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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Competition and Payment Systems held by the Competition Committee in October 2012.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la concurrence et les systèmes de paiement qui s'est tenue en octobre 2012 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

In light of the written submissions and the oral discussion, the following points emerge:

- (1) *An aim of competition enforcement is to identify, stop and deter anti-competitive arrangements and behaviour by market participants, particularly when it has a direct impact on consumer welfare. In the payment systems sector, where many markets operate with multi-sided platforms, anti-competitive arrangements and behaviour may have an impact on participants in different markets, be they consumers, merchants or banks.*

An initial consideration for competition authorities is generally to properly define the relevant markets that an arrangement or behaviour affects. Many relevant markets in the payments systems sector involve multi-sided platforms. It is appropriate to consider this industry characteristic, just as any other relevant industry characteristics are appropriate to consider in the process of obtaining a thorough understanding of how a particular market functions; competition analysis is always a fact-driven process. In markets with multi-sided platforms, a number of markets may be affected by a restriction on competition, but the competition analysis will normally focus just on the relevant market where the restriction of competition is found. For example, in the EU's decision concerning MasterCard MIFs, the relevant market where the effect on competition was analysed was the acquiring market, although the issuing market and wider inter-system market were also defined. In the EU's decision concerning Visa / Morgan Stanley, the relevant market was also defined as the acquiring market, whereas in the EU's case against Groupement des Cartes Bancaires, the relevant market was defined as the issuing market.

- (2) *Restrictions of competition in payment markets may have a variety of impacts on different consumer groups given the multi-sided platforms that operate in many of these markets.*

When assessing the impact of potentially anti-competitive behaviour like, say, the setting or changing of interchange fees ("IF"), one should take into consideration that this might affect different groups of consumers in different ways. First, when faced with a reduction in the IF, the merchants may keep some of that reduction and pass-on some to the cardholder and other customers in the form of lower prices. Secondly, the bank may see an increase in card payments compared to cash payments (if merchants promote card payments at a lower fee) but they may also perhaps try to increase prices to cardholders and other bank clients to make up for decreased IF revenue. But in this case, the account holders are likely to consider switching banks and any collective action by banks may face antitrust enforcement. This illustrates that assessing the impact on different groups of consumers may be complicated, when the effects on different markets are taken into account. It is important to recognize that one group of consumers (e.g., merchants) may be disadvantaged, even if there may be potential benefits to other consumer groups. Moreover, the critical point to recall is that competition policy is aimed to protect the *process* of competition, not to assure any particular outcome.

One person argued that the overall impact on cardholders cannot be determined unless we know the rates of merchant pass-through and bank pass-through. However, the existing research on this

topic is far from consensual and it is possible that different market conditions will yield different rates of pass-through in different countries or regions of the world. It is also possible that the merchants' or the banks' pass-through is not purely price-based, i.e. that it can impact the quality and level of service and not necessarily only the price. Also, banks may pass-through benefits to cardholders in the form of loyalty points or other types of benefits. All of this makes the proper estimation and comparison of pass-through rates very difficult and so one should be cautious when trying to empirically calculate the overall impact on cardholders. In any event, this issue is not essential for competition enforcement, given that there are a number of other consumer groups (e.g. merchants, non-cardholders, etc.) who are affected by anti-competitive arrangements or behaviour. Moreover, it is important that competition analysis be workable; extensive consideration of possible effects that are increasingly remote to the behaviour at issue (cf. Effects of a cartel on the price of its members' purchases of inputs) is, in many cases, unlikely to be useful.

- (3) *It is generally accepted that competition authorities and regulators should try to minimise barriers to entry or exit into payment systems and to abolish restrictions on market participants' behaviour, like the 'no surcharge' rule, the 'no-steering' rule, or the 'honour all cards' rule. However, there can be unintended consequences and not all systems require the same approach.*

When retailers accept a card, they are often bound by rules imposed by the card brand governing how merchants must behave with respect to the card. In particular, certain rules have the effect of limiting the retailers' ability to influence the choice of payment mechanism by the customer. These rules can make merchants less sensitive to merchant fees, by making their demand for card services more inelastic. The rules also limit the ability of merchants to negotiate for lower rates. Thus, these rules can negatively affect competition among payment systems.

Governments have often intervened when it was thought that such rules were inconsistent with desired policy goals. One of the main rules of concern is the 'honour all cards' rule.

The 'honour all cards' rule states that if a card brand is accepted, all cards issued under that brand must be accepted. This rule has been challenged by some competition authorities because it ties a product that merchants felt they had to accept (the main card system) with a product the merchants did not want to accept (like a new card or a more expensive card).

While some jurisdictions have challenged the 'honour all cards' rule as they felt that this "all or nothing" approach denied merchants the ability to steer customers away from cards that impose significantly higher fees on merchants (like premium credit cards), others felt that the cumulative effect of removing other rules (like the 'no surcharge' or the 'no steering' rule) made it unnecessary to challenge the 'honour all cards' rule.

Other rules of concern are the 'no surcharge' rule and the 'no steering' rule. They prohibit merchants from setting different prices depending on the mode of payment. The ability of merchants to surcharge or steer may change the terms of negotiation with a card acquirer or network over merchant fees, even if the merchant does not in the end choose to surcharge its customers.

Several countries tackled the issue of the 'no surcharge' rule, but did not all come up with the same solution. For instance, Denmark and Norway decided to prohibit the 'no surcharge' rule, at least in some situations. In particular, Denmark introduced the possibility of surcharging the use of credit cards while not allowing surcharge in the use of debit cards. This was seen as giving the merchants the incentives to direct customers towards the national debit card scheme that was

considered to be the most cost-efficient payment card without discriminating against debit cards from other countries.

On the other hand, Norway, after prohibiting the 'no surcharge' rule, noted that there has been a very low penetration of surcharges amongst the merchants in their country. This was, apparently, caused by the slow development of the required technology, the fact that merchants still find it costly to implement surcharging, and a first-mover disadvantage for merchants, particularly for face-to-face transactions as opposed to internet transactions.

Similarly, a market investigation in Romania found that merchants by and large prefer not to apply price differentials. However, the Romania competition authority indicated that due to the complex trade-offs between efficiency, consumer protection, transparency and competition, the 'no surcharge' rule would be carefully examined in their country.

- (4) *There is currently a debate about the importance and the role of the Multilateral Interchange Fee ("MIF") in a payment system. There is the question of whether the MIF is necessary for the operation of the payment system and the question of whether bilaterally agreed interchange fees can replace a MIF.*

In several OECD countries, competition authorities have found that multilateral interchange fees ("MIFs") for four-party payment systems infringe competition law. Other OECD countries have regulated MIFs. The reason is that MIFs have the object or effect of fixing a floor for the merchant service charges and that MIFs may not be necessary for the operation of the payment system.

In particular, the EU concluded in the MasterCard decision, upheld by the EU's General Court in 2012 but now appealed by MasterCard to the EU's Court of Justice, that MIFs are a decision of an association of undertakings and that MIFs are not objectively necessary for the operation of a four-party scheme. This was based on a number of factors including (a) the existence of card schemes without MIFs in some countries, (b) the advantages that issuers receive from cards (e.g. cost savings for debit cards and interest revenue for credit cards) even if there is no MIF, and (c) the experience in countries which had lowered MIF levels significantly without significant disruption to card issuing.

There is not a unanimous view on this. In some instances, decisionmakers have concluded that MIFs were important to the operation of a card scheme. Other jurisdictions concluded the opposite: banks had sufficient incentives to issue cards without the additional stimulation of an interchange fee.

It was generally acknowledged that MIFs are more likely to be needed to launch a new card or payment system where the principal barrier is the issuing of the new cards or payment system. If the usage or demand of the payment card is widespread or the system is already well established, it is likely that the MIF will not be needed.

An interesting case in Hungary concerned the EU's decision to accept commitments from Visa to cap the domestic interchange fees for its debit cards, even though MasterCard has not offered similar commitments. Previously the Hungarian competition authority had prevented the Hungarian banks from setting their own MIF rates in Hungary, and so a number of Hungarian banks have recently switched from issuing Visa debit cards to MasterCard debit cards, despite the risks of fines and private damages. This suggests that regulation may be desirable to help card schemes and banks bring their behaviour into line with competition rules and objectives.

- (5) *Innovation in payment systems may develop and may create new opportunities for players to enter the payments sector while creating new challenges for competition authorities and regulators.*

New technologies are providing new avenues for companies to enter the payments sector. One of the fastest developing technologies comes from the telecommunications industry, with the development of mobile payment technologies. For example, special chips can be put into mobile phones that, in the future, could constitute a part of a payment service. Whether these developments would be a complement or a substitute for existing card systems remains to be seen. For internet payments, there is rapid development in some countries (e.g. the Netherlands) of the use of credit transfers with an immediate acknowledgement of payment. For face-to-face payments, direct debits, where the basic information is extracted from a card, are used in some countries (e.g. Germany) in place of many traditional card payments.

The general implication of these developments is that, for the first time, there is a possibility that innovation in the payment system technology would be driven not by banks or networks, but by other players. This could have the impact of forcing banks or networks to innovate, or it could enable the entry into some payment systems markets of non-banks, like mobile-phone companies and others. This could provide a new impetus for innovation and growth in a market where there have been previously concerns about the pace of innovation, due to the fact that payment systems have been owned or controlled by banks. Yet these developments are uncertain. There may be more opportunities for entry into complementary products and services than into substitutes for existing payments systems providers. It will be important to ensure that competition from new sources is not unreasonably restrained.

Additional regulatory challenges posed by the new developments are manifold. First, authorities need to make sure that the incumbents (*i.e.* the banks) allow any new systems to develop and to test, in markets, whether they are more efficient, less expensive, and desired by consumers. Second, regulations should adapt to the new products and the new providers by making sure that there are adequate protections for fraud and financial stability but also that markets are not regulated in a way that excludes new providers. A particular challenge for European regulators and authorities will be to make sure that the Single Euro Payment Area is flexible enough to accommodate these new technologies and systems.

Third, competition authorities should try to understand how much change will be brought on by the new technologies and quickly identify and tackle any competition problems that may arise, before the market tips in favour of a particular system. They should also ensure that the problems with competition in the existing payments instruments (e.g. excessive MIFs and restrictive scheme rules such as the 'honour all cards' rule, the 'no steering' rule, or the 'no surcharging' rule) should not be carried over into the new technologies. This is particularly true, for instance, in the choice among alternative new technologies regarding the security aspect of the transaction. Care should be taken that competition problems and bottlenecks are not unnecessarily created by the ways in which new technologies are implemented or are treated by market incumbents.

Finally, the last challenge concerns social policy. There is a real question whether the new technologies would increase financial exclusion, because they would be replacing cash with technologies that could be harder for some segments of the community to use. Likewise, some sections of society may simply not have access to the same kind of mobile phones, internet and other technology.

CANADA

Introduction

This paper provides a brief overview of the electronic payments landscape in Canada, focusing on recent market developments and, more particularly, the Competition Bureau's (the "Bureau") legal challenge to Visa and MasterCard's anti-competitive practices in relation to the rules they impose on Canadian merchants. This application was heard by the Competition Tribunal (the "Tribunal") in May and June of 2012 and is currently on reserve.¹

The Bureau is an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act*. The Bureau is mandated with ensuring that Canadian businesses and consumers prosper in a competitive and innovative marketplace.

1. History of electronic payments in Canada

Canada has a highly developed payment card infrastructure. The roots of this system date back to the late 1960s, when general purpose credit cards were first issued in Canada.² The Visa brand was introduced in Canada in 1977, followed by the MasterCard brand in 1979.³ Today, Visa and MasterCard collectively account for approximately 92 percent of the value of credit card transactions in Canada.⁴ American Express, which entered the Canadian marketplace in the early 1990s, is the most recent credit card brand to gain acceptance and use in Canada, and today holds a market share of approximately 8 percent.⁵

In 1994, Interac Direct Payment ("Interac"), a PIN debit network, was launched in Canada.⁶ Compatibility between Interac debit and the automatic banking machine ("ABM") cards carried by the majority of Canadians contributed to the widespread and rapid adoption of the former as a preferred payment system for consumers. By the same token, the relatively low (and generally fixed) cost of Interac payment processing made the system particularly attractive to merchants, especially when compared to the *ad valorem*, percentage-based fees charged to merchants by Visa, MasterCard and American Express.

¹ The documents referenced in this paper relating to the Competition Bureau's case against Visa and MasterCard can be retrieved from the Competition Tribunal website by searching for case CT-2010-010 or following the attached hyperlink: <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=333>.

² See <http://www.rbc.com/history/quicktofrontier/chargex-visa.html> and http://www.mastercard.com/ca/company/en/corp_history.html.

³ *Ibid.* See also http://www.mastercard.com/ca/company/en/corp_history.html.

⁴ Task Force for the Payment System Review, *Credit and Debit Card Markets*, p. 20. (http://paymentsystemreview.ca/wp-content/themes/psr-esp-hub/documents/r04_eng.pdf).

⁵ *Expert Report of Mike McCormack* (CT-2010-010), para. 16(e), p. 7. See also Task Force for the Payment System Review, *Credit and Debit Card Markets*, p. 20.

⁶ See <http://www.interac.ca/about.php>. PIN debit utilizes short "personal identification numbers" for cardholder verification, rather than signatures.

Interac debit cards have proven to be extremely popular with both merchants and consumers, and have surpassed credit cards as the most heavily used electronic retail payments medium in Canada.⁷ Interac debit is the cheapest form of payment for many Canadian merchants to accept, with median transaction fees estimated at \$0.12 per transaction.⁸ Continued low fees for payment processing are ensured by a wide-ranging Consent Order agreed upon by Interac and the Bureau in 1996, one element of which requires that Interac operate on a cost-recovery basis.⁹

Following the growth of Interac, the Canadian electronic payment cards landscape remained relatively stable, from a competition standpoint, until MasterCard and Visa undertook their initial public offerings in 2006 and 2008, respectively. These initial public offerings marked the conversion of Visa and MasterCard from associations of competing banks to independent, for-profit corporations.

Prior to this time, the Bureau had been concerned that permitting a financial institution to be a member of both Visa and MasterCard ("duality") could allow one credit card network to negatively influence the competitive operation of the other through common governance. However, with the Visa and MasterCard associations dissolved, the Bureau released a public letter to Canadian financial institutions, advising them that it would not pursue enforcement action under the *Competition Act* against an institution that issued or processed the transactions of multiple credit card brands.¹⁰

Contemporaneously, the credit card networks began making significant changes to their own operations in Canada. Starting with the launch of Visa's Infinite credit card in early 2008, Visa and MasterCard rolled out an assortment of so-called "premium" credit card programs, with higher rewards and other benefits (such as 24 hour concierge service).¹¹ These cards cost Canadian merchants significantly more to process than basic credit cards, but provide them with little or no added benefit.¹²

Continuing the trend, in March 2010, MasterCard introduced the "MasterCard World Elite", a so-called "super-premium" credit card offering even higher rewards.¹³ Again, Canadian merchants received negligible, if any, benefits in exchange for considerably higher transaction processing fees.

By early 2009, merchants began to voice serious concern with the increasing cost of credit card acceptance.¹⁴ Credit card processing costs were escalating far faster than other expenses, with the vast majority of merchants having little or no countervailing bargaining power.¹⁵

⁷ Task Force for the Payment System Review, *Credit and Debit Card Markets*, p. 12.

⁸ Carlos Arango and Varya Taylor, "Merchants' Costs of Accepting Means of Payment: Is Cash the Least Costly?", Bank of Canada Review (Winter 2008-2009).

⁹ See <http://www.ct-tc.gc.ca/CMFiles/0092a38PEW-3102004-3532.pdf>. On June 25, 1996, the Tribunal issued a consent order against Interac Inc. and nine of the charter members of the Interac Association. In addition to stipulating that Interac operate on a cost recovery basis, the consent order required the respondents to expand representation on the Association Board and change its rules and by-laws so as to liberalize access to the network, as well as eliminate constraints on product innovation and price competition. The consent order has been varied on several occasions since it was first issued but the essential elements remain binding on the respondents.

¹⁰ See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02749.html>.

¹¹ Task Force for the Payment System Review, *Credit and Debit Card Markets*, pp. 21-22.

¹² *Witness Statement of Michael Shirley* (CT-2010-010), paras. 26-28; *Witness Statement of Tim Broughton* (CT-2010-010), para. 15; *Witness Statement of Charles Symons* (CT-2010-010), para. 42; *Witness Statement of Paul Jewer* (CT-2010-010), para. 41; *Witness Statement of Candice Li* (CT-2010-010), para. 28.

¹³ Task Force for the Payment System Review, *Credit and Debit Card Markets*, p. 22.

Merchant concern with these trends led Canada's federal Department of Finance to establish, on April 16, 2010, a voluntary Code of Conduct for the Credit and Debit Card Industry in Canada (the "VCC").¹⁶ The purpose of the VCC is threefold: (1) to ensure that merchants are fully aware of the costs associated with accepting payment cards; (2) to explicitly authorize merchants to discount for different methods of payment and different payment card networks; and (3) to allow merchants more freedom in choosing which payment options to accept.¹⁷ While technically voluntary, the VCC has been adopted by all the major payment networks and financial institutions operating in Canada.

