2013, available at <http://rschmal.scripts.mit.edu/docs/Evans%20Schmalensee%20Multi-Sided%20Platforms%2030Jan2013.pdf>.