Case C-549/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

29 August 2023

Referring court:

College van Beroep voor het bedrijfsleven (Netherlands)

Date of the decision to refer:

29 August 2023

Applicant:

American Express Europe SA

American Express Carte France SA

Visa Europe Ltd

MasterCard Europe SA

Autoriteit Consument en Markt

Koninklijke Luchtvaart Maatschappij NV

Subject matter of the main proceedings

This request is made in proceedings relating to fees paid to a co-branding partner when issuing a co-branded credit card under a three party payment card scheme. The Autoriteit Consument en Markt (Authority for Consumers and Markets) considers that these fees exceed the maximum threshold set for interchange fees in Regulation 2015/751.

Subject matter and legal basis of the request

In the context of the present request for a preliminary ruling under Article 267 TFEU, the referring court questions the consequences of treating a three party payment card scheme with a co-branding partner as equivalent to a four party

payment card scheme under Regulation 2015/751. That court has doubts as to the interpretation of Articles 4 and 5 of Regulation 2015/751, which contain the terms 'net compensation' and 'interchange fee'. These terms assume payments to an issuer, whereas there is no issuer in a three party payment card scheme.

Questions referred for a preliminary ruling

1. Is Article 2(11) of Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions ('the Regulation') to be interpreted, for the purposes of the application of the substantive provisions of that regulation, as meaning that the total net amount of payments, rebates or incentives received by a co-branding partner of a three party payment card scheme in relation to card-based payment transactions or related activities is to be regarded as net compensation, even if that co-branding partner is not itself an issuer?

2. Is Article 4 of the Regulation, read in conjunction with the second sentence of Article 2(10), to be interpreted as meaning that net compensation falls directly within the scope of Article 4?

3. Is Article 5 of the Regulation to be interpreted as also covering remuneration, including net compensation, received by a co-branding partner from the payment card scheme, if the co-branding partner is not an issuer?

4a. Is Article 5 of the Regulation to be interpreted as meaning that remuneration, including net compensation, received by a co-branding partner in relation to payment transactions or related activities has an equivalent object to the interchange fee if that remuneration has the intention of expanding the business of the payment card scheme?

4b. Is Article 5 of the Regulation to be interpreted as meaning that remuneration, including net compensation, received by a co-branding partner in relation to payment transactions or related activities has an equivalent effect to the interchange fee if that remuneration has the effect of expanding the business of the payment card scheme?

4c. If the answer to those questions is in the negative, the question then arises as to which criteria and/or factors should be used to assess whether remuneration, including net compensation, received by a co-branding partner in relation to payment transactions or related activities has an equivalent object or effect to the interchange fee?

5. Is Article 5 of the Regulation to be interpreted as meaning that remuneration must already be regarded, for the purposes of the application of Article 4 of the Regulation, as forming part of the interchange fee if the remuneration has an equivalent object to the interchange fee?

6. Is Article 2(11) of the Regulation to be interpreted as meaning that a merchant service charge paid by a co-branding partner to a three party payment card scheme may be deducted from the payments, rebates or incentives received by the co-branding partner from the payment card scheme in relation to card-based payment transactions or related activities?

7a. Is Article 2(11) of the Regulation to be interpreted as meaning that not only monetary compensation from the co-branding partner but also the costs or economic consideration for a service supplied by a co-branding partner may be deducted from the total amount received by the co-branding partner from the payment card scheme?

7b. If the answer to that question is in the affirmative, what criteria should be used to determine that value?

Provisions of European Union law relied on

Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, Articles 2, 4 and 5

Succinct presentation of the facts and procedure in the main proceedings

1 American Express Europe and American Express Carte France (together, 'Amex') operate a three party payment card scheme within the meaning of Article 2(18) of Regulation 2015/751. Visa and MasterCard operate a four party payment card scheme within the meaning of Article 2(17) of Regulation 2015/751.

2 In the case of a four party payment card scheme, payment transactions are made through the intermediation of an issuer (on the cardholder's side) and an acquirer (on the payee's side). As part of this, the acquirer pays the issuer a fee for settlement of the transaction, which is known as the interchange fee. The net compensation, as defined in Article 2(11) of Regulation 2015/751, is part of the interchange fee.

3 In the case of a three party payment card scheme, the scheme issues the payment card and settles the payments made with the card itself, which means that there is no (visible) interchange fee in such a scheme. Regulation 2015/751 sets the maximum amount of interchange fees and, in principle, cannot therefore apply to three party payment card schemes. However, Article 1(5) of Regulation 2015/751 declares that regulation applicable to a three party payment card scheme if it issues a card with a co-branding partner.

4 In 2010, Amex entered into a partnership with Koninklijke Luchtvaart Maatschappij ('KLM') as a co-branding partner to issue co-branded credit cards to

consumers. In addition to a ‘signing bonus’, Amex paid KLM a number of other fees for this.

5 As part of that partnership, customers are given access to KLM’s loyalty programme, allowing them to save ‘Miles’, inter alia by travelling with KLM. Those ‘Miles’ can then be exchanged for flights or other KLM services. In addition, KLM and Amex agreed that Amex cardholders could save Miles directly under the loyalty programme. To that end, Amex buys Miles from KLM and awards them to its cardholders based on credit card usage.

