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Associations of undertakings and their decisions in the wake of MasterCard

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*283 1. Introduction

Article 101(1) TFEU's open-ended legal categories of agreement, decision and concerted practice have been defined consistently in a functional fashion. In its September 2014 MasterCard judgment, [1] the Court of Justice of the European Union seemingly relied on freshly refined benchmarks to classify market behaviour under that provision's "decisions by associations of undertakings" banner. This contribution questions to what extent the MasterCard judgment indeed breaks new ground or constitutes a mere continuation of previous interpretive practices by the Court in this realm. In doing so, it will revisit the key features of the "decisions by associations of undertakings" concept in EU competition law (section 2). On the basis of functional criteria of *composition* and *mandate*, a potentially ever-increasing variety of actions could be captured by the "decisions by associations of undertakings" definition. In MasterCard, the Court confirms this tendency, relying on a generalised "alignment of interests" standard of proof to identify a an association of undertakings capable of adopting decisions captured by art.101 TFEU (section 3).

Although the Court's "alignment of interests" standard has been tailored to the specific circumstances of this case, it is submitted that the Court in doing so set a precedent that would allow the Commission to continue its increasingly functional interpretation of Treaty legal concepts. That approach not only confirms how the scope and enforceability of art.101 TFEU are being modernised against the background of a more economic approach, it also sheds light on new or unforeseen legal pitfalls and problems such approach inevitably triggers (section 4).

2. "Decisions by associations of undertakings": a limitless notion?

Throughout its case law, the Court of Justice gradually uncovered the constituent elements of the "association of undertakings" notion (a.) and the key features of the decisions such associations can adopt (b.). The Court's well-known functional interpretation of art.101 TFEU concepts—aimed at capturing as many varieties of potentially anti-competitive behaviour within the scope of the restrictive practices prohibition [2]—facilitated the development of an ever wider definition of the "decisions by associations of undertakings" notion (c.).

a. Associations of undertakings in article 101 TFEU

The associations of undertakings notion captures any grouping of economic operators [3] which could potentially be used as an intermediary, a shield or an alternative means to maintain, monitor and develop prohibited collusive practices. [4] Trade associations or other professional associations acknowledged as such by national law and created to protect and promote the interests of particular economic operators are the most obvious examples of such groupings. [5]

Beyond those obvious cases, any *common structure or common body* representing undertakings' interests could qualify as an association in that regard. [6] National law classifications do not matter for the qualification of a structure or body as an association within the meaning of art.101 TFEU. [7] The fact that associations themselves ***284** had been structured as non-profit corporate legal persons [8] or do not have legal personality [9] does not detract from their "associations of undertakings" status. It has also been confirmed that associations of associations of undertakings fall within the "association of undertakings" concept. [10] More complicated cases have arisen in situations where the association or body at hand has not (only) been considered a trade association, but also acted as a public law body or had been entrusted with regulatory or tariff functions by a governmental decision. [11] In that context, the Court has been invited to draw the boundaries of the "associations of undertakings" concept more clearly. The case law here particularly distinguished two criteria to determine whether or not a body could be qualified as an association of undertakings, focusing on the *composition* and the *mandate* of the association or body at hand. [12]

In terms of *composition*, a body has to be composed of representatives of the profession in order to qualify as an association. Not only must those professionals qualify as undertakings in their own right for the body to be an association, [13] they must also be able to determine the scope, structure and governance of the body at hand. [14] As such, government representatives in such bodies do not impede the fact that the body could still be an association of undertakings, at least to the extent that those representatives do not have a veto right or a decisive governance influence over the decision-making process by the body. [15] According to the Court in Centro Servizi Spediporto, a body composed of a majority of representatives of the public authorities would not qualify as an association of undertakings. [16] *A contrario*, this would mean that bodies composed of a majority of professional representatives would fulfil the composition prong of the association of undertakings definition. [17] The case law thus confirms that bodies representing a particular group of professionals—whether or not governed by public regulation—yet exclusively or majoritarily composed of customs agents, [18] lawyers, [19] medical professionals, [20] tariff industry experts, [21] agricultural professionals [22] and insurers [23] amongst others fulfil the composition prong of the associations of undertakings definition.

The *mandate* criterion questions to what extent the body composed of professional representatives serves the public interest or the mere interests of the profession itself. [24] A body will only be qualified as an association to the extent that it represents the private interests of its members. In the context of Reiff, the Court ruled that the setting of compulsory tariffs *by tariff boards, after approval by the public authorities, did serve the public interest since, if necessary, public authorities could substitute their decision for that of the boards*. [25] In Pavlov and OTOC, the Court ruled that the imposition on members of a regulated profession of a common compulsory supplementary pension scheme or of compulsory training courses offered by one specific body, did not amount to decisions in the public interest. Such decisions were rather taken in the *economic interests* of the members of that profession themselves. [26] Likewise, in Wouters, a regulation constituting the expression of the intention of the delegates of the members of a profession that they should act in a particular manner in carrying on their economic activity was considered not to have a bearing on the public interest, even though the association at hand also had public interest tasks to fulfil in other domains. [27] As