More recently, in March 2012, a federally-mandated Task Force for the Payments System Review released a report recommending significant changes to the way Canada's payments system operates.¹⁸ The report calls for the modernization of Canada's payments architecture, including improving industry governance and facilitating digital payment methods, such as electronic invoicing and payments ("EIP") and mobile payments.¹⁹ The Department of Finance subsequently proposed certain amendments to the VCC to address the mobile payments market in Canada, which is still in its early days of development.²⁰

2. Competition Bureau Investigation

In April 2009, the Bureau commenced an inquiry into the merchant rules and pricing of Visa and MasterCard. The inquiry was prompted by merchant complaints of rapidly escalating processing fees and of the restrictive rules imposed on them by Visa and MasterCard.

Beginning in 2008, the "merchant discount rates" or "merchant service fees" paid by Canadian merchants for credit card processing began to rise significantly. Today, credit cards represent the most expensive form of payment for many Canadian merchants.²¹ Within a merchant service fee is a number of components, including an acquirer margin, network fees for the use of the Visa and MasterCard infrastructure, and an interchange fee payable to the credit card issuing bank. Of most concern to the Bureau is the interchange fee component, which can represent more than 80 percent of a given merchant service fee.²²

Interchange fees are set by Visa and MasterCard, but are remitted to the financial institutions that issue credit cards. In essence, interchange fees represent a portion of Visa and MasterCard's merchant-derived revenue that is allotted directly to the issuing banks. This is done in an effort to incent the issuance of their respective brand of credit cards, through increased promotion and cardholder rewards.

¹⁴ See, for example, statements by the "Stop Sticking It To Us" Coalition (<http://www.newswire.ca/en/story/499731/parliamentary-hearings-to-probe-visa-mastercard-gouging>).

¹⁵ See, for example, *Witness Statement of Tim Broughton* (CT-2010-010), paras. 13-14.

¹⁶ See <http://www.fin.gc.ca/n10/10-029-eng.asp>.

¹⁷ See http://www.fin.gc.ca/n10/data/10-049_1-eng.asp.

¹⁸ See <http://www.fin.gc.ca/n12/12-030-eng.asp>.

¹⁹ Task Force for the Payments System Review, *Moving Canada into the Digital Age*, p. 10.

²⁰ See http://www.fin.gc.ca/n12/data/12-106_1-eng.asp.

²¹ *Witness Statement of Charles Symons* (CT-2010-010), paras. 19 & 40; *Witness Statement of Paul Jewer* (CT-2010-010), paras. 25 & 37; *Witness Statement of Mario De Armas* (CT-2010-010), paras. 22 & 41; *Witness Statement of Craig Daigle* (CT-2010-010), paras. 15 & 25.

²² *Closing Submissions of the Commissioner of Competition*, paras. 82, 88-90 (CT-2010-010). See also *Notice of Application* (CT-2010-010), paras. 43-44; *Witness Statement of Mario DeArmas* (CT-2010-010), para. 37; *Witness Statement of Paul Jewer* (CT-2010-010), para. 31.

In a typical, competitive market, how a company chooses to allocate revenue is rarely a concern to competition authorities. In this instance, however, the credit card networks have imposed rules on merchants that prevent the market from functioning competitively. While the merchant rules of each network are formulated slightly differently, the Bureau's view is that their anti-competitive effects are fundamentally the same. Both Visa and MasterCard impose so-called "no-surcharge" and "honour-all-cards" rules on merchants, as non-negotiable conditions of credit card acceptance. Moreover, both networks provide that merchants who violate the rules can face a number of sanctions, up to and including the termination of all credit card processing – a consequence which can have dire effects on a merchant's financial viability.

The no-surcharge rules prohibit merchants from imposing additional fees on consumers based on a consumer's choice of a credit card as a method of payment.²³ This operates as a price parity requirement, ensuring that no purchase made by way of a credit card, even a premium one, will be more expensive for the consumer than an equivalent purchase made by way of cash or an Interac debit card.²⁴ Since credit cards are significantly more expensive for merchants to process than most other payment methods in Canada, the no-surcharge rules effectively force users of other payment methods to subsidize the cost of credit card processing. The end result is that all consumers pay for the rewards earned by a privileged minority of premium cardholders.²⁵

If the no-surcharge rule did not exist, merchants would have the unfettered ability to differentially price transactions based on payment method, allowing price signals to be properly and efficiently transmitted to consumers. The Bureau believes that, even without actually instituting differential pricing, merchants could use the *threat* of surcharging to instigate the price negotiations that characterize typical markets.

The Bureau also believes that the anti-competitive harm stemming from the inability of merchants to differentially price transactions, and to engage in meaningful negotiations relating to interchange fees, is amplified by the existence of the honour-all-cards rules, which require merchants accepting any Visa or MasterCard branded credit cards to accept all credit cards issued under that brand.²⁶ In the Bureau's view, the elimination of the honour-all-cards rules would free merchants to negotiate acceptance of credit cards on a product by product basis, rather than being required to accept all credit cards of a given brand, regardless of processing cost.

In light of the above, on December 15, 2010, the Bureau filed a civil application with the Tribunal to strike down the no-surcharge and honour-all-cards rules imposed by Visa and MasterCard.²⁷ The

²³ See Rule 5.11.2 of the *MasterCard International Rules* (http://www.mastercard.com/us/merchant/pdf/BM-Entire_Manual_public.pdf) and Section 5.1.C of the *Visa International Operating Regulations* (http://corporate.visa.com/_media/visa-international-operating-regulations.pdf).

²⁴ While discounting is permitted in Canada under the VCC, it is not an effective substitute for surcharging. See *Witness Statement of Pierre Houle* (CT-2010-010), para. 62; *Witness Statement of Michael Shirley* (CT-2010-010), paras. 39-41; *Witness Statement of Charles Symons* (CT-2010-010), paras. 65-69; *Witness Statement of Craig Daigle* (CT-2010-010), paras. 39-42; *Witness Statement of Paul Jewer* (CT-2010-010), paras. 55-60.

²⁵ *Witness Statement of Charles Symons* (CT-2010-010), para. 45.

²⁶ See section 5.8.1 of the *MasterCard International Rules* and Core Principle 6.2 of the *Visa International Operating Regulations*.

²⁷ The Competition Tribunal is a specialized Canadian tribunal that combines expertise in economics and business with expertise in law. Membership in the tribunal is composed of qualified lay members and judges of the Federal Court.

application, filed under section 76 of the *Competition Act*, does not directly challenge interchange fees, but rather takes the position that the no-surcharge and honour-all-cards rules of Visa and MasterCard combine to eliminate competition between the two networks for merchants' acceptance of their credit cards, resulting in increased costs to businesses and, ultimately, consumers.²⁸

The Bureau's application asserts that without the ability of merchants to surcharge credit card transactions, refuse to accept certain credit cards or otherwise effectively encourage their customers to use lower cost methods of payment (including credit cards with lower card acceptance fees), neither Visa nor MasterCard, nor any of the participants in their respective networks, have any meaningful incentive to compete with respect to card acceptance fees by, for example, lowering interchange fees.²⁹

While recognizing the two-sided nature of credit card networks, which face interdependent demand from merchants and cardholders, the Bureau's application focused on the merchant side of the network, where the rules at issue were imposed by Visa and MasterCard. The Bureau does not accept that the existence of a two-sided network in any way alters the analysis of the relevant issues in the Bureau's case, including the definition of the appropriate relevant market.³⁰ This approach is consistent with precedent from a recent decision of the European General Court, reasoning from prominent members of the US antitrust community, and the analysis of independent expert witnesses who testified before the Tribunal.³¹

The hearing of the Bureau's application commenced on May 8, 2012 and concluded on June 21, 2012. The parties to the proceeding are currently awaiting a ruling from the Tribunal.

²⁸ *Notice of Application* (CT-2010-010). Section 76 of the *Competition Act* is a civil price maintenance provision which prohibits (among other things) vertical agreements that influence upwards or discourage the reduction of prices, where such agreements have an adverse effect on competition.

²⁹ *Ibid*, para. 14.

³⁰ *Closing Argument of the Commissioner of Competition* (CT-2010-010), para. 248.

³¹ See, for example, MasterCard, Inc et al v European Commission, Judgment of the General Court (Seventh Chamber), 24 May 2012; "Defining Relevant Product Markets in Electronic Payment Network Antitrust Cases", Renata B. Hesse and Joshua H. Soven, 73 *Antitrust L. J.* 709 (2005-2006); and *Reply Expert Report of Ralph A. Winter* (CT-2010-010), para. 48.

DENMARK

This note represents the Danish Competition and Consumer Authority's contribution to the 2012 OECD roundtable on "Competition issues in payment systems" to be held at the meeting of the competition committee on 24-25 October 2012.

The note constitutes an update to the Danish contribution to the 2006 roundtable held on competition and efficient usage of payment cards (DAF/COMP(2006)32). This current update focuses on the relevant developments as well as some new perspectives of recent developments that characterizes the Danish payment card market at the moment.

1. Structural Conditions

1.1 Background on market structure

There are a number of characteristics within the Danish payment card market that are quite specific for the Danish market.

Firstly, Danish consumers are among the consumers in Europe who mostly use payment cards as means of payment. This is the case both in regards to shopping in a regular shop (physical trade) and in regards to E-commerce (internet shopping).

Secondly, Dankort (a national issued electronic debit card) is the most widely used electronic payment instrument in Denmark. The number of Dankort issued in Denmark has increased almost continuously since Dankort was first issued in the early 1980's. At the end of 2011 there were issued approximately 4.5 million Dankort, which exceeds the number of inhabitants over 18 years in Denmark. In 2011 the total spend using the Dankort was nearly 300 billion DKK, which corresponds to an average spend per capita of approximately 87,000 DKK.

The number of Danish issued international payments cards has increased during the last couple of years, and there is today more international payment cards issued than Dankort. In 2011 there were issued between 4.5 and 5.5 million international payment cards in Denmark. In comparison there were issued between 1.5 and 2.0 international payment cards in 2006 at the last OECD roundtable. The number of transactions in 2011 made with international payment cards was around 150 million, which is significantly lower than transactions made with Dankort that amounted to 922 million.

The Dankort is owned by Nets, and Nets is the single acquirer of Dankort. If businesses want to be able to receive Dankort as means of payment, they must use Nets as their acquirer, and Nets and its subsidiary Teller, who acquirers international payment cards, have therefore become the central acquirers on the Danish payment card market because of Nets monopole regarding Dankort. The reason for this supposedly being that many retail businesses prefer to have only one acquirer, and therefore chose to use Nets/Teller as their sole acquirer not just for Dankort but for the acquiring of all payment cards that they wish to be able to receive as means of payment.

On the one hand, the widespread use of Dankort is cost efficient due to the existence of fixed costs, but on the other hand the very high concentration on the acquirer side implies a low level of competition, which, all else equal, may hamper cost efficiency and innovation.

This being said, other acquirers (such as Swedbank, Valitor and Handelsbanken) also operate in the Danish market, but to a much lesser extent.

In the Danish 2006 contribution it was mentioned that American Express returned to the Danish market in 2000 in cooperation with one of the largest Danish banks. Currently, this bank no longer issues American Express cards, and to the DCCA's knowledge there are not any other Danish banks that do issue American Express cards at the moment.

Thirdly, the Danish regulation of fees with particular regards to rules on surcharging is quite particular to the Danish system. In 2011 a so called "Split-model" was implemented which in relation to surcharging in the physical trade distinguishes between debit and credit cards. Hence, surcharging of merchant service charges is allowed with all credit cards, whereas surcharging is prohibited with all debit cards. See section 2.3 for more information on this.

1.2 Social costs and benefits of different payment systems

Regarding the social costs and benefits of different payment systems Danmarks Nationalbank (the Danish central bank) has conducted a study of costs of payments in Denmark. The National Bank concludes:

"The survey shows that there are considerable social costs linked to payments. For the payment methods covered by the survey, these costs totalled kr. 16.6 billion in 2009, corresponding to 1.0 per cent of the gross domestic product, GDP, cf. Table 2.

Broken down by types of payments, costs of payments at point of sale totalled just over kr. 9 billion. Costs per payment were lowest for Dankort payments at around kr. 3 per payment, while the social costs per cash payment amounted to just over kr. 7. Payments with international cards involved the highest costs per payment".¹

Table 2: Social costs of payments in Denmark, 2009

	Total (billion DKK)	Per payment (DKK)
Payments at point of sale	9,1	-
- Cash	5,8	7,36
- Dankort	2,5	3,15
- International debit cards	0,5	11,89
- International credit cards	0,4	21,17
Online card payments	0,3	-
- Dankort	0,2	4,10
- International debit cards	0,1	12,70
- International credit cards	0,1	21,49
Other remote payments	7,2	-
- Online banking transfers	1,8	36
- Other transfers	2,9	57
- Betalingsservice	2,5	15
All payments	16,6	-

¹ See Summary, p. 7 in "Costs of Payments in Denmark", Danmarks Nationalbank. Website: http://nationalbanken.dk/DNUK/Publications.nsf/side/Cost_of_payments_in_Denmark!OpenDocument

Regarding the infrastructure on the Danish payments market, Danmarks Nationalbank concludes:

“For payment services, common solutions and products offer advantages. In Denmark, the banks have, for many years, cooperated on developing a common infrastructure for payments. Key elements are the Dankort and Betalingsservice, which all banks offer their customers. The low costs for the Dankort according to the survey are due in particular to the large number of payments with this card. Given the existence of fixed costs, payment types with large number of payments will, all else being equal, involve low costs per payment.”²“

1.3 New payment technologies

As for new payment technologies emerging on the Danish payment market, the Danish Competition and Consumer Authority has currently been informed that the four mobile network operators in Denmark are planning to cooperate on the creation of a common mobile payment solution, a so called mobile wallet.

The solution implies that consumers can carry out payments directly from their bank accounts by means of their mobile phone. The cooperation between the mobile operators may be similar to that established by the British mobile operators recently approved by the Commission (COMP/M.6314) and to the Swedish solution “Wy Wallet”.

The Danish operators intend for the mobile wallet to be an open platform, so that other interested companies wishing to supply mobile payments may be able to use this infrastructure.

The Danish Competition and Consumer Authority has not assessed the competitive implications of this cooperation agreement but considers in general that emergence of new payment infrastructures is beneficial to competition in the market for payment infrastructures. Today there are a few other payment solutions on the Danish market that are alternative to the traditional card payments or payments through the mobile telephone bill, such as Pay-Pal and the Danish “Mobilpenge.dk” (a mobile payment solution supplied by the banks and Nets) but they hold very limited market shares.

2. Fees and Charges

2.1 Merchant service charges

When looking at the different levels of merchant service charges (MSC’s) which is a fee that the acquirer puts on the merchants as payment for being able to accept electronic payment cards, it is important to distinguish between MSC’s for Dankort vs. MSC’s on other payment cards *and* between the physical vs. the non-physical trade.

The Danish acquirers are obliged by government order to publish their maximum MSC levels. However, the merchants may negotiate individually with the acquirers regarding MSC levels for their individual agreements. In the following Teller’s (Nets) maximum MSC-levels are described.

Regarding MSC’s on *Dankort* in the *physical trade* the Danish merchants pay a yearly subscription fee to Nets for accepting Dankort. A ministerial order sets a ceiling for the total MSC-amount which Nets can charge from the merchants per year. In 2012 this ceiling was 282 mio. DKK (38m euro), corresponding to half of the costs of operation the Dankort payment system.

² See Summary, p. 9 in “Costs of Payments in Denmark”, Danmarks Nationalbank.

The total yearly fee is divided between the merchants depending on the number of transactions during the year for each merchant. The merchants are divided into eight groups.

Figure 1: MSC for Dankort in the physical trade in DKK

Number of transactions per year	Annual subscription fee in 2012
1 - 499	642
500 - 4.999	836
5.000 - 19.999	4,624
20.000 - 49.999	16,008
50.000 - 124.999	22,428
125.000 - 199.999	31,248
200.000 - 399.999	61,636
400.000 -	119,852

Regarding MSC's on *Dankort* in the *non-physical trade* the MSC's are set by Teller according to the art. 79 in the Danish Payment Services and Electronic Money Act (the PSEM Act), see section 2.3. Hence, the annual subscription fee does not apply to *Dankort* payment transactions in the non-physical trade. MSC for accepting *Dankort* in the non-physical trade varies between 0.70 DKK to 1.45 DKK + 0.10% according to the transaction value.

Figure 2: MSC for Dankort in the non-physical trade

Transaction value	MSC
Below 50 DKK	0.70 DKK
Between 50-100 DKK	1.10 DKK
Above 100 DKK	1.45 DKK + 0.10 %

Regarding the MSC levels on international payment cards these also are set by the acquirers according to the art. 79. Maximum MSC published on acquirers website can vary between 0.95 % and 3.50 % depending on type of payment card and other factors.

2.2 Interchange fees

In general interchange fees could be reasoned by an attempt to maximize social welfare through usage of the payment card.