6 In 2018, KLM launched a tender procedure for a new co-branding partnership, again choosing Amex as its cooperation partner from among several payment card schemes, including Visa and MasterCard. Under that new partnership, Amex again paid a ‘signing bonus’ to KLM, as well as a number of other fees.

7 In May 2017, the Authority for Consumers and Markets opened an investigation into the partnership between Amex and KLM. On 6 March 2019, the Authority for Consumers and Markets imposed an order for periodic penalty payments, requiring Amex to pay KLM, in the context of its existing and future co-branding partnership, a per transaction fee of no more than 0.3% of the value of the transaction as defined in Article 4, read in conjunction with Article 5 of Regulation 2015/751.

8 Amex and KLM lodged a complaint against that decision of 6 March 2019 with the Authority for Consumers and Markets. They maintain that they comply with the rule of 0.3% in the context of their partnership, in particular because Amex deducts the value of the Miles it purchases from the fees it pays.

9 By decision of 22 January 2020, the Authority for Consumers and Markets declared the complaints lodged by Amex and KLM to be unfounded and then, by decision of 21 December 2020, levied periodic penalty payments.

10 KLM and Amex brought an action against the decision of 21 December 2020 before the rechtbank Rotterdam (District Court, Rotterdam). That court declared the actions brought by Amex and KLM to be well founded, annulled the decisions of the Authority for Consumers and Markets of 22 January 2020 and 21 December 2020 and ordered the Authority for Consumers and Markets to adopt a new decision. The District Court, Rotterdam held that the Authority for Consumers and Markets had not given sufficient reasons for its position that all fees paid by Amex to KLM constituted an implicit interchange fee, by failing to show that those fees had an equivalent object or effect to the interchange fee. Accordingly, the District Court, Rotterdam is not in a position to find that Amex has infringed Article 4 of Regulation 2015/751, read in conjunction with Article 5 thereof.

11 Both the Authority for Consumers and Markets, and KLM and Amex brought an appeal before the referring court. Visa and MasterCard also lodged an appeal as interested parties in the proceedings at first instance.

The essential arguments of the parties in the main proceedings

Interpretation of Article 4 of Regulation 2015/751

12 Amex submits that, just as there are fees within a four party payment card scheme that are not governed by Regulation 2015/751, there are also fees within a three party payment card scheme that are not governed by that regulation. Both the wording and the objective of Regulation 2015/751 cover only the fees received by the card issuer, which are absent in a three party payment card scheme.

13 The Authority for Consumers and Markets submits that the fees received by KLM from Amex must be classified as net compensation within the meaning of Article 2(11) of Regulation 2015/751 and, therefore, are part of the interchange fee. According to the Authority for Consumers and Markets, classification of payments as interchange fees and, more specifically, as net compensation does not require that these payments are received by an issuer, which does not exist in a three party payment card scheme with a co-branding partner. The maximum amount of that interchange fee is governed by Article 4 of Regulation 2015/751 and, therefore, the net compensation at issue is directly covered by that provision. In this view, it is supported by MasterCard.

Interpretation of Article 5 of Regulation 2015/75

14 According to Amex, the wording of Article 5 of Regulation 2015/751 precludes fees paid to a co-branding partner, which is not an issuer, from being regarded as interchange fees. There is therefore no need to ascertain whether the fees have an equivalent object or effect to the interchange fee.

15 By contrast, the Authority for Consumers and Markets, MasterCard and Visa maintain that, in adopting Regulation 2015/751, the EU legislature considered that fees paid to a co-branding partner in a three party payment card scheme could lead to a market failure comparable to that of the interchange fee in a four party scheme.

16 The Authority for Consumers and Markets believes that what matters here is the effect of the remuneration in the relationship between the payment card scheme and the co-branding partner. Fees have an equivalent effect if they can convince a third party to cooperate with a payment card scheme, regardless of whether that effect is intended.

Interpretation of the term 'net compensation'

17 Amex and KLM submit that, for the purposes of calculating the net compensation, the merchant service charge paid by KLM to Amex for acquiring credit card transactions should be deducted from the fees paid by Amex to KLM. The Miles acquired by Amex are also eligible for this, which means that the 0.3% rule laid down in Article 4 of Regulation 2015/751 is not exceeded.

18 The Authority for Consumers and Markets argues that the merchant service charge paid by KLM to Amex for accepting credit card transactions cannot be deducted, as that payment is made in the context of a legal relationship that does not involve the joint issuance of a payment card. As regards the Miles, it considers that their value is set too high, as not all Miles are redeemed at 100% and this may lead to the circumvention of the maximum interchange fee.