a result, those bodies have been—in the circumstances of each case—qualified as associations ***285** of undertakings. If those bodies exercise function as regulatory bodies in the public interest, they will not be qualified as associations of undertakings for the purpose of those public interest tasks. [28]

b. Decisions by associations of undertakings

In its early case law, the Court stated that a "decision" adopted by an association relates to any kind of activity engaged in by the association *calculated to produce the results which it aims to suppress*, [29] i.e. any calculated measure on behalf of the association to ensure that the market behaviour of its affiliated undertakings is streamlined. The mere adoption of a recommendation, the Court stated, can be sufficient in that regard, if it applies to all members of the association or if all members feel constrained or bound by it. [30]

The notion of decision is directly attached to the mandate criterion outlined in the previous section. To the extent that a body adopts any calculated decision in the interest of its members, it will be considered to represent the "private interests" of participating undertakings. If that is the case, a "decision" potentially captured by the art.101(1) TFEU prohibition is deemed to be in place.

c. An inclusive definition

The composition and mandate components of the "association of undertakings" definition and the associated decision criterion have been interpreted on a case-by-case basis and in the interest of including a wide variety of organisational features within its scope. Whereas it has been longstanding practice that an association can also develop economic activities in its own right, the case law remained inconclusive as to whether an undertaking in its own right and with its own economic activities could also be considered an "association of undertakings", if it acted within the interests of other economic operators, which do not own or govern the undertaking concerned on a day-to-day basis. To the extent that this would be the case, the composition criterion would become even more fluid and open-ended. Precisely this question came to the fore in the MasterCard judgment, as the next section will outline.

3. Refining the traditional definition in MasterCard

The classical open-ended definition of "decisions by associations of undertakings" offered the Commission a significant margin of assessment when determining whether and how to classify the behaviour of particular economic entities. The peculiar set-up and organisational features of the MasterCard payment organisation provided a fruitful testing case in that respect (a.). Building on the concepts—and on the gaps—emerging from previous case law, the Commission and EU Courts effectively applied a refined association of undertakings definition to this organisation (b.), in an attempt to capture fee-setting practices engaged in by MasterCard. [31] Arguing that MasterCard actually represented the common interests of banks licensed to use its payment card system, the Commission and Courts implicitly relied on a "alignment of interests" standard of proof read into both the existing composition and mandate criteria (c.).

a. The specificities of the MasterCard payment organisation

The MasterCard case relates to the issue of a payment card organisation—such as MasterCard—setting an "interchange fee" to be paid by one financial institution to another when completing a transaction on the basis of the payment card scheme set up by MasterCard and in which the banks participate. [32] The European Commission maintained that the system set up by MasterCard had the effect of restricting competition, [33] as those fees made transactions by payment card more expensive for the users of such cards. It was also maintained that the participating banks in the scheme had an

interest in keeping the fees in existence, as it would be beneficial to them. [34] At this point, the structure of the MasterCard company became a point of interest for competition law enforcement agencies, as the business had been structured as a co-operative scheme between participating banks, which acted as the co-operation's members. [35]

Anticipating competition law concerns however, MasterCard had been transformed into a publicly listed corporation—its shares being traded on the New York Stock Exchange—in its own right since 2006, having non-bank shareholders and without the banks participating ***286** in all aspects of its business life any longer. [36] Whilst the banks relying on MasterCard services have undeniably remained *stakeholders* in the operation of the new corporation as licensees of the MasterCard scheme, [37] they no longer played as central a role in the daily management and governance structure of the organisation. As a result, legal questions arose as to whether the Commission could still classify the fee-setting actions taken by the MasterCard organisation as "decisions by an association of undertakings" for the time frame after MasterCard abandoned its co-operative structure.

b. Extending the "association of undertakings" definition?

In its decision, the European Commission confirmed that an association of undertakings as a general rule [38] consists of undertakings of the same general type (composition) and makes itself responsible for representing and defending their common interests vis-à-vis other economic operators, governmental bodies or the public in general (mandate). [39] Before MasterCard's 2006 governance overhaul, banks relying on the payment card scheme were effectively represented in the MasterCard organisation and had to consider themselves bound by rules—including on interchange fees—established by the organisation's management bodies prior to being able to participate in the payment card system. [40] Banks were more specifically constituent members of the organisation and as such saw their economic interests represented in the organisation's decision-making process. [41] From 2006 onwards, MasterCard shares started being traded publicly and were no longer exclusively confined to participating banks. [42] According to the Commission, the banks nevertheless still remained bound by the rules established by the MasterCard management bodies and above all, they remained interested parties—which continued to be consulted—whenever a decision on the operation of the payment card system was being adopted. [43] In addition, those members explicitly agreed to the change in ownership structure of the association, which hinted at the fact that their common interests remained protected throughout such governance change. [44] From practice, it even became clear that the global management board—which could theoretically revoke or adapt any decisions by European or national boards on the amount of the fees in particular geographic regions—did adopt a deferential position vis-à-vis decisions adopted by those boards, in which banks continued to be represented as licensed members of the MasterCard system. [45] As a result, decisions on the setting of fees continued to reflect the common interest of the organisation's licensees and were binding on them. [46] Those elements, the Commission maintained, were sufficient as a matter of EU law to prove "the faithful expression of the association's resolve to coordinate the commercial conduct of its members". [47] As a result, MasterCard's fee-setting scheme was classified as a decision by an association of undertakings.