However, from a competition point of view interchange fees can also be viewed as problematic if they result in the setting of a floor for the fee level of the merchant service charges. This may often be the case and will thus constitute a limitation of the competition on the market, since the interchange fees then result in higher prices whilst preventing market integration.

In Denmark all interchange fees are a payment from acquirer to issuer. The domestic interchange fee levels are agreed in a multilateral agreement between the Danish banks and Nets, and are thus not regulated or approved by the government. For the international credit cards the DCCA has observed the following levels for domestic multilateral interchange fees (MIFs):

- MIF for sector specific credit cards (supermarkets): 0.40 %
- MIF for non-sector specific credit cards: 0.75 %
- MIF for commercial credit cards: 0.75 %

In the Danish roundtable contribution from 2006, section 2.3 on Interchange fees, it is mentioned that the DCCA had chosen to initiate a separate investigation of the interchange fee for non-physical Dankort transactions. With this investigation the DCCA found that the levels of the interchange fees were reasonable and adequate at the time being, since the fee levels reflected the banks' issuing costs (see section 6.1. for more info on the investigation).

On the European level, there is currently much attention drawn to the multilateral interchange fees regarding cross-border transactions, e.g. regarding Visa's and MasterCard's multilateral interchange fee structures. The DCCA will be following these cases closely.

2.3 *Regulation of fees*

In Denmark fees involved in card transactions are regulated in the Danish Payment Services and Electronic Money Act (the PSEM Act), as mentioned above. The area has been regulated by law since 1984 when the first act on payment cards was implemented. Amongst other things the PSEM Act regulates acquirers' possibility to charge fees from merchants accepting payment instruments for the covering of the costs of operation a payment system.

The act has been reviewed and changed many times since 1984. Today the act is overall a reflection of the European Payment Services Directive (2007/64/EF). In the following the most important changes and amendments to the first regulations will be mentioned:

Regarding MSC's: Apart from MSC's on Dankort in the physical trade, which are regulated by the above mentioned annual subscription fee model decided by government order, all MSC's in Denmark, including MSC's for international payment cards, are subject to art. 79 in the PSEM Act.

The PSEM act art. 79 stipulates that unreasonable prices and profit margins may not be applied in setting charges etc. in connection with execution of electronic payment transactions. Unreasonable prices and profit margins mean prices and profit margins which are greater than those which would apply under effective competition. This means that the DCCA may impose reduction of fees in question, if they are found unreasonably high.

In the period 2005-2011 there were caps in the physical trade regarding MSC levels for domestic issued international credit cards and debit cards of 0.75 % and 0.40 % respectively. These price caps were eliminated in 2011 in order to provide uniform rules for both domestic and foreign issued payment cards.

Regarding surcharging: From 2005-2011 merchants were not allowed to surcharge MSC's, when payment was made with domestic issued payment cards in the physical trade. On the other hand, surcharging was allowed when payment was made with foreign issued payment cards. However, new rules regarding surcharging were also introduced in 2011.

The new rules now allow merchants in *the physical trade* to surcharge fees to consumers who pay with credit cards, while it is not allowed to surcharge fees for using debit cards. This division between debit and credit cards in relation to surcharging is called "the Split Model".

There have been no further changes regarding the rules for use of payment cards in the *non-physical trade*, including e-commerce (internet-shopping). Hence, the regulation is common for all payment cards in the non-physical trade; Merchants are allowed to surcharge no matter, which payment card the consumer uses in the non-physical trade, and the acquirer shall stipulate his MSC levels in accordance with the general fee clause.

The impact of the new rules of setting MSC and surcharging ensure that there no longer is a distinction based on “card nationality” since the new rules no longer make a distinction between payment cards issued in Denmark and payment cards issued in other countries.

It seems that the effect of the new Split-model has been that at the moment mostly large retail businesses actually choose to surcharge on credit cards, whilst smaller retail businesses do not. This might have to do with the costs of setting up a system that distinguish between debit and credit cards, or perhaps the smaller retail businesses are afraid of losing customers, if they choose to surcharge. The DCCA will follow the development over the next couple of years to see if surcharging becomes more common in the retail business.

Consequently, the DCCA will also closely monitor possible competitive aspects and implications as a result of the new rules regarding surcharging and setting MSC and the authority will continue to evaluate the development in the MSC levels in order to stimulate the trend towards appropriate MSC's.

3. Competition law

3.1 Competition law application

As mentioned in section 2.3 payment systems and the setting of fees are regulated by the PSEM Act. In some areas the PSEM Act applies a less strict burden of proof as to what constitutes a restriction of competition compared to the Danish Competition Act. First of all a possible intervention against unreasonable prices set by an acquirer according to article 79 does not necessitate that the acquirer possesses a dominant position in the market. Second of all such intervention implies a less strict burden of proof regarding the level of prices and profit margins. Furthermore it is not necessary that unreasonable prices and profit margins are observed over a longer period. On the contrary actions can be taken immediately. Hence some cases have been carried through on the basis of the PSEM Act instead of the Danish Competition Law.

In 2006, the DCCA decided to carry out a survey of the interchange fee for transactions with the domestic debit card scheme (Dankort) in non-physical trade in order to determine whether the fees were in compliance with the general fee clause in the former Payment Services Act, which prohibited the setting of unreasonable prices and profit margins in connection with the execution of electronic payment transactions, just as the current general fee clause in the PSEM Act.

The DCCA collected cost data from 8 representative banks, including the central Danish acquirer, PBS (now Nets), which combined cover the majority of the market.

The methodology of the survey came down to a cost-based approach. The banks had difficulties gathering the relevant costs since their costs regarding Dankort had to be segregated from a number of management accounts. Nevertheless, after some adjustments the DCCA found that the data gave a fair view of the relevant costs. Ultimately, the survey revealed that the average costs of the banks were 1.06 DKK per transaction. Since the interchange fee was set at 1.10 DKK per transaction, this outcome did not give rise to further investigation into a possible infringement of the former Payment Services Act.

Currently the DCCA is conducting a new investigation of the setting of MSC's regarding Dankort in the non-physical trade in order to evaluate whether these fees are in accordance with the general fee clause in the PSEM Act. A decision is expected this year.

ESTONIA

Electronic payments tools like credit transfers and direct debits, payment cards, e-payments and m-payments are generally regarded as secure and convenient tools for carrying out financial transactions and play an important role on the economic activities of companies and retailers as well as in the everyday life of consumers.

There was a significant increase during the last years in cashless payments in Estonia, up to 90% since 2001. The innovative e-payment systems of banks and simple access to these systems have created favourable conditions for such a development. During the last five years the increase of e-payments was about 50%, of direct debits about 30% and m-payments 18%. The number of POS terminals and ATM with the cash and the payment function increased more than 50%. Joining the euro area on 1 January 2011 also boosted significantly the number of cashless payments in general and particularly the usage of payment cards.

According to the recent survey carried out by TNS Emor on average more than 59% of respondents in Estonia preferred to use the payment cards and this proportion was even bigger in case of larger cities or super/hypermarkets. Payments in cash still remain as significant part of general payment tools, but according to survey that practice is more typical for older people or low income households.

The issue of interchange fees and the legal and economic grounds for setting such fees was a matter of consideration in different jurisdictions during years¹.

The interchange fee is paid when a merchant's bank (acquirer) and a consumer's bank (issuer) are different. In this case, the bank serving the merchant shall pay an interchange fee to the bank serving the consumer, which is generally a percentage of the amount of the card payment. Interchange fees form a significant part of merchant service fees applied by the merchant's bank to merchants and therefore affect the merchants' mark-up. Indirectly the interchange fees are paid by the consumer as the merchants integrate these costs in the prices of goods.

In recent years the Estonian Competition Authority has carried out the relevant study on interchange fees for debit and credit cards domestic transactions, established by main Estonian banks (six licensed credit institutions and affiliated branches of foreign credit institutions - banks). Until mid-June 2008 the multilaterally agreed interchange fee (MIF) 1% of the amount of card transaction was in force. This MIF was agreed on domestic level by the aforementioned banks. Since July 2008 the MIF was cancelled and banks turned to bilateral agreed interchange fees practice. The model and level of interchange fee became a subject of bilateral negotiations between two particular banks, on individual basis. The banks have reduced interchange fees on a number of occasions during the course of the proceedings. As a result, the interchange fees have decreased from the jointly agreed 1% initially in force (at the mid of) in June 2008 on average to 0,5% by the end of study². Thereby, some banks have agreed on an additional reduction of

¹ See Information paper on competition enforcement in the payment sector
http://ec.europa.eu/competition/sectors/financial_services/information_paper_payments_en.pdf

² Decision of Estonian Competition Authority on 20 February 2012 No 5.1-5/12-006, available only in Estonian, see http://www.konkurentsiamet.ee/public/OTSUS_20_02_2012_Valjavote.pdf.

interchange fees with the increase of card payments in volume. As a result the average fees will most likely continue to decrease significantly in the future. The analysis shows that the cuts of the existing interchange fees have been carried over to the merchants' fees, and this should also impact consumers. The current system of bilaterally agreed interchange fees is more open to competition, because the interchange fees are affected by each bank's business strategy. Taking into account that the banks have reduced the fees substantially and made the system more open to competition the Competition Authority has decided to terminate the proceedings.

At present time the matter of regulation of interchange fees on governmental level is not under consideration.

Honour-all-cards rule is not in use and in principle the merchants are not obliged to accept the payment cards as such or some types of cards. However, it is generally of interest of the merchant to provide the consumers with the variety of payment possibilities. Some merchants are on the position that merchant service fees (MSC) remain at a relatively high level. However, in some cases the merchants were quite successful on renegotiation such fees but indeed, it could constitute a problem for smaller merchants. Even some merchants declare that the costs of cash management remain generally lower than those of MSC, but they also point out that the management of cash is the fare of being costless. There is no prohibition by law³ for merchants to surcharge or use discount rule for particular payment means. In general, in case of surcharging it is acceptable if such charge reflects the particular costs of merchant. However, there is no indication that such practice is widespread between merchants in Estonia.

³ Law of Obligations Act art 752 p 7.

EUROPEAN UNION

Introduction: EU approach to competition and regulation in the payments sector

The aim of this short paper is to provide an overview of the activities of the EU in the area of payments, both through competition enforcement and regulation, and the current review of the card, mobile and e-payments sector launched in January 2012. The paper is also intended to explain the underlying reasons behind the action taken and in particular to explain the competition analysis in the different types of cases that have been examined.

Payments are important and justify detailed scrutiny by competition authorities for three reasons. First, payments are estimated by the ECB¹ to represent a total cost to society of about 1% of GDP or €130 billion per year. The ECB also estimates that revenue from payments represents about 25% of total bank revenue in the EU², so any action on the banking sector must take into consideration payments. Secondly, an effective payments market is essential for the development of the internal market in the EU. In particular, barriers to cross-border payments, which appear to limit the willingness of people to buy cross-border even over the internet³, have a major impact on the whole internal market. Finally, payments are a network industry as it must be possible to make payments from one bank to any other. It is therefore essential that payment service providers ("PSPs") work together to develop and adopt necessary standards for inter-operability. However, this sort of co-operation between potential competitors can give rise to competition concerns if elements are discussed that are not strictly necessary for inter-operability.

1. Action taken

Since payments were last discussed in the OECD in 2006, the European Commission ("Commission") has been particularly active in this sector. In January 2007 the Commission published its final report on the Sector Inquiry into retail banking, where payments were one of the two main issues examined⁴. In 2007, the Commission adopted three competition decisions. The Cartes Bancaires Decision⁵ found that the pricing system organised by Cartes Bancaires, the main card scheme in France, restricted competition by hindering the entry to the market of new card issuers. The Visa / Morgan Stanley Decision⁶ found that Visa restricted competition by refusing to allow Morgan Stanley to acquire Visa card payments. And the

¹ Schmiedel, H., Kostova, G. and Ruttenberg, W. *The Social and Private Cost of Retail Payments: A European Perspective*. ECB Occasional Paper Series, No. 137, Sept. 2012.

² Gertrude Tumpel-Gugerell, Member of the Executive Board of the ECB, at the conference "The future of retail payments: opportunities and challenges" Vienna, 12 May 2011.

³ European Commission, *Communication on E-commerce*, COM(2011/942), January 2012, and European Commission, *Green paper toward an integrated market for card, internet and mobile payments*, January 2012. Available at: http://ec.europa.eu/internal_market/payments/cim/index_en.htm

⁴ http://ec.europa.eu/competition/sectors/financial_services/inquiries/sec_2007_106.pdf

⁵ Case COMP/38.606, *Groupement des Cartes Bancaires (CB)*, Commission Decision of 17 October 2007. http://ec.europa.eu/competition/antitrust/cases/dec_docs/38606/38606_611_1.pdf

⁶ Case COMP/37.860, *Morgan Stanley / Visa International And Visa Europe*, Commission Decision of 3 October 2007. http://ec.europa.eu/competition/antitrust/cases/dec_docs/37860/37860_629_1.pdf

MasterCard Decision⁷ found that MasterCard's Multilateral Interchange Fees ("MIFs") for cross-border consumer card transactions restricted competition by raising the level of merchant service charges ("MSCs") to banks for the acceptance of card payments. All three decisions were appealed. The General Court upheld the Visa / Morgan Stanley Decision in 2011 and the MasterCard Decision in 2012. We are still awaiting the judgment in the *Cartes Bancaires* case. Visa did not appeal the Morgan Stanley judgment, but MasterCard has appealed the judgment to the ECJ.

In 2009, MasterCard offered Undertakings to reduce its cross-border consumer MIFs to 0.2% for debit cards and 0.3% for credit cards; it introduced a number of changes to its scheme rules to facilitate competition in the card payments markets; and it repealed the increases in its scheme fees to acquirers which could have had a similar effect on the market to MIFs. The Commissioner for competition at the time stated that in light of the Undertakings, she did not intend to open proceedings against MasterCard for non-compliance with the Decision. In 2009 the Commission also issued a Statement of Objections ("SO") to Visa for all the MIFs it sets in the EEA (cross-border MIFs and the MIFs for domestic transactions in eight Member States). In 2010 Visa Europe offered commitments, very much based on the MasterCard Undertakings, but the MIF reduction only covered debit transactions (reduced to 0.2%) and not credit. These commitments were made binding in December 2010⁸. In July 2012 the Commission issued Visa a supplementary SO covering its MIFs for credit card transactions, which also included the possibility that the Visa scheme rules obliging acquirers in other Member States to apply the MIF of the country of the merchant ("cross-border acquiring") to be a possible restriction of competition. In September 2011 the Commission opened proceedings against the European Payments Council ("EPC") for its work on e-payments as the Commission was concerned that it may hinder the entry of new players and new technology in the e-payments market.

In parallel, the European regulation of payments has changed significantly the scope for competition in these markets. The Payment Services Directive⁹ introduced the notion of Payment Institutions, which are non-banks who are regulated and able to provide payment services throughout the EEA. It also provided that merchants are allowed to offer customers rebates for different payment means if they so choose, and that they can charge surcharges for different payment means, unless the Member State decides that surcharging should be prohibited. This therefore removes the issue of surcharging from the payment scheme and makes it a public policy issue. In 2009, Regulation 924/09¹⁰ strengthened the rules on cross-border payments and covered for the first time direct debit payments. The SEPA Regulation¹¹ in 2012 provided for the removal of the national credit transfer and direct debit schemes and the transfer to the EU-wide SEPA schemes from 2014. It also prohibits per transaction MIFs for direct debit and provides strict criteria for MIFs for transactions that cannot be properly executed or have been reclaimed by a payment service provider (so-called "R- transactions").

In January 2012, the Commission published a Green Paper on card, internet and mobile payments. This is an important sector for the future in its own right as already mentioned in the introduction. It also has significant impacts on other sectors, as payments by card, internet and mobile are needed to promote the development of e-commerce and the internal market more generally. The aim of the consultation

⁷ Case COMP/34.579, *MasterCard*, Commission Decision of 19 December 2007. http://ec.europa.eu/competition/antitrust/cases/dec_docs/34579/34579_1889_2.pdf

⁸ Case COMP/39.398, *Visa MIF*, Commission Decision of 8 December 2010.

⁹ Council Directive 2007/64/EC on payment services in the internal market (PSD) [2007] OJ L319.

¹⁰ Council Regulation 924/2009 on cross-border payments in the Community [2009] OJ L266/11.

¹¹ Council Regulation 260/2012 on establishing technical and business requirements for credit transfers and direct debits in euro (SEPA Regulation) [2012] OJ L94/22.

launched by the Green Paper was to see if there was a need to change the balance between regulation, self-regulation and competition enforcement in this sector. In October 2012 the Commission announced that it would bring forward proposals to regulate MIFs and review the PSD by April 2013.

2. Competition enforcement

In competition enforcement in the payments sector, the Commission has given priority to action against MIFs, but it has also addressed business rules which limit competition between incumbents and exclusionary behaviour hindering market entry. This section looks at these three types of case.

