

Opt-out action to compensate Portuguese consumers for anticompetitive practices by Mastercard

An opt-out representative action (popular action) was filed today at the Portuguese Competition, Regulation and Supervision Court by Ius Omnibus, a consumer protection association, aimed at compensating all Portuguese consumers who were injured by Mastercard's anticompetitive practices, identified by the European Commission.

If it is successful, this action will force Mastercard to pay damages in an estimated total of over 400 million EUR, granting each Portuguese consumer the right to an average compensation of 40 EUR.

1. What is the object of this action?

It is a popular action in the defense of diffuse and individual homogenous interests, filed by Ius Omnibus (consumer protection association).

It is an action in defense of competition and a damages action based on damage caused to consumers by Mastercard's anticompetitive practices, which infringed article 101 TFEU and article 9 of the Portuguese Competition Act (and provisions which preceded it), filed under the Popular Action Act (Law no. 83/95) and the new Private Enforcement Act (Law no. 23/2018).

2. What are Mastercard's anticompetitive behaviours raised in this action?

The action is based on **two behaviours** by Mastercard, both **identified in two decisions of the European Commission**.

In simplified terms, Mastercard:

- (1) adopted Mastercard network rules which made it more expensive than it should have been for Portuguese merchants to accept Mastercard and Maestro cards in domestic (Portuguese) transactions; and
- (2) fixed excessively high prices for transactions with cards issued outside the EEA.

In a **first decision**, of 22 January 2019 (AT.40049 *Mastercard II*), the European Commission fined Mastercard 507,5 million EUR. Mastercard confessed and did not appeal this decision. As identified in this Decision of the European Commission, between 27 February 2014 and 8 December 2015, Mastercard restricted access by merchants to cross-border services in the EU for payments with Mastercard and Maestro cards, credit and debit, for withdrawals and for card present and card not present (e.g. online) transactions. In practice, the Mastercard rules made it so Portuguese merchants could not have access to lower prices for payment card services which were practiced in other EU Member States.

Ius Omnibus will also seek to prove that Mastercard's behaviour identified by the European Commission occurred at least since 2000. And that it also affected transactions with commercial cards.

This Decision of the European Commission creates an irrebuttable presumption of the existence of the infringement. This means that the identified unlawful behaviour is already proven for the purposes of this action.

In a **second decision**, of 29 April 2019 (same case file), the European Commission accepted the commitments proposal by Mastercard, to respond to other competitive infringements which had been identified.

In this case, Mastercard set excessively high multilateral interchange fees for transactions in Portugal (in the EU) with Mastercard and Maestro cards, debit and credit, issued outside the EEA (interregional transactions), for card present and card not present transactions. The behaviour was only terminated on 29 October 2019. Ius Omnibus will also seek to prove that it occurred at least since 2000. And that it also affected transactions with commercial cards. According to EU case-law, the European Commission's preliminary analysis, which preceded this commitments decision, creates a rebuttable presumption that the infringement occurred (it's up to Mastercard to prove that there was no unlawful behaviour).

3. Who is represented in this action?

All consumers residing in Portugal are automatically represented in this action. Specifically, all-natural persons who lived in Portugal for at least part of the period during which the anticompetitive practices occurred (2000 to 2019).

Consumers needn't do anything in order to be represented and to be entitled to compensation if the action is successful.

Any consumer who wishes not to be represented in this action may exercise the right to opt-out, by communicating that intention to the court. Consumers may also decide to intervene in the case in support of Ius Omnibus.

4. How were Portuguese consumers injured by Mastercard's anticompetitive practices?

Mastercard's anticompetitive practices made it so Portuguese merchants who accepted Mastercard and Maestro cards paid more for the services of accepting payments with these cards (acquiring) than they would have paid in the absence of those unlawful practices.

Until 2015, when the EU directly regulated the prices of these services, Portugal was one of the countries in the EU where these services were most expensive.

The surcharge caused by those anticompetitive practices was then passed on by merchants to their clients. It is always consumers who end up paying for cost increases of this type, covering the entire market.

When passing on these added costs to their clients, merchants were not able to discriminate between those who paid with Mastercard cards, with other types of cards, in cash, or with other forms of payment.

This means all Portuguese consumers were affected by Mastercard's anticompetitive practices, through the increase of the prices of the products and services which they acquired, regardless of how they paid for them.

5. What is Ius Omnibus seeking?

Ius Omnibus asks that the Court declare that Mastercard infringed EU and Portuguese competition law continuously between 2000 and 2019.

It asks that Mastercard be ordered to compensate consumers represented in this action for the damage which was caused by these infringements. This damage equals the surcharge of the card acquiring services for transactions with Mastercard cards. This surcharge was passed on to consumers along the vertical chain. The damage must be updated to take into account inflation, plus interest.

6. What compensation will consumers be entitled to?

The value of the compensation will depend on the scope of the anticompetitive behaviours which the Court will conclude to have been proven. Ius Omnibus estimates that the behaviours in question, between 2000 and 2019, caused Portuguese consumers total damages of at least **400 million EUR (four hundred million euros)** – value of the global compensation to be paid by Mastercard.