The General Court in its review judgment was confronted with the claim that the Commission had adopted an overly broad definition of the "association of undertakings" concept. MasterCard maintained that the Commission did not fully consider the absence of a clear participation of banks in the European board and the lack of a mandate to set a fee entrusted to MasterCard, an independent corporation with its own business interests. [48] The General Court claimed that in order for a decision to be in place, evidence of an "institutionalised form of coordination of the banks" had to be adduced sufficiently by the Commission. [49] The Court further elaborated on the actual standard of proof to be met for this assessment. It held that it needed to be analysed to what extent

"the banks continued, collectively, to exercise decision-making powers in respect of the essential aspects of the operation of the MasterCard payment organisation […] both at a national and at a European level". [50]

By highlighting that the banks continued to be represented in the European Board of MasterCard and by showing that the banks "were not merely customers for the services provided but participated collectively and in a decentralised manner in all essential elements of the decision-making power", the existence of a "commonality of interests" was proven, which is a relevant factor in establishing the existence of a "decision by an association of undertakings". [51]

The findings of the Commission and the General Court were subsequently confirmed as a matter of EU law by the Court of Justice in its appellate judgment on the matter. In the judgment, the Court clearly distinguished the MasterCard case from earlier "association of ***287** undertakings" judgments, which generally dealt with the public or regulatory scope of professional associations. In this case, according to the Court, the private nature of the MasterCard payment organisation was beyond doubt, raising new questions as to how the composition and mandate criteria should be applied in this setting. [52] MasterCard and intervening banks had argued that the establishment of a mere commonality of interests was not sufficient to identify a decision by an association of undertakings. [53] On the contrary, such a decision could only be proven on the basis of clear composition and mandate indications, which were, according to the banks, not sufficiently present. By elevating the "commonality of interests" criterion to a standard of proof, the Commission and General Court would have misinterpreted the notion of a decision by an association of undertakings. [54] In line with the Advocate General, [55] the Court rejected this narrow reading on two grounds. First of all, it held that the General Court referred to the "commonality of interest" criterion as a mere element in establishing the existence of a decision, rather than the conclusive standard to be maintained. [56] The criterion would thus neither be general nor exclusive. [57] Secondly and more substantively, the Court confirmed that the two factors which qualified—as a matter of EU law—MasterCard as an association of undertakings were fulfilled. On the one hand, the continued involvement of the banks in its decision-making *governance schemes* reflected MasterCard's role as a forum through which licensee banks could engage in common—potentially collusive—practices. [58] On the other hand, the continued *interests* banks and MasterCard had in establishing an interchange fee such as the one at stake in the case offered the basis for an implicit mandate from the banks to MasterCard. [59] On those grounds, the Court held that the Commission and the General Court did not err in qualifying MasterCard's interchange fees decisions as "decisions by an association of undertakings". [60]

c. "Commonality of interest" as new general standard of proof?

The Court of Justice's reasoning in MasterCard is simultaneously refreshing yet also not completely unexpected. On the one hand, the judges made clear they did not elevate—as a matter of legal doctrine—the "commonality of interest" standard to the general or exclusive standard of proof to establish the existence of a decision by an association of undertakings falling within the scope of art.101 TFEU. A functional interpretation of that criterion, as applied to this case, nevertheless resulted in the direct conclusion that MasterCard should be considered an association of undertakings. On the other hand, the Court has implicitly widened its testing criteria of composition and mandate so as to give aligned interests a more prominent and general place within the "association of undertakings" standard of proof.

As to the composition criterion, the Court made clear that enforcement authorities are not restricted to look only at the actual composition of a body, but also at the ways in which governance structures of a body are amenable to taking undertakings' interests into account. Even though participating banks were no longer formally shareholders of the post-2006 MasterCard corporation, they remained stakeholders in particular decision-making procedures and participants in the workings of some management boards. The combination of such participation as well as stakeholder interest in the outcomes of MasterCard's decisions were both considered relevant in meeting the composition prong of

the association of undertakings' definition. [61] As such, the *actual governance structures and features* and the role played therein by beneficiaries of certain market behaviour practices rather than the actual composition or legal form of the body at hand are guiding. [62] Whereas this standard could already have been inferred from previous case law, the Court here clearly confirmed that the composition criterion should indeed be interpreted as widely as possible.