2.1 MIF cases

In 2001 in the Visa I Decision, the Commission found that a number of the Visa scheme rules (excluding the MIF rules) did not appear to restrict competition under Article 101(1) at that time. In 2002 in the Visa II Decision, the Commission found that the Visa cross-border MIFs were a restriction of competition by effect but exempted the MIFs provided they were reduced to 0.70% for credit transactions and €0.28 per debit transaction until the end of 2007. In 2007 as noted above the Commission found that the MasterCard MIFs restricted competition and that MasterCard had not demonstrated that they were covered by the exception in Article 101(3). The 2009 Visa SO and the 2012 Visa supplementary SO express the preliminary concern that Visa's MIFs restrict competition by object and by effect and Visa has not demonstrated that they fall within Article 101(3).

The General Court judgment in the MasterCard case broadly supported the framework of assessment under the competition rules used by the Commission in its MIF cases. The judgment addressed in particular the issues of: association of undertakings, MIFs as not objectively necessary, restriction of competition by effect, and Article 101(3). The Commission's analysis of MIFs under competition rules can be briefly summarised along the lines below.

- MIFs constitute a decision of an association of undertakings (in this case the banks that use the MasterCard system) under EU competition law, even if the corporate form has changed: in 2006 MasterCard became a publicly listed company. When qualifying MasterCard as an association of undertakings after its incorporation as a separate company, the Commission took into account that: (a) the banks continued to exercise control over key elements of the scheme (although not the level of the cross-border MIF itself), (b) the banks and MasterCard continued to have a commonality of interests in having a MIF and (c) competition rules cannot be evaded simply on account of form.
- The relevant market identified by the Commission is the acquiring market.
- MIFs are not objectively necessary for the operation of a four party payment scheme. There are examples of four party payment schemes operating without a MIF. It is also perfectly conceivable that banks operate within a payment system with at par settlement, if necessary, with a less restrictive default, such as the prohibition of ex post pricing. In Australia a significant reduction in MIF levels had not led to a decrease in card use. And in general banks save costs from card issuing (eg the use of debit cards reduces the need for cash handling by banks) and receive additional revenue from card issuing (eg interest on credit card balances). It is therefore unlikely that they would stop issuing cards if MIFs did not exist.
- The competition analysis therefore focuses on MIFs alone and not on the card scheme as a whole. Any other alleged benefits of MIFs are not examined under Article 101(1), which determines

whether the MIFs are a restriction of competition, but under Article 101(3) which provides an exception for restrictions provided they meet the criteria.

- MIFs are a restriction of competition by object and/or effect. MIFs restrict competition by object as they reduce the level of uncertainty on the market for acquiring banks and they have an impact on MSCs. They also restrict competition by effect between acquiring banks by artificially inflating the basis on which these banks set their charges to merchants and effectively determine a floor for the merchant service charge below which merchants are unable to negotiate a price. The restrictive effect in the acquiring markets is further reinforced by the effect of the MIFs on the network and issuing markets as well as by other network rules and practices, namely the Honour All Cards Rule (the 'HACR'), the No Discrimination Rule (the 'NDR'), blending, and application of different MIFs to cross-border as opposed to domestic acquirers.
- In principle it is not excluded that MIFs may be justified under Article 101(3) but the burden of proof is on schemes. The main argument¹² that the schemes have brought forward, for example in the MasterCard case, has been based on the efficiencies created by encouraging the issuing and use of cards to match greater demand from merchants to receive card payments. This argument is based on the presumption that merchants are unable (for legal or practical reasons) to steer customers to favoured payment means. The alleged efficiencies and the indispensability of MIFs to achieve these efficiencies continue to be challenged by the Commission. But in any case under Article 101(3) the MIFs must be set at a level that allows merchants overall to receive some of the benefits of these alleged efficiencies.

After the 2007 Decision concerning MasterCard's MIFs and following discussions with the Commission, the Merchant Indifference Test ("MIT") formed the basis for the MasterCard Undertakings of 2009 and the Visa Commitment Decision of 2010. Under the MIT, the cost incurred by the merchant when a customer uses its card should not exceed the cost for receiving a cash payment. This requires detailed estimates for the costs to merchants of handling cash and card payments, of the average size of these payments and the fees charged to merchants for both cash and card handling by third parties (principally banks but also others such as cash handling companies). Finally, it is also necessary to estimate the average level of the acquirer margin and scheme fees to estimate the maximum level of the MIF¹³.

Economists have argued that under certain conditions the MIT gives rise to an efficient outcome. However, the key point under a competition analysis is that the MIT is a way to measure the benefits to merchants of card acceptance compared to cash acceptance and this allows the calculation of a MIF level that cannot be exceeded under Article 101(3). This is not to say that any MIF that meets the MIT is necessarily justified under Article 101(3). It is also necessary to confirm that the other conditions of Article 101(3) are met. The Commission has therefore identified a number of limits of the MIT:

- If merchants can steer customers then there is no justification for a MIF which in effect leads to steering via the banks. This is because the efficiencies that are allegedly created by the MIF can be generated in a less restrictive manner by the direct surcharging of merchants. For example, when receiving payments by direct debits merchants are normally in long-term relations with customers and so can steer them directly (eg €10 discount if you sign a mandate for direct debit).

¹² Other arguments that have been put forward include: the efficient allocation of costs (see the discussion on reject direct debit transactions in paragraph 16; and services of general interest such as "the war on cash".

¹³ These calculations are explained in more detail in the Commission Decision of 8 December 2010 on Visa Europe's commitments, paragraphs 57-68.

- When a means of payment has very widespread usage in a market without a MIF, there is no need to subsidise its issuing or use. Examples could include payment cards if they became very widespread.

2.2. *Business rules and competition*

In addition to addressing the level of MIFs and exclusionary behaviour, the Commission has examined the business rules of card schemes. In the MasterCard Decision of 2007 the Commission found that some of MasterCard's business rules reinforced the effect of the MIFs on competition. In response, MasterCard included a number of changes to its business rules in its Undertakings of 2009. Similarly, Visa's commitments of 2010 modified its business rules. In the supplementary SO sent to Visa in 2012, the Commission expressed the preliminary concern that Visa's cross-border acquiring rules were an infringement in their own right of the competition rules. The cross-border acquiring rules require all acquirers, even if based in other countries, to apply the domestic MIF of the country of the merchant. The concern is that these rules have the object and effect of restricting competition by hindering cross-border acquiring leading to market sharing. Under the MasterCard Undertakings and Visa Commitments, the card schemes modified their business rules to promote competition and transparency:

- Honour All Cards Rule (HACR) and unbundling. The card schemes would only apply the HACR within a brand and not across brands. For example, a merchant could accept Maestro cards but not MasterCard cards. Merchants could also have separate acquirers for different brands of card if they wanted.
- Non-discrimination. Merchants would not be prohibited from steering their customers to different payment means. This issue was addressed under the Payment Services Directive for surcharging and rebating (see below) and so there was no justification for the schemes to impose their own rules.
- Unblending and publication. The acquiring banks would offer unblended prices (eg MIF+ pricing) by default to merchants, so merchants would benefit from the use of cheaper cards by their customers. The card schemes would publish all their MIF rates.
- Commercial cards: The schemes would ensure that commercial cards issued in the EEA are visibly and electronically identifiable at POS terminals if the terminal has the necessary capability.

2.3 *Exclusionary cases*

The third category of behaviour that has been subject of investigation under the EU competition rules has been exclusionary behaviour by the banks. Examples include the Visa / Morgan Stanley Decision of 2007, the Cartes Bancaires Decision of 2007 and the proceedings against the EPC opened in 2011¹⁴.

- In Visa / Morgan Stanley, the Commission found that Visa excluded Morgan Stanley from the acquiring market as it refused to let it join the Visa scheme because Morgan Stanley operated the Discovery card in the US. This decision was upheld by the General Court in 2011 and Visa did not appeal.

¹⁴ For Visa / Morgan Stanley and Cartes Bancaires see *Supra* notes 4 and 5. For the EPC see: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39876

- In *Cartes Bancaires*, concerning the domestic French card scheme, the Commission found that changes to its pricing system hindered card issuing by new issuers. This decision was also appealed to the General Court and we are awaiting the judgment.
- In the EPC e-payments case, the Commission opened proceedings in September 2011. At the time, the Commission announced that the investigation focused on the standardisation process for payments over the internet ('e-payments') due to concerns about the alleged exclusion of new entrants and payment providers who are not controlled by a bank. Joaquín Almunia, Commissioner, Vice President in charge of Competition Policy, said: *"Use of the internet is increasing rapidly making the need for secure and efficient online payment solutions in the whole Single Euro Payments Area all the more pressing. I therefore welcome the work of the European Payments Council to develop standards in this area. In principle, standards promote interoperability and competition, but we need to ensure that the standardisation process does not unnecessarily restrict opportunities for non-participants."* This investigation is continuing, but the EPC has announced that it has decided to abandon the development of the e-payment framework and any standardisation initiatives that would have the same object or effect.

In the two cases where the Commission has adopted a decision, the basic structure of the concerns is similar.

- The banks act together through an association of undertakings (as in the MIF cases).
- The alleged restriction is not ancillary to the main operation because it is not objectively necessary for the main payment system.
- Therefore it is necessary to carry out the competition analysis on the exclusionary behaviour alone and not on the whole payment scheme. As the alleged restriction does not seem to be ancillary, any justifications for the exclusionary behaviour (eg security) must be examined under Article 101(3).
- In principle this behaviour may be justifiable under Article 101(3), but the burden of proof is on the parties. In practice Visa did not argue for an exemption in the Morgan Stanley case; and in the *Cartes Bancaires* case the Commission found that the argument put forward of limiting free riding was not justified.

3. SEPA and the regulation of payments

In parallel with the competition enforcement outlined above, the regulation of payments has continued at EU level. When the euro was introduced the EU adopted a Regulation on cross-border payments in euros¹⁵ according to which the fee charged by banks to their customers for cross-border payments cannot exceed the fee for the equivalent domestic transaction. One of the principal aims of this provision was to ensure that the banks would not benefit from continued segmentation of the payments market and so remove potential barriers to the creation of new EU-wide payments infrastructure. In 2002 the European banks, working through the EPC, launched a self-regulatory initiative called the Single Euro Payment Area ("SEPA"). The aim is to ensure that cross-border payments with euros throughout the EU are as easy and efficient as national payments. It is intended to cover all the main means of payment: credit transfer, direct debit, and payment cards. SEPA can be seen as the natural complement to the introduction of the euro. The EPC has created EU-wide credit transfer and direct debit schemes that will replace the old national

¹⁵ Council Regulation (EC) 2560/01 on cross-border payments in euro [2001] OJ L344.

systems. For card payments, the EPC does not intend to create a new scheme but has published the SEPA Cards Framework which sets out criteria for card schemes to be considered compatible with SEPA.

In addition to the work by the EPC, it was necessary to harmonise national payments legislation.

- In 2007 the EU adopted the Payment Services Directive ("PSD")¹⁶ which harmonises the key elements of the payments systems in the EU. From the competition point of view the key provisions were on payment institutions and steering rules. The PSD introduced the concept of payment institutions, which are not banks as they cannot hold funds except for transaction purposes, but which are active in payments. As a result a number of new companies including telecoms companies have entered the payments markets in the EU. This provision therefore clarifies and enlarges the scope for non-banks to operate in the payments market. On rebating the PSD provides that all merchants shall be allowed to rebate different payment means if they so choose. Merchants are also able to surcharge unless the Member State decides not to allow surcharging. About half the Member States decided to allow merchants to surcharge and about half decided not to allow them to. This provision in principle therefore means that it is the public authorities which decide whether surcharging can take place and no longer the payment schemes.
- In 2009, a revised Regulation on cross-border payments was adopted. The main change from a competition point of view compared to the 2002 Regulation was that the MIFs for direct debit were regulated. MIFs for domestic direct debit transactions could continue at or below their existing level until November 2012 in the six Member States which had MIFs. For cross-border direct debit transactions a default MIF of 8.8 cents was applicable until 2012.
- In 2012, the SEPA Regulation¹⁷ was adopted. This will oblige all the old national systems for credit transfer and direct debit to be phased out by 2014 and the transactions moved to the new EU-wide schemes created under SEPA. The Regulation also clarifies that there should be no per transaction MIFs (that is MIFs that are charged for each transaction) for direct debit transactions. For cross-border transactions this applies from November 2012 and for domestic transactions in the six Member States with MIFs from 2017. This is intended to provide clarity to the market in line with the competition rules¹⁸. However, MIFs are allowed under clear conditions for direct debit transactions which cannot be properly executed or have been reclaimed by a payment service provider (called R-transactions). Normally the costs of direct debits are very low, but if they are not properly executed costs can be significant as the parties and the banks need to be informed and to examine the reasons for the failure. An appropriate collection of MIFs for R-transactions can help to ensure that the costs for the failure of the transaction are imposed on the party that is responsible. This should therefore encourage all parties to prevent failures and so create efficiencies. It should be noted that this justification for a MIF in line with Article 101(3) is one of the few that has been viewed positively by competition authorities which does not rely on the balancing argument¹⁹.

¹⁶ PSD, *Supra*, note 8.

¹⁷ SEPA Regulation, *Supra*, note 10.

¹⁸ See paragraph 9 which explains that MIFs for direct debits do not appear to be justified under Article 101(3) as merchants and payers tend to be in long-term contractual relationships and so merchants can incentivise directly the use of direct debit if they choose (for example by offering customers an annual discount if they sign a direct debit mandate).

¹⁹ See paragraph 9.

4. The Green Paper and next steps

The Commission published the Green Paper²⁰ because it identified efficient and competitive payments as a key driver for the development of the internal market in the EU and because of the rapid advances in technology, particularly online and mobile payments, which is likely to change the functioning of the market. The Green Paper assesses the current landscape of card, internet and mobile payments in Europe. It also identifies the gaps between the current situation and the vision of a fully integrated payments market and the barriers which have created these gaps. The objective of the Green Paper was to launch a broad-scale consultation process with stakeholders on this analysis and to help identify the right way to improve market integration. About 300 replies were received and published with a summary in June²¹.

In the Green Paper the Commission sets out its vision and objectives for the payments market. This is that:

"there should be no distinction between cross-border and domestic payments. On the basis of the standards and rulebooks provided by SEPA, this distinction should also become obsolete for non-euro payments within the EU. This would result in a true digital Single Market at EU level. Full integration would mean:

- *Consumers use a single bank account for all payment transactions, even if they live outside their country of origin or travel frequently throughout the EU. By accelerating innovation, payments become more convenient and adjusted to the specific circumstances of the purchasing transaction (online v offline, micro- v large-value payments, etc.).*
- *Businesses and public administrations are able to simplify and streamline their payment processes and centralise financial operations across the EU. This has significant potential to generate savings. Furthermore, common open standards and faster settlement of payment transactions improve cash-flow.*
- *Merchants are also able to benefit from cheap, efficient and secure electronic payment solutions. Increased competition makes alternatives to handling cash more attractive. In turn, this also makes moving into e-commerce more compelling and leads to improved customer experiences when making payments.*
- *Payment service providers (PSPs), i.e. banks and non-bank PSPs, are able to benefit from economies of scale through standardising payment instruments, thereby achieving cost savings after the initial investment. It opens access to new markets, both for increasing the revenue base for existing payment instruments and for launching innovations on a broader scale.*
- *Technology providers, such as software vendors, processors and IT consultants, can base their development work and solutions on pan-European instruments, facilitating innovation across the EU Member States.*

For this vision to become reality for card, e- and m-payments, a number of additional issues need to be addressed, such as security, freedom of choice, unhindered technical and business innovation, standardisation of the various components and interoperability."

The Green Paper then looks at six different issues to achieve this objective. The two most controversial issues, which are particularly important from a competition point of view, are regulation of

²⁰ Commission Green Paper, *Supra*, note 2.

²¹ Available at: http://ec.europa.eu/internal_market/payments/cim/index_en.htm

MIFs and related measures and access to information on the availability of funds on bank accounts. As regards MIFs, the issue is whether the wide variation in MIFs across the EU can be justified or whether there is a need to regulate them. A related question is whether the barriers to cross-border acquiring, and in particular the obligation to apply the MIF of the country of the transaction, are in line with EU internal market and competition rules. Transparency and business rules can be seen as flanking measures to the issue of MIFs. Key issues here are the possibility for merchants, if they choose, to offer rebates or ask for surcharges to their customers depending on the means of payment they use.

Standards is a highly technical area but essential if a fully functioning internal market in payments is to develop. The EPC in particular, but other bodies as well, are devoting considerable time to developing and rolling out such standards. But the rate of progress is very slow in some areas. Related to standards is the question of the conditions under which third parties should have access to information on the availability of funds in bank accounts. This is very closely linked to the Commission's competition case against the EPC opened in September 2011²². Ideally, clear standards and conditions (particularly concerning security) should be established by the authorities or the market, and all payment means that meet these conditions should be allowed on the market. This aim was clearly stated by Mr Barnier, Commissioner responsible for the internal market, at the Hearing on the Green Paper²³.