The value of the individual compensation each consumer will be entitled to will depend on the value of the global compensation determined by the Court and of the characteristics of each type of consumer. A consumer who made more purchases suffered more damage than a consumer who made less purchases.

On average, if Ius Omnibus' estimate for the global compensation is confirmed, **each represented consumer** will be entitled, **on average**, to **40 EUR (forty euros)**.

These figures do not include updating to take into account inflation, nor legal interest until complete payment, which are to be added.

7. How does the popular action and the compensation of consumers work?

The mechanism for mass compensation of consumers used in this case, foreseen in the Portuguese rules on popular actions, has never been tested in practice, until the last step. However, according to the law, the following will happen if the Court finds in favour of Ius Omnibus:

- 1) the Court will determine the amount of the global compensation to be paid by Mastercard to consumers, to be paid out to a compensation fund;
- 2) the Court will decide how to identify the injured consumers and how to calculate how much each consumer is entitled to, and what he/she must present in order to claim his/her compensation;
- 3) the Court will appoint someone to manage the compensation fund, including the receipt, management and payment of compensation to injured consumers and the submission of reports to the Court;
- 4) the Court will set a reasonable deadline for consumers to claim their share of the compensation, and this will be publicized in various ways;
- 5) consumers will then have to contact the compensation fund manager and provide the evidence decided by the court and payment instructions, in order to receive their share of the compensation;
- 6) at the end of the legally set deadline, if part of the global compensation has not been distributed to consumers:
 - (i) that amount will be used to pay the expenses incurred by Ius Omnibus in the pursuit of this action; and

- (ii) the amount which is left will be surrendered to the Ministry of Justice, to be used to support access to the law and justice, including the promotion of popular actions.

8. Are there other actions of this type in Europe against Mastercard?

There are few actions such as this one in Europe against Mastercard. Most countries have very restrictive laws when it comes to the defense of consumer rights in court. Most countries do not allow, as in Portugal, for an association to seek compensation of all injured consumers (in the opt-out system).

In the United Kingdom, which does allow opt-out, an action is pending against Mastercard, based on a previous decision of the European Commission, seeking damages for consumers which total several thousand million EUR (*Merricks v Mastercard*).

9. How is this action funded?

Preparing an action of this nature in an adequate way, which allows for its success, is extremely costly, requiring the hiring of specialized lawyers, economists and consultants. The action's success is dependent on suitably handling very broad and technical facts and an extremely complex area of legal-economic knowledge, as well as reacting effectively to the vast financial and human resources which will be deployed by the other side, who benefits from profound information asymmetry.

The lack of financial resources by consumer protection association is one of the, if not the main factor which accounts for why these legal mechanisms have not been more used so far. Indeed, in the absence of public funds which can be used to finance popular actions of this nature, it is impossible for an individual consumer or an association of consumers to take on the several hundreds of thousands of euros in costs which inevitably are required to pursue such an action. The only way to pursue an action of this type it to resort to litigation funding. The practice of litigation funding is well established in other EU Member States and it is now beginning to be used in Portugal. It was litigation funding which allowed the pursuit of an opt-out consumer damages action against Mastercard in the UK. The UK's Competition Appeal Tribunal confirmed that the action would have been impossible without that funding and that, therefore,

to refuse the possibility of such funding and the remuneration of the funder would be to deny access to justice and the exercise of the rights in question.

The present action is funded by Nivalion, the leading and financially strongest litigation funder of continental Europe.

The funder assumes all of Ius Omnibus's costs of the litigation and all its risks. It will only recoup its investment if the action is successful, if and to the extent the Court authorizes it, and if enough money remains in the global compensation fund, after distribution of compensations to consumers who request their share. Under these conditions, Ius Omnibus committed to returning to the funder the money it invested, plus a fair remuneration for the risk and time it was deprived of its capital, the proportionality of which will be assessed and controlled by the Court.

The funding agreement guarantees the prevention of money laundering and terrorism financing and the transparency of the source of funding before the Court.

This funding model ensures that consumers will not have to bear any of the costs of pursuing this action, and that **any consumer who claims their share of the compensation** at the end of the case **will be entitled to 100% of his/her compensation.**

10. About Ius Omnibus

Ius Omnibus is a not-for-profit association, created in March 2020, with the objective of defending consumers in the European Union. It is headquartered in Portugal and has members from several European countries. The members of the bodies of Ius Omnibus are not remunerated.

The Board of Ius Omnibus is as follows:



Ana Gomes
President
Former member of European Parliament



Julia Suderow
Vice-President
Professor at Deusto University



Maria José Azar-Baud
Vice-President
Professor at Paris-Sarclay University

Ius Omnibus is represented in this case by the law firms Sousa Ferro & Associados and Pais de Vasconcelos & Associados.

For further information or requests for interviews, please contact:

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