The mandate criterion has been interpreted in an equally interest-focused fashion. The Court basically confirmed as a matter of law that a joint interest of undertakings in the actual processes leading to and the outcomes obtained in relation to the decisions adopted by MasterCard offered a sufficiently certain indication of MasterCard's (implicit?) mandate from the banks to continue developing, refining and adopting interchange fees to the benefit of those stakeholders. Stakeholders'—in this case banks'—interests in the decisions adopted by the Boards and their involvement in the processes leading up to that decision ought to be the backbone of the Commission's and Courts' legal assessment. [63] The presence of such interests in the *process and outcomes* of another corporation's decisions establishes a presumption of an implicit mandate entrusted to that corporation to act as an "association of undertakings" in the interest of those stakeholders. Any decision or other presumably binding recommendation ***288** thus adopted by that corporation would therefore logically qualify as a "decision by an association of undertakings". The Court even seems to agree with the European Commission that a potential alignment of interests in the process and outcomes would be sufficient to qualify a corporation such as MasterCard as an association of undertakings. [64] If a thus structured association adopts a decision aligned to the interests of its licensees and binding on the latter, this decision falls within the scope of art.101(1) TFEU.

As a result, the presence of a joint or common interest in the *governance features* of a business unit and in the *processes and outcomes of corporate decisions* suffices to identify a "decision of an association of undertakings". Whereas not an exclusive criterion, "commonality of interest" does form the backbone analytical element in proving the existence of a decision by an association of undertakings in this case. To the extent that an enforcement authority adduces the presence of a sufficient (potential) alignment of interests between the functioning of a corporation and other undertakings, the corporation can be considered "an association of undertakings" adopting decisions to be scrutinised on the basis of EU competition law. As such, the actual or potential alignment of interests essentially shapes the legal standard of proof imposed on competition authorities when classifying behaviour within the "decisions by associations of undertakings" notion in the context of art.101 TFEU.

4. Beyond MasterCard: classifying market behaviour in the decision by associations of undertakings box

The alignment of interests standard of proof raises new questions as to how businesses such as MasterCard can effectively defend themselves against allegations that they should be considered an association of undertakings. It will be argued that the increasing attention to a "more economic approach" underlying art.101 TFEU in principle justifies a more lenient standard of proof (a.), albeit to the extent that specific safeguards are put in place to ensure that undertakings or associations can effectively justify their actions. In the post-MasterCard set-up, those safeguards have not been developed or considered to their fullest extent (b.).

a. Fitting a "more economic approach"?

In the wake of MasterCard, it would seem sufficient for the European Commission or a national competition authority to argue that the alignment interests mediated through a specific body in which undertakings concerned have governance and outcome interests as *stakeholders* suffices to establish an "association of undertakings" within the scope of art.101 TFEU. From a legal point of view, it could be argued that the Court in doing so relied on a legal presumption on the basis of which the establishment of a sufficiently joint interest in the governance structures and decision making processes and outcomes of a business unit qualifies that unit as an association of undertakings.

By establishing this presumption, the Court fitted its interpretation of the "associations of undertakings" notion within a legal framework reflective of a "more economic approach" towards art.101 TFEU. [65] The legal presumption used facilitates the finding by the European Commission of a particular format of co-operative behaviour without essentially being bound by strict legal categories and extended proof requirements. [66] Relying on such a legal presumption not only grants competition law enforcement authorities fresh leeway in classifying market behaviour in widening categories, but also enables them to assess a case on its (anti-)competitive merits, without having to spend too much time on preliminary legal classification of such behaviour. [67] Shifting attention to the substance of the matter would directly allow enforcement authorities and undertakings or associations concerned to adduce or justify the anti-competitive effects of market behaviour on the structure and functioning of the market, rather than focusing on the legal categories within which such behaviour should be classified. From that point of view, the Court's judgment fits other recent case law ventures seeking to strike a new balance between economically informed assessments and the need for legal standards adapted to such assessments. [68]

b. In search of legal safeguards

The Court's approach at the same time also raises new questions and calls for clarity to be provided as to legal safeguards currently still in place. In the present set-up of MasterCard, it cannot be inferred immediately to what extent a business unit like MasterCard would have been able to rebut the presumption that it did not constitute an association of undertakings. The elements adduced by the latter—focusing on governance structure changes whereby banks turned from members into mere licensed stakeholders—did not suffice in this respect. It would rather seem to be required that the business unit shows that its business decisions do not in any way align with the interests of a group of undertakings in order to avoid that unit from being classified as an association of those undertakings. [69] As the Commission pointed out in ***289** considerable detail, this had not been the case in relation to MasterCard, which actually continued its line of business and merely adapted the legal form used to conduct its business through. [70]