The European Parliament is preparing an Opinion on the Green Paper which should be adopted in November 2012. The draft Opinion, which has been adopted in Committee but not by the Parliament as a whole, shows a consensus calling for an impact assessment on the possibility to regulate MIFs and on the need for further harmonisation of the rules on surcharging²⁴. In October 2012 the Commission announced that it would bring forward proposals to modify the PSD and to regulate MIFs by April 2013. Work is now beginning on impact assessments but it is too soon to say what the conclusions will be or what form the legislative proposals will take.

5. Conclusion

This short paper makes it clear that payments will continue to be a priority for the Commission in the coming years. Harmonisation of regulation should help to break down the barriers to cross-border payments and improve the scope for competition and develop opportunities for both payment providers and consumers. The Commission has announced that this will include a proposal on MIFs which will be controversial. But it is hard to see how else the segmentation of the national payments markets can be addressed, given the reluctance of the major payment schemes to adapt their business models (and in particular the MIFs they apply) in a pro-active manner to the competition rules. Competition enforcement appears likely to remain necessary to address the behaviour of market players that is not fully regulated. Self-regulation, particularly in the area of standards is going to be essential as well, and a key question will be how to ensure that the incentives of all involved will encourage rapid development and roll-out of these standards. An appropriate mix of these instruments should result in payments markets that are better equipped to meet the demands of their users and create integrated markets on the basis of current and future technology.

²² See paragraphs 13 and 14.

²³ Speech by M. Barnier at the Hearing on 4 May 2012: "D'une manière générale, il ne devrait y avoir aucun obstacle injustifié à l'accès au marché de nouveaux prestataires, dès lors que la sécurité des paiements est garantie." ("In general, there should be no unjustified obstacles to access to the markets by new entrants, provided that the security of the payments is guaranteed").

²⁴ The draft Opinion also calls for a ban on MIFs altogether, but it is unclear to what extent this will be supported by the Parliament as a whole.

FRANCE

(Version française)

Les moyens de paiement scripturaux sont essentiels à la fluidité des actes d'achat et de vente et au fonctionnement de l'économie dans son ensemble. Ainsi, aujourd'hui en France, plus de 17 milliards d'opérations de paiement sont réalisées sans avoir recours aux espèces¹, c'est-à-dire principalement par le biais de la carte bancaire, du chèque, du prélèvement et du virement.

A cet égard, les innovations radicales (p.ex., l'introduction de la carte bancaire dans les années 60) et incrémentales (p.ex., la sécurisation permise par le recours généralisé au code PIN lors des transactions effectuées par carte) ont été et demeurent de puissants moteurs de changement dans les habitudes de paiement, à mesure que les utilisateurs s'approprient les bénéfices, en termes de sécurité et de confort d'utilisation notamment, que procurent les nouveaux moyens de paiement.

Pour autant, le rôle traditionnel d'aiguillon que joue la concurrence, en favorisant à la fois l'émergence de nouveaux services et la baisse des tarifs des services existants, rencontre des obstacles spécifiques dans le secteur des paiements. Du fait de la combinaison de facteurs réglementaires et du comportement des acteurs, le consommateur n'est pas en mesure de choisir le moyen de paiement en fonction de critères de coûts et d'efficacité.

Les facteurs réglementaires ont été analysés par l'Autorité de la concurrence ainsi que dans un rapport récent remis au ministre de l'économie². Ils peuvent résulter du souhait des pouvoirs publics de promouvoir la gratuité de certains moyens de paiement pour des motifs d'intérêt général, qui est à l'origine de subventions croisées entre moyens de paiement, ainsi que de l'interdiction de la répercussion par le commerçant du coût relatif à l'utilisation de la carte bancaire sur le prix facturé au porteur de cartes³. Or, l'autorisation de la différenciation tarifaire selon les modes de paiement constitue un outil crucial pour introduire une concurrence entre moyens de paiement car elle assure la prise de conscience, par les consommateurs, du véritable coût qu'ils induisent aux commerçants, et finalement assument collectivement du fait de l'utilisation des moyens de paiement. Partant, la possibilité de différenciation permet un arbitrage efficace entre les différents instruments de paiement mis à disposition des consommateurs et évite une répercussion générale du surcoût éventuel d'un moyen de paiement sur l'ensemble des consommateurs, y compris sur ceux qui utilisent des moyens de paiement moins onéreux.

¹ Banque de France, Cartographie des moyens de paiement, Bilan de la collecte 2011 (données 2010), décembre 2011.

² L'avenir des moyens de paiement en France, rapport de Georges Pauget et Emmanuel Constans, mars 2012.

³ L'article L.112-12 du code monétaire et financier, introduit par l'ordonnance n° 2009-866 relative aux conditions régissant la fourniture de services de paiement et portant création des établissements de paiement, dispose que « le bénéficiaire [du paiement] ne peut appliquer de frais pour l'utilisation d'un instrument de paiement donné. Il ne peut être dérogé à cette interdiction que dans des conditions définies par décret », qui n'a pas été adopté à ce jour. Avant 2009, cette interdiction existait déjà dans les faits en raison du recours généralisé, dans le cadre des systèmes de paiements existants, à la « *no surcharge rule* » ou « *no discrimination rule* », restriction contractuelle imposant aux commerçants de pratiquer un prix uniforme, indépendamment du moyen de paiement choisi par leurs clients.

A ces facteurs réglementaires peuvent s'ajouter des restrictions de nature contractuelle.

En premier lieu, le recours à des mécanismes de coopération et de compensation interbancaires implique que les banques se départissent d'une détermination autonome de leur position concurrentielle sur le marché. Si les mécanismes de coopération interbancaire ne sont pas interdits *per se*, il revient aux opérateurs de démontrer que les éventuels mécanismes financiers mis en place, à l'image des commissions interbancaires multilatérales, sont plus efficaces que des accords bilatéraux, qu'ils n'éliminent pas la concurrence et qu'ils sont porteurs de progrès économique au bénéfice du consommateur. Cette condition n'est pas remplie, en particulier, si les commissions afférentes à la coopération interbancaire sont fixées à un niveau supra-concurrentiel. Dans cette hypothèse, ces commissions pèsent sur les commerçants, qui les incluent dans leurs charges, et donc dans le prix de leurs produits ou services, et, *in fine*, dans le prix payé par le consommateur.

En deuxième lieu, l'absence de transparence tarifaire du côté du débiteur, qui n'a souvent pas conscience du coût qu'il assume du fait de l'utilisation d'un moyen de paiement donné, favorise la répercussion des surcoûts. Si la directive « services de paiement »⁴ prévoit que les États membres de l'Union européenne doivent en principe lever les interdictions éventuelles à la répercussion des surcoûts par les commerçants, elle ne traite pas des autres restrictions contractuelles qui peuvent favoriser cette opacité tarifaire et empêchent de différencier les prix selon le moyen de paiement utilisé et, partant, de transmettre un signal de prix orientant le comportement du porteur de carte⁵.

En troisième lieu, du côté du créancier, en particulier les commerçants, le refus d'un moyen de paiement en raison de son coût élevé peut souvent ne pas constituer une option viable du fait du risque clientèle qu'il induit, une partie des clients pouvant être captés par un concurrent qui accepte, quant à lui, le moyen de paiement en cause.

Dans le cadre de la mise en œuvre des dispositions des articles L.420-1 du code de commerce et 101 du traité sur le fonctionnement de l'Union européenne (ci-après « TFUE »), l'Autorité de la concurrence a ouvert plusieurs procédures, dont certaines ont déjà abouti, en vue de restaurer la concurrence sur les marchés des services de paiement. Ces affaires concernent l'ensemble des moyens de paiement, hors espèces (I). Parallèlement et hors du cadre contentieux, l'Autorité a pris part aux débats, réactivés notamment à l'occasion de la publication du Livre vert de la Commission européenne sur les moyens de paiement⁶, relatifs, d'une part, au principe d'une initiative législative européenne en matière de commissions multilatérales d'interchange (« CMI ») et, d'autre part, à l'interdiction des restrictions contractuelles à la répercussion par le commerçant du coût d'utilisation des cartes bancaires, ainsi que les modalités susceptibles de l'entourer (II).

⁴ Directive 2007/64/CE du Parlement européen et du Conseil du 13 novembre 2007 concernant les services de paiement dans le marché intérieur, modifiant les directives 97/7/CE, 2002/65/CE, 2005/60/CE ainsi que 2006/48/CE et abrogeant la directive 97/5/CE.

⁵ Ces restrictions contractuelles sont de deux sortes : (i) la « *Honour All Cards Rule* » (HACR) dont l'objet est d'imposer au commerçant qui la signe d'accepter toutes les cartes émanant du même système de paiement, quels que soient les coûts impliqués pour lui du fait de l'acceptation de l'ensemble de la gamme de cartes du système ; (ii) la pratique dite du « *blending* » qui consiste pour une banque à faire la moyenne des coûts que toutes les cartes bancaires d'un système de paiement représentent pour un commerçant donné, et à ne lui facturer que cette moyenne sans lui soumettre une facture détaillant le prix de chaque carte.

⁶ Livre vert de la Commission européenne du 11 janvier 2012 : « Vers un marché européen intégré des paiements par carte, par Internet et par téléphone mobile »

1. La pratique décisionnelle de l'Autorité en matière de commissions interbancaires multilatérales

Entre 2010 et 2012, l'Autorité a, par trois décisions successives, précisé son approche en matière de commissions interbancaires, en établissant une grille d'analyse des dites commissions et en posant les conditions auxquelles celles-ci peuvent, le cas échéant, être justifiées au regard du progrès économique apporté. L'Autorité instruit par ailleurs un autre dossier sur d'autres systèmes quadripartites de carte de paiement.

L'Autorité a rendu une première décision le 20 septembre 2010⁷ portant sur les commissions interbancaires établies entre onze banques au titre de la remise et du traitement des chèques, dans le contexte particulier du passage, au début des années 2000, d'un traitement physique à un traitement dématérialisé des chèques.

Dans sa décision, l'Autorité a apprécié les observations des parties en réponse à sa communication des griefs, et en particulier si elles avaient apporté, conformément au droit national et à l'article 101, paragraphe 3 TFUE, des justifications à leur accord entre concurrents rentrant dans le champ de l'article 101, paragraphe 1 TFUE. A cet égard il incombait aux parties de démontrer que leur accord « *contribuent à améliorer la production ou la distribution des produits ou à promouvoir le progrès technique ou économique, tout en réservant aux utilisateurs une partie équitable du profit qui en résulte, et sans: a) imposer aux entreprises intéressées des restrictions qui ne sont pas indispensables pour atteindre ces objectifs, b) donner à des entreprises la possibilité, pour une partie substantielle des produits en cause, d'éliminer la concurrence* ».

L'Autorité a sanctionné les onze banques concernées pour avoir fixé de manière commune la commission dite échange image chèque (« CEIC »), qui revenait à fixer un prix plancher sans que celui-ci ne soit justifié par un progrès économique. D'un montant uniforme de 4,3 centimes d'euros par chèque, elle était versée par la banque du remettant (bénéficiaire du chèque) à la banque du tiré (émetteur du chèque) pour chaque opération. La CEIC avait pour objet de compenser la perte de trésorerie au détriment des banques tirées, engendrée par l'accélération du règlement interbancaire des chèques liée à la dématérialisation du traitement des chèques. Cependant, du fait de son caractère fixe, elle ne permettait pas de compenser réellement les pertes des banques tirées, qui étaient liées aux montants moyens des chèques échangés, et non à leur nombre, ces montants variant très fortement selon les établissements concernés. En outre, les pertes de trésorerie sur les chèques tirés étaient déjà compensées, au moins en partie, par les gains de trésorerie sur les chèques remis et par les économies de coûts de traitement retirés de la dématérialisation.

Deux des commissions connexes, liées à l'annulation d'opérations compensées à tort (commission dite AOCT), ont également fait l'objet d'une sanction, dans la mesure où la restriction de concurrence découlant de la substitution, de manière concertée entre les banques, d'un profil de coût commun à un profil de coût diversifié, limitait la liberté des banques de déterminer de manière indépendante et individuelle leur tarification en fonction de leur propre niveau de coûts. L'Autorité n'a pas exclu une fixation en commun du montant de ces commissions, posant comme critères cependant que ces commissions rémunèrent un service clairement identifié, qu'elles soient acquittées par la banque induisant ou demandant la prestation et enfin que leur montant soit fixé en référence au coût de la banque la plus efficace, et ce afin d'inciter les banques à réduire leurs coûts ainsi que d'éviter que la fixation multilatérale

⁷ Décision du 20 septembre 2010 n° 10-D-28 relative aux tarifs et aux conditions liées appliquées par les banques et les établissements financiers pour le traitement des chèques remis aux fins d'encaissement. Cette décision a été réformée par arrêt de la cour d'appel du 23 février 2012. Cet arrêt a fait l'objet d'un pourvoi.

des commissions ne puisse avoir d'impact inflationniste sur les commissions payées par les clients des banques.

En revanche, l'Autorité de la concurrence a estimé que les autres commissions pour services connexes permettaient des économies de transaction au regard de transactions bilatérales, rémunéraient dans une juste proportion des services nouvellement rendus par une catégorie de banques à une autre (tels que le traitement des rejets) et permettaient de compenser les transferts de charges résultant de la dématérialisation du système d'échange des chèques (comme par exemple l'archivage des chèques).

A la suite de sa décision rendue dans le secteur des chèques, l'Autorité a conclu deux procédures d'engagements, relatives aux cartes de paiement, d'une part, et autres moyens de paiement scripturaux (virements, prélèvements, TIP, etc.), d'autre part. Dans les deux cas, l'Autorité a estimé que des engagements robustes, crédibles et vérifiables avaient été proposés par les banques.

La décision de l'Autorité du 7 juillet 2011, rendant obligatoire les engagements présentés par le Groupement des Cartes Bancaires⁸, a ainsi abouti à la baisse substantielle des commissions liées à l'utilisation de la carte de paiement, dans le cadre du système national quadripartite « CB »⁹ auquel adhèrent plus de 130 banques. Dans son évaluation préliminaire, l'Autorité a invité les banques à lui présenter des engagements afin que le niveau des commissions interbancaires, qui n'avait pas évolué depuis vingt ans malgré la sécurité accrue de ce mode de paiement, l'évolution des positions bancaires, la baisse des coûts et la généralisation de la carte de paiement, soit fixé en cohérence avec ces évolutions de marché.

Lorsque les commissions sont liées à des services rendus par une banque à une autre ou à des prestations induites par une banque à une autre, comme c'était le cas pour les commissions liées à la prestation d'une banque au profit d'une autre banque ou du client de cette autre banque, rendue de manière exceptionnelle (service de capture de carte ou d'annulation d'opération) ou systématique (service de retrait dans un DAB), l'évaluation préliminaire a comparé les niveaux des commissions interbancaires aux coûts supportés par la banque la plus efficace.

Pour la commission appliquée dans le cadre du système « CB », la CIP (« commission interbancaire de paiement »), dont la fonction, à l'instar des commissions examinées par la Commission européenne dans le cadre des décisions récentes *Mastercard* (2007) et *Visa* (2010), est d'encourager la détention et l'utilisation de cartes de paiement par les utilisateurs et de financer le système dans son ensemble, le standard de référence était nécessairement différent. Ne contestant pas leur principe – les commissions multilatérales d'interchange peuvent, sous certaines conditions, contribuer au progrès économique en favorisant le développement de systèmes de paiement efficaces –, l'Autorité a indiqué que leur montant devait être contrôlé afin d'éviter que le système de cartes en cause ne puisse tirer parti d'une éventuelle

⁸ Décision du 7 juillet 2011 n°11-D-11 relative à des pratiques mises en œuvre par le Groupement des Cartes Bancaires.

⁹ Les commissions interbancaires de paiement et de retrait, les plus importantes en valeur, voient leur montant respectif baisser sensiblement de - 36 % et de - 20 %. La commission interbancaire de paiement, qui est versée par la banque du commerçant à la banque du porteur de la carte à chaque paiement baisse de 0,47 % à 0,30 % en moyenne, soit une baisse de 36 %. Le produit annuel de la CIP, aujourd'hui de près de 1,5 milliard d'euros, devrait finalement être réduit d'environ 500 millions d'euros. La commission interbancaire de retrait, versée à chaque retrait par la banque du porteur de carte à la banque gestionnaire du distributeur de billets, est réduite de plus de 20%, passant de 0,72 € à 0,57 €. Cette baisse de la CIR aboutit à une réduction de près de 100 millions d'euros du produit annuel de la CIR, actuellement de l'ordre de 450 millions d'euros. La baisse de cette commission, aujourd'hui fréquemment répercutée aux porteurs par la majorité des banques, aura très vraisemblablement un effet direct et à la baisse sur la facturation des porteurs de cartes.

réticence des commerçants à refuser les paiements par carte par crainte de voir leurs concurrents capter leur clientèle s'ils refusent de les accepter.