Succinct presentation of the reasoning in the request for a preliminary ruling

19 The provision regarding the equivalence of a three party payment card scheme with a co-branding partner to a four party payment card scheme was added to Regulation 2015/751 at an advanced stage of the legislative process, which means that the wording of that regulation is tailored to four party payment card schemes with a distinguishable issuer. In its judgment of 7 February 2018 (*American Express*, C-304/16, EU:C:2018:66), the Court of Justice held that, for the purposes of the application of Article 1(5) of Regulation 2015/751, the classification of a three party payment card scheme as a four party payment card scheme is not conditional on a co-branding partner of a three party payment card scheme acting as an issuer within the meaning of Article 2(2) of that regulation.

20 Unlike the court of first instance, the referring court considers that, in view of the effects of that equivalence, the interpretation of Articles 4 and 5 of Regulation 2015/751 is not sufficiently clear to leave no scope for any reasonable doubt. Therefore, in order to assess whether the fees paid by Amex to KLM, its co-branding partner, when issuing a co-branded credit card infringe Regulation 2015/751, the referring court seeks clarification on several points.

Interpretation of Article 4 of Regulation 2015/751

Question 1

21 According to the referring court, it is not clear whether the payments received by KLM from Amex constitute net compensation within the meaning of Article 2(11), since the definition of that term requires payments to be received by an issuer, which is absent from a three party payment card scheme.

22 The Court of Justice has already ruled, in paragraphs 70 and 71 of Case C-304/16, that it is not inconceivable that some type of consideration or benefit might be identified as constituting an implicit interchange fee, even though the co-branding partner does not act an issuer. Given that, under Article 2(10) of Regulation 2015/751, the net compensation is part of the interchange fee, the court asks whether it is also not necessary for the payments to be received by the issuer in the case of net compensation.

Question 2

23 If the answer to the first question is in the affirmative, the referring court asks whether the net compensation, as part of the interchange fee, falls directly within the interchange fee cap provided for in Article 4 of Regulation 2015/751. In such a situation, there would be no need to ascertain whether that net compensation had an equivalent object or effect to the interchange fee, as required by Article 5 of Regulation 2015/751.

Interpretation of Article 5 of Regulation 2015/751

Question 3

24 Article 5 of Regulation 2015/751 establishes a prohibition of circumvention of the fees paid to an issuer. The referring court again questions whether, for three party payment card schemes, it may be considered, in the light of paragraphs 70 and 71 of Case C-304/16, that it is not necessary for the recipient of the fees to be an issuer in order for the prohibition of circumvention to apply.

Question 4(a), (b) and (c)

25 If the answer to the third question is in the affirmative, it is not clear to the referring court from the wording of Regulation 2015/751 when fees paid to a co-branding partner in a three party payment card scheme have an equivalent 'object or effect' to the interchange fee as required by Article 5 of Regulation 2015/751.

26 The referring court infers from the preparatory work relating to Regulation 2015/751 and from the Opinion of the Advocate General of 6 July 2017 in Case C-304/16 (EU:C:2017:524, inter alia, points 95 to 96, point 132 and footnote 44) that the effect or object of remuneration in such a three party payment card scheme could be equivalent to the interchange fee if that remuneration has the effect of expanding the business of the payment card scheme.

Question 5

27 Further, the referring court asks whether, in the light of the wording 'equivalent object *or* effect of the interchange fee' [emphasis added] in Article 5 of Regulation 2015/751, it is sufficient for the purposes of the application of Article 4 of that regulation that remuneration has an object that is equivalent to an interchange fee. According to the referring court, even in the light of the objective of Regulation 2015/751 of alleviating the impact on consumers of the costs associated with card-based transactions, it can be considered that it is mainly the effect of remuneration that matters in terms of such remuneration forming part of the interchange fee for the purposes of the application of Article 4 of Regulation 2015/751.

28 *Interpretation of the term 'net compensation'*

Question 6

29 The referring court is also uncertain, in the context of a three party payment card scheme, as to the method of calculating the total net amount, a term which appears in the definition of 'net compensation' in Article 2(11) of Regulation 2015/751.

30 It notes that recital 31 of Regulation 2015/751 links net compensation to the prohibition of circumvention in Article 5 of that regulation. Recital 31 states, inter alia, that, when calculating the net compensation, for the purpose of checking whether circumvention is taking place, the total amount of 'payments or incentives' received by an issuer should be reduced by the 'fees' paid by the issuer to the payment card scheme. There are therefore two flows of fees. First, the 'payments or incentives' paid by the payment card scheme to the issuer and, second, the 'fees' paid by the issuer or co-branding partner to the payment card scheme.

31 The referring court is uncertain, in the context of the three party payment card scheme at issue, without an identifiable issuer, whether the merchant service charge paid by KLM to Amex for the acquisition of credit card transactions falls within that second flow of fees and may therefore be deducted from the fees paid by Amex to KLM when calculating the interchange fee.

Question 7(a) and (b)

32 Finally, the referring court notes that the wording of the definition of 'net compensation' and recital 31 do not limit the fees to be taken into account to monetary compensation only. The referring court therefore considers that the Miles purchased by Amex from KLM could be deducted from the total amount of the fees it pays to KLM that are relevant to the calculation of the net compensation. The referring court also raises the question of how to determine the value of such non-monetary compensation in order to prevent circumvention of the interchange fee cap provided for in Article 4 of Regulation 2015/751.