Beyond the specific circumstances of the MasterCard case however, an immediate consequence of the Court's judgment is that the burden of proof thus imposed on a unit like MasterCard is to claim that its business decisions are not aligned with—and therefore never even remotely in the interests of—a group of undertakings, even when such decisions would also make sense from the business unit's own point of view. Such an argument, whilst not completely impossible to develop, would impose a heavier burden of proof on the business unit concerned compared to the burden borne by the Commission or the national competition authority. Whereas such uneven division in the burden of proof is not entirely uncommon in EU competition law analysis—it can be noticed equally in relation to the establishment of "concerted practices" under art.101 TFEU—questions could be raised as to whether the Commission could merely rely on such a presumption. In the context of concerted practices, the General Court seems to have hinted that the Commission had to adduce more elements (other than a mere finding of parallel conduct) to prove that a concerted practice was in place. [71] Previously, it was deemed by the Court of Justice that adducing evidence of contacts between undertakings and proof of subsequent parallel conduct sufficed to qualify behaviour as falling within the "concerted practice" definition. [72] At the very least, the General Court seemed to imply that a mere reliance on the presumptions developed by the Court without substantiating them could not suffice to establish a decision by associations of undertakings or a concerted practice to be in place. The Court of Justice did not however explicitly build on this posture in MasterCard, raising questions as to whether such additional elements of proof can also be required when establishing the decision by an association of undertakings.

Whereas it could be argued that excessive attention to formal legal categories in art.101 TFEU detracts attention from the actual merits assessment of the case—as a more economic approach would want to promote [73] —the current imbalanced system of categorizing behaviour is highly undesirable from a practical point of view. Practically, business units remain

in the dark on how to defend themselves against classifications in one of the art.101 TFEU categories proposed by the Commission or national authorities. In particular, a more lenient application of legal categorisation standards presupposes that discussions on the merits of a case should take place in a procedural and substantive law environment where enforcement bodies and defendant undertakings or associations are able to defend their positions and to adduce matters of fact and law that result in a balanced assessment of each case. [74] It suffices only briefly to be reminded that this is not the case in the present EU competition law analytical framework. On the one hand, the extensive investigation and enforcement powers conferred on the Commission and on national authorities continue to be criticised from the point of view of a right to a fair trial. [75] On the other hand, the Commission's penchant for classifying behaviour as a restriction by object and the uncertainty as to how an undertaking can defend itself against such an allegation, [76] the Commission's and the Courts' failure to establish a clear and balanced restriction of competition test [77] and the remaining uncertainties on the interaction between arts 101(1) and 101(3) TFEU 10 years after Regulation 1/2003 all exemplify the confusing and unpredictable substantive assessment environment through which undertakings and associations have to navigate. [78]

It should be recalled that in MasterCard, the Commission clearly focused on the effects of the measure and thus provided for opportunities to contest the anti-competitive effects the fee-setting scheme may have had. [79] In this case, classification within the art.101 categories therefore only triggered a more informed discussion of the effects on competition of the alleged restriction, rather than resulting in the immediate prohibition of specific business practices. Even in that situation, however, the lack of clear standards on how to more evenly distribute opportunities to adduce and contest factual or legal assessments in a consistent manner results in a rather unpredictable legal environment. The Commission's penchant for classifying behaviour as falling within the restriction by object category and the ensuing lack of in-depth analysis of the nature and effects ***290** of behaviour concerned in many other cases would seem to highlight that a more lenient categorisation may also result in more practices being prohibited without a full assessment of the effects of such practices being engaged in. This again would frustrate undertakings' or associations' rights to at least contest or attempt to justify the format through which their market behaviour materialises.

In light of those practical uncertainties, MasterCard's further blurring of the conceptual boundaries of legal categories governing the composition and mandate criteria applied should not be welcomed, unless it is indeed accompanied by a thorough analysis of the actual effects of the behaviour concerned under art.101 TFEU. A mere extension of the scope of legal categories by way of legal presumptions without providing for adequate means to rebut those presumptions should not be considered a way forward in an enforcement context seeking to bring more fairness to an effectiveness-focused enforcement framework. [80] It therefore remains to be seen to what extent the Court, in its future case law, will balance calls for a more economic assessment of potentially anti-competitive behaviour with the the need for workable legal categories and presumptions allowing undertakings or associations to defend themselves against preliminary classifications of their behaviour within the art.101 TFEU categories.

5. Conclusion

In MasterCard, the Court confirmed that the *alignment of interests* prevailing throughout (corporate) *governance structures* and *decision-making processes and outcomes* engaged in by a particular private economic operator would be sufficient to presume the existence of an association of undertakings. Whereas that qualification already highlights an ever more extensively functional interpretation of the "association of undertakings" notion itself, it equally demonstrates how the Court grants leeway to competition law enforcement authorities to capture as wide a variety as possible of differently structured practices within the scope of the art.101(1) TFEU prohibition.

Although the creation of a legal presumption fits a "more economics-oriented" EU competition law assessment scheme, the identification and application of such presumptions has not yet been accompanied by sufficient opportunities to rebut or contest the conclusions inferred from the presumption. Such opportunities should nevertheless be taken more

seriously when aiming to construct a more perfect, legally certain and predictable EU competition law enforcement environment, in which the balance economically informed assessments and legal safeguards are to be reconciled.