L'Autorité a privilégié, pour le contrôle du nouveau niveau de la CIP proposé dans les engagements, la référence au test d'indifférence du commerçant – ou « test du touriste » –, également mis en œuvre par la Commission européenne dans les affaires Visa et Mastercard. Ce test repose sur la détermination du niveau de CMI qui n'excède pas, en moyenne, les avantages transactionnels que les commerçants retirent de l'acceptation des cartes de paiement plutôt que d'un autre moyen de paiement. Le test d'indifférence implique donc de regarder à la fois les avantages retirés (rapidité de transaction, facilité de gestion administrative, etc.) et les frais encourus (équipement en terminal, etc.) par les commerçants par rapport à un moyen de paiement alternatif, en particulier les espèces.

A la suite de cette décision, l'Autorité a réuni, pour la première fois, le 6 février 2012, un comité de pilotage chargé de développer la méthodologie du test d'indifférence et de recueillir des données permettant sa mise en œuvre dans le contexte français. Les résultats de ces travaux pourront, le cas échéant, être utilisés pour la révision des commissions du système « CB » à l'expiration des engagements prévus par la décision n°11-D-11, soit en 2015. L'Autorité de la concurrence a souhaité recueillir l'opinion de tous les acteurs concernés et étendre le champ des participants au-delà des parties à la procédure concernant le Groupement des cartes bancaires. Ont été invités à participer, sous la présidence de l'Autorité de la concurrence, les représentants du Groupement des cartes bancaires, MasterCard, Visa, des représentants des commerçants (la Fédération des entreprises du commerce et de la distribution, le Conseil du Commerce de France), des représentants d'associations de consommateurs (Confédération de la Consommation, du Logement et du Cadre de Vie ; UFC Que Choisir), et des représentants de la Banque de France, de l'Autorité de contrôle prudentiel, de la Commission Européenne et du comité consultatif du secteur financier.

Enfin, dans sa décision rendue le 5 juillet 2012¹⁰, l'Autorité a obtenu des 11 principales banques établies en France une évolution significative du niveau des commissions interbancaires pratiquées à l'égard des moyens de paiement scripturaux autres que le chèque et la carte de paiement, ce qui comprend notamment les prélèvements, deuxième moyen de paiement en France (20% des actes de paiement). Les commissions à l'opération sont, à compter de septembre 2012 réduites de moitié, puis supprimées à compter du 1^{er} septembre 2013. Les commissions exceptionnelles, prélevées en cas de rejet, sont également réduites de moitié dès à présent et devront faire l'objet d'une réévaluation au 1^{er} septembre 2013 sur la base des coûts de la banque la plus efficace. Cette solution anticipe, s'agissant de l'ensemble des commissions visées dans cette affaire, les obligations découlant du règlement dit « end-dates » en matière de prélèvement¹¹ qui prévoit la suppression (pour les commissions systématiques domestiques) ou l'orientation vers les coûts (pour les commissions exceptionnelles) des commissions actuellement en vigueur, respectivement au 1^{er} février 2017 et au 1^{er} février 2014, au plus tard.

2. L'opportunité de la mise en œuvre d'une initiative législative

Le Livre vert sur les paiements de la Commission européenne fait état des obstacles à une plus forte intégration au niveau européen et recense les différentes options envisageables pour y remédier. Sous l'angle du fonctionnement concurrentiel du marché des services de paiement, deux questions – sur

¹⁰ Décision du 5 juillet 2012 n°12-D-17 relative à des pratiques relevées dans le secteur des moyens de paiements scripturaux (prélèvement, titre interbancaire de paiement, téléversement, virement et lettre de change).

¹¹ Règlement (UE) n° 260/2012 du Parlement européen et du Conseil du 14 mars 2012 établissant des exigences techniques et commerciales pour les virements et les prélèvements en euros et modifiant le règlement (CE) n° 924/2009.

lesquelles l'Autorité a déjà une expérience – ressortent particulièrement : l'encadrement du niveau des commissions multilatérales d'interchange (CMI) par le biais d'un instrument législatif européen et la généralisation, dans le prolongement de la directive « services de paiement »¹², de l'interdiction de restreindre la répercussion, par le commerçant, du coût d'utilisation d'une carte de paiement¹³.

S'agissant des CMI, l'efficacité d'une initiative législative européenne dépend de plusieurs conditions, dont le respect assurerait notamment la bonne articulation entre des situations nationales spécifiques et un cadre commun. En effet, l'importance des incitations à fournir dépendant étroitement de facteurs variant d'un État-membre à l'autre (habitudes de paiement, propension à utiliser la carte), et dans la mesure où plus 95% des paiements par carte portent sur des transactions nationales, la fixation d'une CMI à un niveau unique en valeur absolue à l'échelle européenne passerait à côté de l'objectif d'incitation à l'utilisation de la carte de paiement, en « subventionnant » soit de façon insuffisante, soit au contraire de façon excessive selon la situation qui prévaut dans un État.

En outre, au regard de l'action déjà menée par les autorités de concurrence, qui ont défini un cadre d'analyse des CMI et ont, pour certaines d'entre elles, déjà fait application du test d'indifférence du commerçant, il est nécessaire que l'instrument législatif éventuellement adopté s'appuie sur cette expérience et associe les autorités de concurrence à la définition d'une CMI de référence, fondée sur des données objectives, fiables et cohérentes avec le droit de la concurrence. A cet égard, l'Autorité travaille à une approche du niveau de CMI correspondant au test d'indifférence de manière transparente et concertée dans le cadre du comité de pilotage mis en place à la suite de l'adoption de la décision « cartes de paiement ». Celui-ci a ainsi engagé une réflexion sur l'échantillonnage représentatif de commerçants, étant noté que tous les commerçants, notamment les petits commerçants, n'ont pas nécessairement les mêmes profils de coûts d'encaissement, ni la même sensibilité aux avantages et inconvénients de la carte. Le comité de pilotage réfléchit également au champ des moyens de paiement alternatifs à prendre en compte dans le cadre du test d'indifférence, dans la mesure où le marché français présente la spécificité d'avoir recours encore de manière significative au chèque.

Enfin, un cadre commun devrait être suffisamment souple afin de permettre une actualisation régulière sur la base des évolutions de marché, aboutissant éventuellement à l'interdiction pure et simple de la CMI si les consommateurs sont déjà enclins, par eux-mêmes, à avoir recours à la carte de paiement, ou si d'autres moyens de paiement plus efficaces émergent.

L'initiative législative pose également la question de son champ d'application, en particulier si celle-ci couvre tant les systèmes à quatre points qu'à trois points¹⁴, ces derniers pouvant constituer une solution

¹² Directive 2007/64/CE du Parlement européen et du Conseil du 13 novembre 2007 concernant les services de paiement dans le marché intérieur, modifiant les directives 97/7/CE, 2002/65/CE, 2005/60/CE ainsi que 2006/48/CE et abrogeant la directive 97/5/CE.

¹³ Voir la réponse de l'Autorité de la concurrence en date du 17 avril 2012 au Livre vert de la Commission européenne.

¹⁴ Dans un système à quatre parties, le prestataire de services de paiement émetteur conclut un contrat avec le titulaire de la carte (payeur) et le commerçant charge un prestataire acquéreur (ou prestataire du bénéficiaire) à acquérir les paiements par carte effectués sur son terminal. Les CMI dans le cadre de ces systèmes sont des frais facturés par le prestataire émetteur sur les transactions effectuées à l'aide des cartes qu'il a émises. Le coût de ces commissions est supporté par le prestataire acquéreur et est ensuite répercuté sur les commerçants. Dans les systèmes à trois parties, la transaction n'implique que le payeur/titulaire de la carte, le bénéficiaire/commerçant et le système, alors que dans un système à quatre parties, la transaction implique le payeur/titulaire de la carte, le prestataire de services de paiement émetteur (ou prestataire payeur), le bénéficiaire/commerçant et son prestataire (le prestataire acquéreur ou le prestataire du bénéficiaire). Le système peut utiliser les commissions collectées pour subventionner un « côté » ou un autre (c'est-à-dire le commerçant ou le titulaire de la carte), ce qui équivaut à une CMI implicite.

de repli – aboutissant à un détournement de la règle – pour les systèmes à quatre points s'ils venaient à bénéficier d'un régime plus favorable.

S'agissant de l'interdiction des restrictions contractuelles à la « surfacturation », qui vise à permettre au commerçant de pratiquer une différenciation tarifaire selon le moyen de paiement utilisé, l'Autorité avait recommandé au ministre en charge de l'économie, dans le cadre d'un avis du 26 juin 2009¹⁵, de transposer strictement l'article 52, paragraphe 3 de la directive « services de paiement »¹⁶, dont l'objectif est de renforcer la concurrence entre moyens de paiement en vue de favoriser le plus efficace d'entre eux. Le récent rapport remis au ministre en charge de l'économie sur l'avenir des moyens de paiement en France appelle également à ouvrir, de manière encadrée, la possibilité d'une telle différenciation¹⁷.

Les bénéfices attendus d'une telle faculté de différenciation sont multiples. Elle permet tout d'abord la prise de conscience, par les consommateurs, du véritable coût qu'ils induisent aux commerçants, et finalement assument collectivement du fait de l'utilisation des moyens de paiement. Partant, la possibilité de différenciation permet un arbitrage efficace entre les différents instruments de paiement mis à disposition des consommateurs et évite une répercussion générale du surcoût éventuel d'un moyen de paiement sur l'ensemble des consommateurs, y compris sur ceux qui utilisent des moyens de paiement moins onéreux. En effet, s'il leur est interdit de répercuter les commissions qu'ils acquittent auprès du système de paiement, les commerçants ne peuvent proposer qu'un prix unique, quel que soit l'instrument de paiement utilisé et ses coûts associés, qui prend en compte la moyenne du coût supporté par le commerçant pour un encaissement (moyenne du coût d'un encaissement en espèces, par carte de débit, de crédit, etc.), et non un prix différencié en fonction de l'instrument de paiement utilisé par le consommateur. Les utilisateurs de moyens de paiement moins coûteux subventionnent de ce fait les utilisateurs des moyens les plus coûteux. Enfin, une telle différenciation incite les prestataires de services de paiement à innover et à délivrer de nouveaux services, plus performants et meilleur marché.

L'Autorité suggère par ailleurs des mesures d'accompagnement pour éviter qu'un commerçant ne puisse abuser de son fort pouvoir de marché ou de l'asymétrie d'informations entre lui-même et son client. Une telle mesure consisterait en particulier à interdire la facturation de frais supérieurs aux charges réellement encourues par le commerçant, comme cela est prévu dans la cadre de la directive de 2011 relative aux droits des consommateurs¹⁸, en cours de transposition par les États-membres. Ce plafonnement des frais, pour être véritablement effectif, pourrait s'accompagner d'une mesure de transparence quant aux frais encourus par les commerçants, soit au total (*Merchant Service Charge* ou « MSC »), soit dans leur seule composante interbancaire (CMI), afin de discipliner les commerçants par crainte d'un effet d'ordre réputationnel.

¹⁵ Avis du 26 juin 2009 n° 09-A-35 portant sur le projet d'ordonnance relatif aux conditions régissant la fourniture de services de paiement et portant création des établissements de paiement.

¹⁶ « *Le prestataire de services de paiement n'empêche pas le bénéficiaire d'appliquer des frais ou de proposer une réduction au payeur pour l'utilisation d'un instrument de paiement donné. Cependant, les États membres peuvent interdire ou limiter le droit de demander des frais compte tenu de la nécessité d'encourager la concurrence et de favoriser l'utilisation de moyens de paiement efficaces.* »

¹⁷ Rapport Constans/Pauget, déjà cité, point 4.4.5.

¹⁸ Directive 2011/83/UE du Parlement européen et du Conseil du 25 octobre 2011 relative aux droits des consommateurs, modifiant la directive 93/13/CEE du Conseil et la directive 1999/44/CE du Parlement européen et du Conseil et abrogeant la directive 85/577/CEE du Conseil et la directive 97/7/CE du Parlement européen et du Conseil, article 19 : « *S'agissant de l'utilisation d'un moyen de paiement donné, les États membres interdisent aux professionnels de facturer aux consommateurs des frais supérieurs aux coûts qu'ils supportent pour l'utilisation de ces mêmes moyens.* »

Il doit également être noté que la possibilité de surfacturer peut inciter les systèmes de paiement à revoir les commissions applicables à leurs cartes afin d'éviter que leurs cartes ne soient surchargées et que les consommateurs soient ainsi dissuadés de les utiliser et de les détenir. La possibilité de surcharger peut donc exercer une pression sur les CMI et ce, si cette possibilité paraît suffisamment crédible, même sans que des surcharges tarifaires ne soient concrètement appliquées.

3. Conclusion

L'action récente entreprise par l'Autorité a permis de ramener les commissions interbancaires à un niveau objectivement déterminé et strictement proportionnel à l'objectif recherché. L'Autorité a par ailleurs pu, par la même occasion, développer une grille d'analyse des commissions interbancaires et préciser les conditions auxquelles elle admet leur application, fournissant par là-même aux parties prenantes une certaine sécurité juridique et un cadre stabilisé.

La question de l'intervention du législateur, européen ou national, doit s'apprécier à l'aune du chemin déjà parcouru. Elle peut s'avérer nécessaire pour étendre le champ de la régulation aux obstacles à la concurrence qui ne peuvent être traités de façon suffisante sur le seul fondement de l'article 101 TFUE mais qui sont nécessaires pour redonner sa juste place au consommateur en tant qu'arbitre du moyen de paiement le plus sûr, le plus innovant et le moins onéreux.

FRANCE

(English version)

Non-cash means of payment are essential for the fluidity of buying and selling and for the functioning of the economy as a whole. Thus, today in France, more than 17 billion payment transactions are carried out without using cash¹, *i.e.* mainly through the use of bank cards, cheques, direct debits and transfers.

In this respect, radical (e.g. the introduction of bank cards in the 60s) and incremental (e.g. the security made possible by the general use of PIN numbers in transactions carried out by card) innovations have been and remain powerful engines for change in payment habits, as users make use of the benefits, particularly in terms of security and ease of use, provided by these new means of payment.

However, the stimulus role traditionally played by competition, simultaneously encouraging the emergence of new services and a decrease in the cost of existing services, is facing specific obstacles in the payments sector. Due to the combination of regulatory factors and the behaviour of the parties involved, consumers are unable to choose a means of payment according to cost and efficiency criteria.

The regulatory factors were analysed by the Autorité de la concurrence, as well as in a recent report submitted to the Minister for the Economy². They can be the result of a desire on the part of public authorities to promote the free use of certain means of payment for general interest reasons, which underlies the cross-subsidies between means of payment, as well as the ban on merchants passing on the relative cost of using bank cards to cardholders through price increases³. And yet, authorising pricing differentiation according to means of payment is a crucial tool for introducing competition between means of payment, because it ensures that consumers are aware of the real cost that they are incurring for merchants, and that they will end up paying collectively, due to the use of means of payment. As such, the ability to differentiate allows for effective arbitration between the various payment instruments made available to consumers and prevents a general passing on of the potential additional costs associated with a means of payment to all consumers, including those who make use of less expensive means of payment.

Restrictions of a contractual nature may add to these regulatory factors.

Firstly, the use of interbank cooperation and compensation mechanisms means that the banks relinquish the self-determination of their competitive position in the market. While interbank cooperation

¹ Bank of France, Cartography of Means of Payment, 2011 Collection Assessment (2010 data), December 2011.

² The Future of Means of Payment in France, report by Georges Pauget and Emmanuel Constans, March 2012.

³ Article L.112-12 of the Monetary and Financial Code, introduced by order no. 2009-866 on the conditions governing the provision of payment services and establishing payment institutions, provides that “*the beneficiary [of the payment] may not charge a fee for the use of a given payment instrument. This ban may only be waived according to the conditions defined by decree*”, which has currently not been adopted. Prior to 2009, this ban already existed in practice due to the general use, within the context of the existing payment systems, of the “*no surcharge rule*” or the “*no discrimination rule*”, a contractual restriction requiring merchants to apply uniform pricing, irrespective of the means of payment chosen by their customers.

mechanisms are not prohibited *per se*, it is for operators to demonstrate that the financial mechanisms that may be implemented, like multilateral interbank fees, are more effective than bilateral agreements, that they do not eliminate competition and that they bring economic progress to the benefit of consumers. This condition is not met, in particular, if the fees pertaining to interbank cooperation are set above a competitive level. In this scenario, these fees are a burden on merchants, who include them in their charges, and therefore in the cost of their products or services and, ultimately, in the price paid by consumers.

Secondly, the absence of transparency with regard to debtors, who are often unaware of the costs that they bear in using a given means of payment, encourages the passing on of additional costs. Although the “payment services”⁴ directive provides that European Union Member States must in principle lift potential bans on merchants passing on additional costs, it does not deal with the other contractual restrictions that can encourage this pricing opacity and prevent the differentiation of costs according to the means of payment used and, consequently, the transmission of a price signal influencing the cardholder’s behaviour⁵.

Thirdly, with regard to creditors, and in particular merchants, refusing a means of payment due to its high cost may often not be a viable option, because of the customer risk that it entails, as some customers may turn to a competitor who does accept the means of payment in question.