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Footnotes

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1 MasterCard Inc v European Commission (C-382/12 P) EU:C:2014:2201; [2014] 5 C.M.L.R. 23.

2 For a more general overview of such tendencies, see P. Van Cleynenbreugel, "Article 101 TFEU and the EU Courts: Adapting legal form to the realities of modernization?" (2014) 51 Common Market Law Review 1381, 1400.

3 See Groupement des Cartes Bancaires CB v Commission of the European Communities (T-39/92) [1994] E.C.R. II-49 at [77].

4 Nederlandse Vereniging voor de Fruit- en Groentenimporthandel (Frubo) v Commission of the European Communities (71/74) [1975] E.C.R. 563 at [30]. See also Societé Cooperative des Asphalteurs Belges (Belasco SC) v Commission of the European Communities (246/86) [1989] E.C.R. 2117 for a clear example in this respect. The decision replaces a potentially anti-competitive agreement otherwise concluded between the undertakings themselves.

5 A trade association by its very nature fits the definition, as it literally comprises an *association of tradesmen, businessmen, or manufacturers in a particular trade or industry for the protection and advancement of their common interests*; see http://www.merriam-webster.com/ [Accessed April 30, 2015] for that definition. A clear example is offered in the 1978 Van Landewyck case, where professional tobacco detaillant associations and commercial federations adopted pricing and distribution structures, imposed minimum resale prices and negotiated trade margins, see Heintz van Landewyck Sarl v Commission of the European Communities (209/78) [1980] E.C.R. 3125 at [96]–[98] and [106]–[109].

6 In Bureau National Interprofessionel du Cognac (BNIC) v Clair (123/83) [1985] E.C.R. 391 at [20], the Court highlighted that any group of traders could qualify as an association. For an overview of varied types of associations of undertakings, see Commission Decision of December 19, 2007 (Case COMP/34.579 — MasterCard, Case COMP/36.518 — EuroCommerce, Case COMP/38.580 — Commercial Cards), para.341, summary published in [2009] OJ C264/8 (hereafter referred to as MasterCard Commission Decision).

7 BNIC [1985] E.C.R. 391 at [17]; Commission of the European Communities v Italy (C-35/96) [1998] E.C.R. I-3851 at [40].

8 van Landewyck [1980] E.C.R. 3125 at [87]–[88]; IAZ International Belgium SA v Commission of the European Communities (96/82) [1983] E.C.R. 3369 at [19]; BNIC [1985] E.C.R. 391 at [20] and [26]; Verband der Sachversicherer eV v Commission of the European Communities (45/85) [1987] E.C.R. 405 at [2]; Pavlov v Stichting Pensioenfonds Medische Specialisten (C-180/98) [2000] E.C.R. I-6451 at [88]; Wouters v Algemene Raad van de Nederlandse Orde van Advocaten (C-309/99) [2002] E.C.R. I-1577 at [68], referring to a professional association.

9 Wouters [2002] E.C.R. I-1577 at [3] and [4] illustrates this.

10 BNIC [1985] E.C.R. 391 at [19] and the Opinion of Advocate General Slynn to that case; [1985] E.C.R. 391 at 395. The General Court confirmed this in Eurofer Asbl v Commission of the European Communities (T-136/94) [1999] E.C.R. II-263 at [9] and Piau v Commission of the European Communities (T-193/02) [2005] E.C.R. II-209 at [69].

11 The primary case in this respect has been Italy [1998] E.C.R. I-3851, which dealt with the specific context of customs agents, a regulated profession in accordance with Italian law.

12 The second criterion has been referred to as the "legal framework" criterion by Advocate General Léger in Wouters [2002] E.C.R. I-1577 at [66]; legal framework refers to the tasks the presumed association was fulfilling and the scope of its actions. In this case, the public regulatory or private interest role of the Dutch Bar Association was at stake, which explains the choice for the "legal framework" terminology. I prefer to use the "mandate" criterion, as it more directly hints at the type of interests the presumed association is taking into consideration.