Within the context of the implementation of the provisions of articles L.420-1 of the Commercial Code and 101 of the Treaty on the Functioning of the European Union (hereinafter “TFEU”), the Autorité de la concurrence has opened several proceedings, some of which have already led to a decision being adopted, in order to restore competition in the payment services markets. These matters concern all means of payment, excluding cash (I). In parallel and outside of the enforcement context, the Autorité has taken part in debates, revitalised in particular by the publication of the European Commission’s Green Paper on electronic payment⁶, relating, on the one hand, to the principle of a European legislative initiative concerning multilateral interchange fees (“MIF”) and, on the other hand, to the banning of the contractual restrictions on merchants passing on the cost of the use of bank cards, as well as arrangements likely to support it (II).

1. The Autorité’s decision-making practice with regard to multilateral interbank fees

Between 2010 and 2012, with three successive decisions, the Autorité stated its approach with regard to interbank fees, drawing up an analytical framework of the aforementioned fees and setting out the conditions in which they can, if necessary, be justified with regard to the economic progress which they bring. Additionally, the Autorité is investigating another case with respect to other four-party payment card systems.

⁴ Directive 2007/64/EC of the European Parliament and Council of 13 November 2007 on payment services in the internal market, amending directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing directive 97/5/EC.

⁵ These contractual restrictions are of two kinds: (i) the “*Honour All Cards Rule*” (HACR), the goal of which is to require all merchants who sign it to accept all cards originating from the same payment system, regardless of the costs incurred by them due to the acceptance of the entire range of cards in the system; (ii) the so-called “*blending*” practice, which consists in banks taking the average of the costs that all bank cards in a payment system incur for given merchants, and only invoicing them for this average, without issuing an invoice detailing the cost of each card.

⁶ European Commission Green Paper of 11 January 2012: “Towards an integrated European market for card, internet and mobile payments”.

The Autorité handed down an initial decision on 20 September 2010⁷ concerning the interbank fees introduced between eleven banks for the remittance and processing of cheques, in the specific context of the change from physical processing to the digital processing of cheques at the beginning of the 2000s.

In its decision, the Autorité assessed the parties' observations in response to its statement of objections and in particular whether they had, pursuant to national law and article 101, paragraph 3 TFEU, provided justifications for their agreement amongst competitors falling within the scope of article 101, paragraph 1 TFEU. In this regard it was incumbent upon the parties to demonstrate that their agreement "*contribute[s] to improving the production or distribution of products or to promoting technical or economic progress, while allowing consumers a fair share of the resulting profit, and without: a) imposing restrictions on the undertakings concerned which are not indispensable for achieving those objectives, b) affording such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question*".

The Autorité fined the eleven banks concerned for having jointly set the so-called exchanges cheque-image fee ("CEIC"), which amounted to setting a floor price, without this being justified by economic progress. Set at a uniform rate of 4.3 euro cents per cheque, it was paid by the bank of the remitter (beneficiary of the cheque) to the bank of the drawee (issuer of the cheque) for each transaction. The goal of the CEIC was to offset the cash losses incurred by the drawee banks, brought about by the acceleration of interbank cheque clearing due to the digitalisation of cheque processing. However, due to its fixed nature, it did not allow for the genuine compensation for the drawee banks' losses, which were tied to the average amounts of the cheques exchanged, and not to their number, with these amounts varying greatly depending on the institutions concerned. Furthermore, the cash losses incurred on the cheques drawn were already compensated for, at least in part, by the cash gains on the cheques remitted and the savings in processing costs resulting from the digitalisation.

Two related fees, linked to the cancellation of wrongly cleared transactions (so-called AOCT fees) were also the subject of a fine, given that the restriction on competition arising from banks substituting, in an organised manner, a common cost profile for a diversified cost profile, limited banks' freedom to determine their pricing independently and individually based on their own level of costs. The Autorité did not rule out the possibility for these fees to be set at a common level, but set as criteria, however, that these fees be in payment for a clearly identified service, that they be paid by the bank requiring or requesting the service and, finally, that their amount be set in reference to the most efficient bank's costs, in order to encourage banks to reduce their costs as well as to prevent the multilateral setting of fees from having an inflationary impact on the fees paid by the banks' customers.

On the other hand, the Autorité de la concurrence deemed that the other fees for related services enabled transaction savings with regard to bilateral transactions, contributed in fair proportion for newly provided services by one category of bank to another (such as the processing of rejections) and allowed for the compensation of cost transfers resulting from the digitalisation of the cheque exchange system (such as the storage of cheques).

Following its decision with regard to cheques, the Autorité finalised two commitment procedures concerning payment cards, on the one hand, and other non-cash means of payment (transfers, direct debits, interbank payment orders, etc.), on the other hand. In both cases the Autorité deemed that robust, credible and verifiable commitments had been proposed by the banks.

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Decision no. 10-D-28 of 20 September 2010 concerning fees and associated conditions imposed by banks and financial institutions for the processing of cheques remitted for cashing. This decision was reversed by the court of appeal on 23 February 2012. This judgment has been further appealed.

The Autorité's decision of 7 July 2011, making the commitment put forward by the *Groupement des Cartes Bancaires*⁸ compulsory, thus resulted in a substantial fall in the fees associated with the use of payment cards, within the context of the national four-party "Cartes Bancaires" system⁹, of which more than 130 banks are members. In its preliminary assessment, the Autorité invited the banks to put forward commitments so that the level of interbank fees, which had not changed for twenty years despite the increased security of this means of payment, the change in the position of banks, the reduction in costs and the widespread use of payment cards, could be set in line with these market developments.

When fees are associated with services provided by one bank to another, or with services required from one bank by another, as is the case for fees relating to a service from one bank to another bank, or to the customer of this other bank, provided on an exceptional (card capture or transaction cancellation service) or systematic (ATM withdrawal service) basis, the preliminary assessment compared the level of interbank fees to the costs borne by the most efficient bank.

For the fee applied under the "Cartes Bancaires" system, the IPF ("interbank payment fee"), whose function, like that of the fees examined by the European Commission in the context of the recent *Mastercard* (2007) and *Visa* (2010) decisions, is to encourage the possession and use of payment cards by users and to finance the system as a whole, the reference test was necessarily different. Not contesting them in principle – multilateral interchange fees can, under certain conditions, contribute to economic progress by encouraging the development of efficient payment systems – the Autorité indicated that their amount had to be controlled to prevent the card system in question from taking advantage of the potential reluctance of merchants to refuse card payments for fear otherwise of losing their clientele to their competitors.

To control the new level of the IPF proposed in the commitments, the Autorité referred to the merchant indifference test – or "tourist test" – also implemented by the European Commission in the *Visa* and *Mastercard* cases. This test is based on establishing the level of IPF that does not, on average, exceed the transactional benefits gained by merchants through accepting payment cards rather than other means of payment. The indifference test therefore involves the simultaneous assessment of the benefits gained (transaction speed, ease of administrative management, etc.) and the costs incurred (terminal equipment, etc.) by merchants compared with an alternative means of payment, in particular cash.

Following this decision, the Autorité, on 6 February 2012, assembled, for the first time, a steering committee entrusted with the task of developing the methodology of the indifference test and collecting data allowing it to be implemented within the French context. The results of this work can, if necessary, be used to revise the "Cartes Bancaires" system fees on the expiry of the commitments provided for by decision no. 11-D-11, i.e. in 2015. The Autorité de la concurrence wished to obtain the opinion of all the parties concerned and extend the field of participants beyond the parties in the procedure concerning the

⁸ Decision no. 11-D-11 of 7 July 2011 concerning practices implemented by the *Groupement des Cartes Bancaires*.

⁹ Interbank payment and withdrawal fees, the highest in terms of value, have seen their respective amounts fall noticeably by -36% and -20%. The interbank payment fee, which is paid by the merchant's bank to the cardholder's bank on each payment, fell from 0.47% to 0.30% on average, i.e. a decrease of 36%. The annual income from the IPF, currently almost 1.5 billion euros, should ultimately be reduced by approximately 500 million euros. The interbank withdrawal fee, paid on each withdrawal by the cardholder's bank to the bank managing the automatic teller machine, has fallen more than 20%, from €0.72 to €0.57. This decrease in the IWF has resulted in a reduction of almost 100 million euros in annual income from the IWF, currently in the order of 450 million euros. The decrease in this fee, currently frequently passed on to cardholders by the majority of banks, will in all probability have a direct downward effect on the amounts charged to cardholders.

Groupement des Cartes Bancaires. Under the chairmanship of the Autorité de la concurrence, representatives from the *Groupement des Cartes Bancaires*, MasterCard, Visa, merchant representatives (the *Fédération des entreprises du commerce et de la distribution* [Federation of Trade and Distribution Companies], the *Conseil du Commerce de France* [Trade Council of France], consumer association representatives (*Confédération de la Consommation, du Logement et du Cadre de Vie* [Confederation of Consumers, Housing and Living Environment], *UFC Que Choisir*), and representatives from the Bank of France, the Prudential Supervisory Authority, the European Commission and the Financial Sector Advisory Committee were invited to participate.

Finally, in its decision of 5 July 2012¹⁰, the Autorité obtained a significant change from the 11 main banks established in France in the level of interbank fees charged with regard to non-cash means of payment other than cheques and payment cards, which include, in particular, direct debits, the second most common means of payment in France (20% of payments). Fees per transaction will be reduced by half from September 2012, and then abolished from 1 September 2013. Exceptional fees, debited for rejections, will also be reduced by half as of now, and must be reassessed on 1 September 2013 on the basis of the most efficient bank's costs. Since this solution deals with all of the fees concerned in this matter, it anticipates the obligations arising from the so-called "end-dates" regulation with regard to direct debits¹¹ that provides for the abolition (for systematic domestic fees) or adjustment towards the costs (for exceptional fees) for fees currently in effect, on 1 February 2017 and 1 February 2014 respectively, at the latest.

2. The opportunity to implement a legislative initiative

The European Commission's Green Paper on payments identifies obstacles to greater integration throughout Europe and lists the various possible options to overcome them. From the point of view of the competitive functioning of the payment services market, two issues – with which the Autorité already has experience – arise in particular: the supervision of multilateral interchange fees (MIF) by means of a European legislative instrument and the general application, through the extension of the "payment services" directive¹², of the ban on restricting the passing on by merchants of the cost of using a payment card¹³.

With regard to MIFs, the effectiveness of a European legislative initiative depends on several conditions, the respect of which would, in particular, ensure a smooth interaction between specific national situations and a common framework. Indeed, since the extent of the incentives to be provided depends strongly on factors varying from one Member State to another (payment habits, tendency to use cards), and since more than 95% of card payments concern national transactions, setting a MIF at a single absolute value throughout Europe would not achieve the goal of encouraging the use of payment cards, by either "subsidising" them too little or, on the contrary, too much, depending on the prevailing situation within a State.

¹⁰ Decision no. 12-D-17 of 5 July 2012 concerning practices identified in the non-cash means of payment sector (direct debit, interbank payment orders, electronic payments, transfers and bills of exchange).

¹¹ (EU) Regulation no. 260/2012 of the European Parliament and of the Council of 14 March 2012, establishing technical and business requirements for transfers and direct debits in euros and amending (EC) Regulation no. 924/2009.

¹² Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, amending directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing directive 97/5/EC.

¹³ See the Autorité de la concurrence's response dated 17 April 2012 to the European Commission's Green Paper.

Additionally, with regard to the action already taken by competition authorities, which have defined a MIF analytical framework, and some of which have already applied the merchant indifference test, the legislative instrument that may be adopted must be based on this experience and include the competition authorities in defining a reference MIF, based on data that is objective, trustworthy and in keeping with competition law. In this regard, the Autorité is working on a MIF-level approach corresponding to the indifference test, in a transparent and organised way, within the context of the steering committee put in place following the adoption of the “payment cards” decision. The committee has therefore begun discussing the representative sampling of merchants, keeping in mind that not all merchants, in particular small-scale merchants, necessarily deal with the same payment costs, or are as sensitive to the advantages and disadvantages of cards. The steering committee is also considering the scope of alternative payment means to be taken into account within the context of the indifference test, given that the French market is still characterised by a widespread use of cheques.

Finally, a common framework should be sufficiently flexible to allow for regular updating based on market developments, possibly leading to the pure and simple banning of MIFs, if consumers are already inclined to use payment cards of their own volition, or if other more efficient means of payment emerge.

There is also the question of the scope of the legislative initiative, particularly if it covers both four- and three-point systems¹⁴, as the latter may constitute a fall-back solution – resulting in the rule being bypassed – for four-point systems, if they were able to benefit from a more favourable regime.

With regard to the banning of contractual restrictions on “surcharging”, which aims to enable merchants to implement pricing differentiation depending on the means of payment used, the Autorité had recommended that the Minister of Economy, within the context of an opinion dated 26 June 2009¹⁵, strictly transpose article 52, paragraph 3 of the “payment services” directive¹⁶, the goal of which is to strengthen competition between means of payment in order to encourage the most efficient one. The recent report submitted to the Minister of Economy concerning the future of means of payment in France also calls for allowing such a differentiation, under certain conditions¹⁷.

There are multiple benefits expected from such an ability to differentiate. Firstly, it enables consumers to become aware of the real cost that they are incurring for merchants and that they finally bear collectively when using means of payment. Consequently, the possibility of differentiating allows for effective arbitration between the various payment instruments made available to consumers, and avoids a general

¹⁴ In a four-party system, the issuing payment service provider enters into a contract with the cardholder (payer) and the merchant requests a purchasing service provider (or the beneficiary’s service provider) to acquire the card payments made on its terminal. Under these systems the MIFs are fees charged by the issuing service provider on transactions carried out using the cards that the provider has issued. The cost of these fees is borne by the acquiring service provider and then passed on to the merchants. In three-party systems, the transaction only involves the payer/cardholder, the beneficiary/merchant and the system, while in a four-party system, the transaction involves the payer/cardholder, the issuing payment service provider (or paying service provider), the beneficiary/merchant and its service provider (the acquiring service provider or the beneficiary’s service provider). The system can use the fees collected to subsidise one “side” or another (i.e., the merchant or the cardholder), which equates to an implicit MIF.

¹⁵ Opinion no. 09-A-35 of 26 June 2009 on the draft order concerning the conditions governing the provision of payment services and establishing payment institutions.

¹⁶ “The payment service provider shall not prevent the beneficiary from applying charges on the payer or from offering him/her/it a reduction for the use of a given payment instrument. However, Member States may forbid or limit the right to demand charges bearing in mind the need to encourage competition and promote the use of efficient payment means.”

¹⁷ Aforementioned Constans/Pauget report, point 4.4.5.

passing on of the potential additional cost of a means of payment to consumers as a whole, including those who use less expensive means of payment. Indeed, if they are prohibited from passing on the fees they pay in relation to the payment system, merchants can offer only one price, regardless of the payment instrument used and its associated costs, which takes into account the average cost borne by the merchant for a transaction (average cost of a transaction in cash, by debit or credit card, etc.), and not a price that differs according to the payment instrument used by the consumer. Those who use less expensive means of payment therefore subsidise those who use more expensive means. Finally, such a differentiation encourages payment service providers to be innovative and provide new services that are more efficient and less expensive.

The Autorité also suggests supporting measures to prevent merchants from abusing their strong market power or the imbalance in information between themselves and their customers. Such a measure would consist, in particular, in prohibiting the invoicing of fees higher than the expenses actually incurred by the merchant, as provided for under the 2011 directive on consumer rights¹⁸, currently being transposed by Member States. In order to be truly effective, this capping of fees could be supported by a transparency measure with regard to fees incurred by merchants, either in total (Merchant Service Charge or “MSC”), or as a single interbank component (MIF), in order to discipline merchants through the fear of having their reputations adversely affected.

It must also be noted that the possibility of surcharging can encourage payment systems to review the fees applicable to their cards in order to prevent their cards from being overcharged and consumers from being thereby dissuaded from using and carrying them. The possibility of surcharging can therefore put pressure on MIFs where such surcharging seems sufficiently credible, even without concrete fee surcharges being applied.

3. Conclusion

The recent action undertaken by the Autorité has enabled interbank fees to be brought back to a level that is objectively determined and strictly proportional to the intended goal. Additionally, the Autorité has, at the same time, been able to develop an analytical framework of interbank fees and specify the conditions under which their application is permitted, thereby providing stakeholders with a certain legal security and a stabilised framework.

The question of legislative intervention, either European or national, must be considered in light of the progress already made. It may prove necessary in order to extend the scope of regulation to obstacles to competition that cannot be dealt with sufficiently on the basis of article 101 TFEU alone, but which are necessary to put consumers back in their rightful place as arbiters of the most reliable, innovative and least expensive means of payment.

¹⁸

Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, article 19: “*With regard to the use of a given means of payment, Member States shall prohibit traders from charging consumers fees that exceed the cost borne by the trader for the use of such means*”.

GERMANY

1. Introduction

Consumers and businesses increasingly conduct business across national borders and technological innovations augment the options available for online and offline payment methods. Despite the successful first steps in recent years to facilitate cross-border payments between Member States of the European Union with the Single European Payment Area (SEPA) project,¹ some structural differences between the various national payment markets still remain.² These may be the result of, e.g., specific provider structures as well as certain products tailored to meet specific needs of users. In order to find ways to further reduce these differences to foster competition on the markets for payment services and to accelerate market integration, the European Commission published its Green Paper *Towards an integrated European market for card, internet and mobile payments* in 2012.