13 Pavlov v Stichting Pensioenfonds Medische Specialisten (C-180/98) [2000] E.C.R. I-6451 at [77]; Wouters [2002] E.C.R. I-1577 at [48]–[49].
14 In that situation, it does not matter that they had been appointed by a public authority, see Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co KG (C-185/91) [1993] E.C.R. I-5801 at [16]–[18].
15 See Bundesanstalt (C185/91) [1993] E.C.R. I-5801 at [24]; for another example in that regard, see Germany v Delta Schiffahrts- und Speditionsgesellschaft GmbH (C-153/93) [1994] E.C.R. I-2517; DIP SpA v Comune di Bassano del Grappa (C-140/94) [1995] E.C.R. I-3257 at [18].
16 Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl (C-96/94) [1995] E.C.R. I-2883 at [23].
17 Italy [1998] E.C.R. I-3851 at [44]; Pavlov [2002] E.C.R. I-1577 at [87]; Opinion of Advocate General Léger in Wouters [2002] E.C.R. I-1577 at [70].
18 Italy [1998] E.C.R. I-3851.
19 Wouters [2002] E.C.R. I-1577.
20 Pavlov [2002] E.C.R. I-1577; see for comments on a national decision, P.K. Gorecki, "A decision of an association of undertakings: reflections on a recent Irish Supreme Court decision, Hemat v The Medical Council" [2011] E.C.L.R. 153.
21 Bundesanstalt [1993] E.C.R. I-5801 (this case nevertheless did not meet the mandate criterion, as will be outlined in the next paragraph).
22 Federation Nationale de la Cooperation Betail et Viande (FNCBV) v Commission of the European Communities (T-217/03) [2004] E.C.R. II-4987.
23 Verband [1987] E.C.R. 405 at [28].
24 Italy [1998] E.C.R. I-3851 at [44]; see for a clear evocation in this respect, Opinion of Advocate General Léger in Wouters [2002] E.C.R. I-1577 at para.70.
25 Bundesanstalt [1993] E.C.R. I-5801 at [24].
26 Pavlov [2002] E.C.R. I-1577 at [84] and [87]; Ordem dos Tecnicos Oficiais de Contas v Autoridade da Concorrencia (C-1/12) EU:C:2013:81; [2013] 4 C.M.L.R. 20 at [48]–[52]; T. Baumé, "OTOC: The Provision of Training by Professional Associations" (2013) 4 Journal of European Competition Law & Practice 321.
27 Wouters [2002] E.C.R. I-1577 at [64].
28 See among others Bundesanstalt [1993] E.C.R. I-5801 at [24]; Germany v Delta Schiffahrts- und Speditionsgesellschaft GmbH (C153/93) [1994] E.C.R. I-2517 at [23]; Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl (C-96/94) [1995] E.C.R. I-2883 at [34]; DIP SpA v Comune di Bassano del Grappa (C-140/94) [1995] E.C.R. I-3257 at [19].
29 Frubo [1975] E.C.R. 563 at [30].
30 Verband [1987] E.C.R. 405 at [29]–[32]. See for additional examples of decision varieties, *R. Whish and D. Bailey, Competition Law, 7th edn (Oxford, Oxford University Press, 2012), p.111*.
31 On the specific nature and concept of those "fees" and on their compatibility with EU competition law prohibitions, see J.D. Mathis, "European competition law and multilateral interchange fees in the market for payment cards: a critical outlook" [2013] E.C.L.R. 139.
32 An interchange fee has been defined by the European Commission as "fees charged by a cardholder's bank (the 'issuing bank') to a merchant's bank (the 'acquiring bank') for each sales transaction made at a merchant outlet with a payment card" (see http://ec.europa.eu/competition/sectors/financial_services/enforcement_en.html [Accessed April 30, 2015]). Such fees can be set either bilaterally between the banks themselves, or multilaterally between the banks by a third party, such as the MasterCard payment card organisation.
33 Similarly, the European Commission equally held the VISA payment card scheme equally to restrict competition. VISA Inc was also considered to qualify as an association of undertakings in this respect, yet—contrary to MasterCard—it did not contest the Commission's association of undertaking qualification. On VISA, see Visa Europe Ltd v European Commission (T-461/07) [2011] 5 C.M.L.R. 3 as well as more recent Commission Decisions making commitments offered by VISA binding on it. For details on that case, see the Commission Decisions, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39398 [Accessed April 30, 2015].
34 COMP/34.579 — MasterCard at [408].
35 COMP/34.579 — MasterCard at [42].
36 COMP/34.579 — MasterCard at [43].
37 COMP/34.579 — MasterCard at [44].
38 COMP/34.579 — MasterCard at [339].
39 COMP/34.579 — MasterCard at [339].

40 COMP/34.579 — MasterCard at [345].
41 COMP/34.579 — MasterCard at [347].
42 MasterCard Commission Decision at [351]–[353]; banks remained the only ones capable of obtaining a licence and continued to be able to exercise rights attached to such licence, which closely resembled the rights previously granted under MasterCard membership status.
43 COMP/34.579 — MasterCard at [359]–[360].
44 COMP/34.579 — MasterCard at [394].
45 COMP/34.579 — MasterCard at [365].
46 COMP/34.579 — MasterCard at [369]–[370] and [383]–[387], building on the criteria in Verband [1987] E.C.R. 405.
47 COMP/34.579 — MasterCard at [397].
48 MasterCard Inc v European Commission (T-111/08) EU:T:2012:260; [2012] 5 C.M.L.R. 5 at [238].
49 MasterCard [2012] 5 C.M.L.R. 5 at [243]–[244].
50 MasterCard [2012] 5 C.M.L.R. 5 at [245].
51 MasterCard [2012] 5 C.M.L.R. 5 at [250] and [259].
52 MasterCard [2014] 5 C.M.L.R. 23 at [75].
53 MasterCard [2014] 5 C.M.L.R. 23 at [52].
54 MasterCard [2014] 5 C.M.L.R. 23 at [54].
55 Opinion of Advocate General Mengozzi to MasterCard EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [45].
56 MasterCard [2014] 5 C.M.L.R. 23 at [73].
57 MasterCard [2014] 5 C.M.L.R. 23 at [73].
58 MasterCard [2014] 5 C.M.L.R. 23 at [71].
59 MasterCard [2014] 5 C.M.L.R. 23 at [72]; at least, it was open to the Commission and to the General Court to infer such information from the case file.
60 MasterCard [2014] 5 C.M.L.R. 23 at [76].
61 COMP/34.579 — MasterCard at [378].
62 MasterCard [2014] 5 C.M.L.R. 23 at [71].
63 As confirmed in COMP/34.579 — MasterCard at [383].
64 MasterCard [2014] 5 C.M.L.R. 23 at [76].
65 For background, *G. Monti, "New Directions in EC Competition Law" in T. Tridimas and P. Nebbia (eds) European Union Law for the Twenty-First Century: Rethinking the New Legal Order (Oxford, Hart Publishing, 2004), p.186*.
66 On the scope and role of presumptions in relation to EU competition law, see already D. Bailey, "Presumptions in EU competition law" [2010] E.C.L.R. 362.
67 The functional interpretation of art.101 TFEU concepts obviously already facilitated this approach, which has been acknowledged as such by the Court, see among others Commission of the European Communities v Anic Partecipazioni SpA (C-49/92 P) [1999] E.C.R. I-4125 at [131] and T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit (C-8/08) [2009] E.C.R. I-4529 at [23].
68 For that argument more generally, Van Cleynenbreugel, "Article 101 TFEU and the EU Courts" (2014) 51 Common Market Law Review 1381, 1383–1384.
69 See for that perspective, COMP/34.579 — MasterCard at [359].
70 COMP/34.579 — MasterCard at [396]–[397].
71 International Confederation of Societies of Authors and Composers (CISAC) v European Commission (T-442/08) EU:T:2013:188; [2013] 5 C.M.L.R. 15 at [102].
72 See in particular, A Ahlstrom Osakeyhtio v Commission of the European Communities (Woodpulp II) (C-89/85) [1993] E.C.R. I-1307 at [126]–[127]; Limburgse Vinyl Maatschappij NV v Commission of the European Communities (T-305/94) [1999] E.C.R. II-931 at [725].
73 On the substantive law features of a more economic approach, see *R. Wesseling, The Modernisation of EC Antitrust Law (Oxford, Hart Publishing, 2000), pp.80–83* and *D. Gerard, "The Effects-Based Approach Under Article 101 TFEU and its Paradoxes: Modernisation at War with Itself?" in J. Bourgeois and D. Waelbroeck (eds), Ten Years of Effects-Based Approach in EU Competition Law Enforcement (Brussels, Bruylant, 2012), p.38*.
74 See for that perspective, P. Van Cleynenbreugel, "Efficient justice in the service of justiciable efficiency? Varieties of comprehensive judicial review in a modernised EU competition law enforcement context" (2014) 10 The Competition Law Review 35.
75 Amongst others, see P. Oliver, ""Diagnostics" — a Judgment Applying the Convention of Human Rights to the Field of Competition" (2012) 3 Journal of European Competition Law & Practice 163; M.

Bronckers and A. Vallery, "Fair and effective competition policy in the EU: which role for Authorities and which role for the courts after Menarini?" (2012) 8 European Competition Journal 283.

76 The example of parallel import restrictions in relation to pharmaceuticals offers a recent illustration of those tendencies, see F. Carlin and B. Batchelor, "Turducken on the menu: initial reflections on the implications of the European Commission's Lundbeck decision" [2013] 34 E.C.L.R. 454. See more generally C.I. Nagy, "The Distinction between Anti-competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?" (2013) 36 World Competition 541.

77 On the scope of the restriction by object test, see Allianz Hungaria Biztosito Zrt v Gazdasagi Versenyhivatal (C-32/11) EU:C:2013:160; [2013] 4 C.M.L.R. 25 at [36]. See also Van Cleynenbreugel, "Article 101 TFEU and the EU Courts: Adapting legal form to the realities of modernization?" (2014) 51 Common Market Law Review 1381, 1411–1413.

78 See on that issue, *A. Italianer, "Competitor Agreements under EU Competition Law", delivered September 26, 2013, p.9*: http://ec.europa.eu/competition/speeches/text/sp2013_07_en.pdf [Accessed April 30, 2015].

79 COMP/34.579 — MasterCard at [409]–[523].

80 On the effectiveness-fairness balance in EU competition law enforcement, see L. Parret, "Sense and Nonsense of Rules on Proof in Cartel Cases" (2008) 4 European Competition Journal 169.

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