This contribution highlights the specific market conditions in Germany and describes the development of payment methods over the recent years, mainly drawing on the experience of the German competition authority, the Bundeskartellamt. First, a brief overview of the markets for card payments and internet payments in Germany is provided (2.). Subsequently, the focus of enforcement activities of the Bundeskartellamt (3.) and selected recent cases (4.) are described. The contribution concludes with a short note on issues of relevance for the future development of the discussed markets (5.).

2. Payment systems in Germany

2.1 Card payments

The conditions in the card payments market in Germany differ distinctly from those in other neighbouring market regions. Germany has not only a well-established and widely used national debit card scheme, the so-called Girocard (or: Electronic Cash). In addition to the Girocard system, an electronic direct debit (*Elektronisches Lastschriftverfahren, ELV*) system has been established – a product which was mainly developed by providers of technical processing services, not by banks. Credit cards play only a comparatively minor role in card payments in Germany.³

Over the last two decades (after its introduction in 1989/90 by the four main German banking associations), the Girocard has become the leading card payment system in Germany. The Girocard system allows consumers to pay with a debit card at the point of sale (POS) using a PIN for authorisation. From the beginning, the scheme foresaw a common fee to be paid by the merchant accepting the Girocard to the issuing bank (with a special rate for the petrol sector), a no surcharge obligation and an honour-all-banks

¹ The SEPA (Single Euro Payment Area) project aims at creating an integrated payments market without distinction between cross-border and domestic payments.

² Compare European Commission: Green Paper „*Towards an integrated European market for card, internet and mobile payments*“ COM(2011) 941 final.

³ Cf. the German contribution to the 2006 OECD Roundtable „*Competition and Efficient Usage of Payment Cards*“.

rule.⁴ Girocards also carry the debit logo of one of the international card organisations (usually Maestro or V-Pay) as part of the co-badging scheme in place in Germany. This allows holders of the national Girocard to compensate for the lack of reach beyond the German border, as the card can be used abroad as a Maestro or V-Pay card. However, there is a rule of precedence in favour of the use of the debit card as a Girocard within Germany although in theory cardholder and issuing bank can agree to use a co-badging scheme. While this co-badging scheme enhances the options for the card holder, the rule of precedence reduces competition between these methods of payment, as the current card issuers (the banks) and the cardholders have little incentives to switch completely to the debit card of another card system. Relatively new is the possibility to use the Girocard directly within the EAPS (Euro Alliance of Payment Systems), a network of national debit card schemes in Europe.

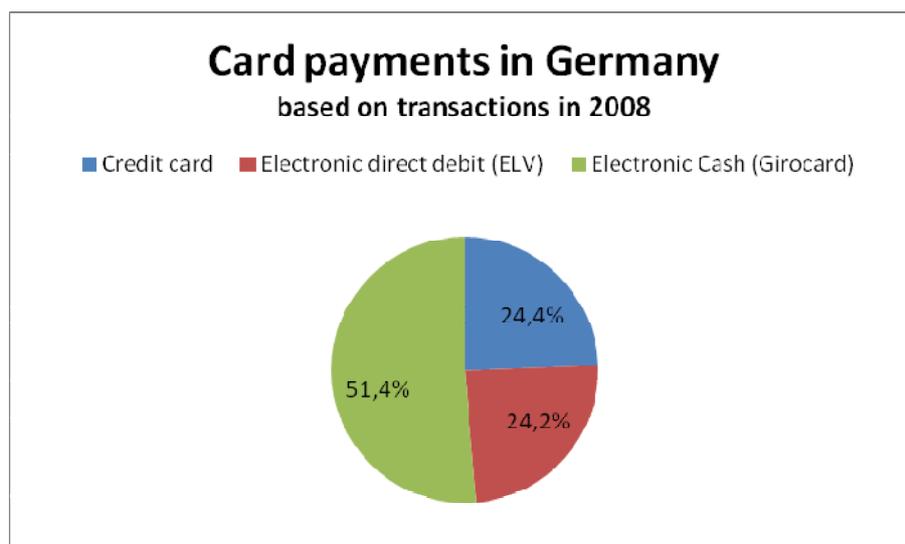
The second scheme frequently used for POS transactions is the ELV system. Under this system, the customer authorises the retailer to withdraw a specific amount from his account with his signature. The debit card is only used to extract the necessary data on bank account and bank identification code. While the Girocard can be considered a highly standardised payment scheme, ELV consists of a large number of product variations. Providers of ELV systems have developed tailored product modifications to cater for the specific needs of different card acceptors. These product variations include, for example, the preliminary examination of possible default risks and payment guarantees. From the perspective of card acceptors, the ELV system offers more choices and the possibility to save costs. Therefore, this system offers a competitive alternative to Girocard for payers as well as payees and as such exerts pricing pressure on the Girocard scheme.

Credit card payments play a comparatively small role in card payment transactions within Germany. This may be due to the fact that most regular bank accounts come with a (personal) drawing credit, reducing the need for short-term credit facilities provided for by credit cards. Only in few sectors (e.g. air travel, hotel bookings) credit card payments are of increasing importance.

In 2009, a consultancy company conducted a survey on behalf of the Bundeskartellamt. In the survey, retailers in the private consumption sector that have direct interaction with the end consumer were questioned. Based on transactions in 2008, the results showed that debit card products of the international credit card organisations play only a minimal role in domestic German transactions because of the rule of precedence in favour of Girocard.

The following graph shows the percentage breakdown of all card payment transactions in Germany (in 2008), as established in the investigations conducted by the Bundeskartellamt:

⁴ Developments in the last years seem to suggest, however, that these rules, in particular the collective fee, are no longer indispensable for the proper functioning of the scheme. The Bundeskartellamt therefore has opened proceedings and is in debate with the banking associations about a model allowing merchants more room to negotiate the level of fees and eliminating other anticompetitive rules of the scheme.



2.2 E-payments

Traditional payment methods used in e-commerce in Germany are debit note (direct debit), debit transfer and credit card payments. Apart from these, there are also some payment forms used that are specifically tailored to the needs of e-commerce, such as Giropay and instant credit transfer (*Sofortüberweisung*), by which payment to the merchant is authorised based on information on the availability of funds in the consumer's account. Other providers, such as PayPal, operate accounts for consumers wishing to use their services and can authorise payments from these accounts.

So far, the significance of these new payment forms remains comparatively low. In 2009, around 60 % of all companies active in e-commerce accepted only traditional offline payment methods.⁵ However, it can be expected that there will be an increase in the use of internet-specific and newly developed payment forms in the nearer future. According to the Bundeskartellamt's assessment, these competing payment schemes exert competitive pressure on each other. At the same time, the Bundeskartellamt acknowledges that the substitutability between credit card payments and payment forms specifically developed for e-commerce is particularly high because they both minimise the risk of payment default from the merchant's point of view. However, the Bundeskartellamt has not yet come to a final conclusion as to the concrete product market definition.

3. Focus of enforcement activities

In the Bundeskartellamt's view, the following aspects are particularly important in order to maintain competition in the payments markets and to prevent a foreclosure of the market with negative effects for the consumer.

Above all, providers from outside the banking sector are exerting competitive pressure on the payments markets. This applies not only to the area of POS card transactions, in which, according to the Bundeskartellamt's assessment, considerable competitive pressure is being exerted by the ELV system. The same is also true for the online transfer schemes operated by providers such as Payment Network (now Sofort AG) or Deutsche Telekom, which have been specifically tailored to the needs of e-commerce.

⁵ Statistics taken for the German Federal Statistical Office, see https://www.destatis.de/DE/Publikationen/STATmagazin/Informationsgesellschaft/2009_12/2009_12OnlineShopping.html

Therefore, in its enforcement activities in this area, the Bundeskartellamt strives in particular to prevent the exclusion of providers from outside the banking sector. Accordingly, it has initiated proceedings intended to prevent the exclusion of such providers from online credit transfer schemes and voiced objections to attempts to change the conditions for participation in direct debit transactions, which might result in the ELV system being squeezed out of the market.

In the case of bank payment systems with a large number of participants, which is typical of card payment systems, collectively agreed fees are a common feature. These can either take the form of multilateral inter-change fees (**MIFs**) in the four-party system of the credit card organisations or merchant fees in electronic cash systems like the Girocard. In this context it should be noted that the competitive pressure exerted by the ELV system on the Girocard system in Germany seems not to affect the international payment card systems. MIFs for VISA and Mastercard credit cards remain very high for transactions within Germany. Due to the alternatives available to the acceptance side, payments with VISA and Mastercard products continue to increase in Germany but remain at a comparatively low level. The high MIFs affect, above all, certain acceptor groups who, for several reasons, are increasingly forced to accept credit card payments. If a credit card issued outside Germany is used in a payment transaction in Germany, the reduced MIFs apply under the arrangement reached with the Commission. The national MIFs are set by VISA Deutschland e.V. or the institution promoting the activities of Mastercard in Germany. The associations of the German credit sector are represented in both corporations. However, these credit associations also operate the German debit card system (Girocard). Therefore, the level of MIFs in Germany cannot be interpreted as the outcome of a competitive process. An intervention to regulate individual price elements in the card payment systems, as discussed in the Green Paper,⁶ may be found necessary as an *ultima ratio*, unless it can be established that prices are the outcome of market processes that are the result of appropriate (negotiating) structures established by the market participants concerned. In Germany's major card payments system, Girocard, such negotiating processes are currently being established for national transactions between the card issuing side and card acceptance side with the participation of third parties, in particular the National Association of Savings Banks and cooperative institutes. These operate on behalf of their members on the one side and service providers commissioned by the merchants with the clearance of card payments on the other. They assume pooling functions and reduce the number of necessary negotiations to a practicable level. This competitive process of price formation requires alternative options for the acceptance side, which in the case of Girocard includes in particular the option to switch to the ELV system, but also other options such as to levy a surcharge or to offer a rebate for the use of particular means of payment.

4. Recent cases

4.1 Interbank agreements and standard terms and conditions for direct debit payments

In July 2011 the main German banking associations informed the Bundeskartellamt through their umbrella association 'Zentraler Kreditausschuss' (meanwhile renamed 'Deutsche Kreditwirtschaft') that they intended to amend two interbank agreements and three standard terms and conditions relating to national direct debits and SEPA direct debits. Two reasons were put forward: firstly, some of the amendments were argued to be a reaction to a recent judgment of the German Federal Court of Justice on the conditions necessary to protect direct debits in case of the insolvency of the payer.⁷ Secondly, it was claimed that the proposed amendments were necessary to prepare the transition to SEPA direct debit (migration of national legacy direct debit mandates to SEPA).

⁶ European Commission: Green Paper „Towards an integrated European market for card, internet and mobile payments“ COM(2011) 941 final.

⁷ See Bundesgerichtshof (BGH) joint judgements of 20. July 2010 – XI ZR 236/07 and IX ZR 37/09.

The proposed amended standard terms and conditions provided for mandatory data elements within the direct debit mandate, including the 'designation of the payee', the 'designation of the payer' and the 'identifier of the payer' (the latter defined as the bank account number and the national bank code). According to the amended standard terms and conditions, the payee would have to transmit this data to his bank in order to initiate the direct debit. The main concern was that the transmission of data which was not available in the Girocard system would be made mandatory.

In order to eliminate the preliminary competition concerns, Deutsche Kreditwirtschaft agreed to publish a more precise definition of the data element 'designation of the payer', which should encompass all types of direct debit mandates that were used, including the submission of 'other data elements' such as card numbers in the ELV. The Bundeskartellamt closed the case and informed Deutsche Kreditwirtschaft by an informal letter in November 2011.

4.2 *Electronic cash*

In 2011 the Bundeskartellamt opened proceedings against the four main banking associations in Germany which offer electronic cash services. The subject of the proceedings are the collectively agreed merchant fee and other provisions such as the no surcharge rule and the honour all cards (banks) rule. The Bundeskartellamt places its main focus on the viability of ELV which exerts the main competitive pressure on electronic cash. The case is still pending.

4.3 *Online credit transfer services*

In 2010 the Bundeskartellamt received a complaint by Payment Network AG (today: Sofort AG), a company offering an online credit transfer service called Sofortüberweisung.de. The company complained that it was being barred by the German banks from offering its online credit transfer services to merchants and payers. Among other measures, this included a lawsuit by Giropay GmbH (a joint venture of Postbank and companies from the savings bank group and the cooperative bank group) against Payment Network AG. Giropay claimed that Payment Network AG was inducing bank account customers to use their online-banking credentials on websites that had not been authorized by their banks. The clauses on using credentials are part of the general terms and conditions that are developed by Deutsche Kreditwirtschaft and are generally adopted by the banks. Banks only allow using these credentials on their own website or on websites of Giropay as a bank-owned online service.

After a preliminary assessment, the Bundeskartellamt came to the conclusion that the general terms and conditions for online banking most likely constitute an infringement of Article 101 TFEU and Section 1 of the German Competition Law (Act against Restraints of Competition – ARC) because the exclusion of online credit transfer services from all but specific (bank-owned) service providers was not deemed indispensable for guaranteeing a secure online banking system – as had been claimed by the plaintiff in a civil case and by Deutsche Kreditwirtschaft in the administrative proceedings initiated by the Bundeskartellamt. The Bundeskartellamt was of the opinion that other measures could be taken in order to safeguard the online banking system, such as the development of a certification procedure comparable to existing certification procedures in other areas of banking services. It submitted a corresponding amicus curiae statement to the competent court. The court decided in March 2011 to stay its procedure until the administrative proceeding was concluded.

In August 2011 Deutsche Kreditwirtschaft issued a first model for a certification procedure for non-bank online banking service providers. While the certification requirements proposed seemed to be acceptable, discussions are still ongoing regarding the need of bilateral contracts with each customer bank, as well as issues of liability. The case is still pending.

5. Concluding remarks

Effective competition between payment service providers at all market levels is crucial for the further development of the payments markets. Measures intended to improve market integration, as envisioned at the European level, should not lead to the disappearance from the market of providers or products which are key drivers of competition. Rather, priority should be given to the removal of existing barriers to market entry and the prevention of new obstacles. This seems particularly relevant to allow for the emergence of new and additional products in the dynamic markets of payment systems to the benefits of consumers and society at large.

HUNGARY

This contribution discusses the developments experienced since the 2006 OECD roundtable in relation to payment systems in Hungary. The focal point of the contribution is the payment card market as major developments have occurred in this area in Hungary, and the Hungarian Competition Authority's (GVH) relevant experience stems from these developments.

The development of payment systems in Hungary has led to payment cards being the most important and widespread alternative to cash, with e-payments and mobile payments being underdeveloped in contrast. Market problems and competition issues have therefore been talked about mostly in relation to payment cards, with interchange fees and card acceptance being the hottest topics. As a result, the market was subject to an enforcement action (competition investigation) initiated by the GVH, a failed price regulation, and several studies performed by the Hungarian National Bank (MNB). While the competition investigation was in line with similar European practices, the European Commission's proceedings on interchange fees resulted in a unique market situation in Hungary, creating a lack of a level playing field for the major market players. These developments prompted further debates over interchange fees and lead to a new competition investigation, with a looming possibility of regulation.

1. Payment systems in Hungary ¹

While Hungary's payment systems have experienced major developments since 2006, the majority of payments are, still performed using cash. Research performed by the national bank established that in 2009 3.7 billion payments were made in the Hungarian economy, 84.4% of which were related to cash. Hungarian society could save up to 106 billion Hungarian Forints a year (24 billion of which is related to payments made by the state) if electronic payment means replaced cash at a rate similar to that witnessed in Northern-European countries. In 2010 the national bank published a cost-of-cash study. The results show that the marginal costs of electronic payments are significantly lower than those of cash-based payments.

In previous years the number of payment accounts and debit cards has increased slowly but steadily, but there still remains much room for improvement. There are two major obstacles to the widespread dominance of efficient electronic payment methods. The first one is the limited availability of basic payment systems in certain regions and for certain groups of society. The second one is related to choices on payments instruments and methods not being made based on their relative efficiency, as the real costs remain hidden to consumers. The accessibility of basic payment methods could improve through the market entry of new service providers, while the spread of internet and mobile technology may contribute to a greater use of account based electronic payment means. While in 2006 only 40% of current accounts were accessible via the internet, today the rate is more than 60%. Currently, basic wire transfer is the prevailing account based electronic payment method, while direct debits are slowly gaining ground.

Pricing of various payment means should drive their usage towards efficiency, if the market signals provided by pricing are appropriate. However, in the case of non-cash payment instruments, pricing usually does not fulfill this role therefore – according to the national bank – measures need to be taken in

¹ Report on the payment system 2012, Hungarian National Bank (MNB), 2012.

order to correct these distorted price signals. In addition to tackling the aforementioned infrastructural barriers, the national bank has also proposed that all regular salaries should be transferred to payment accounts, a stepwise introduction of obligatory card acceptance and a progressive limitation of cash usage. Adding to the problem is the fact that every third transaction in which the state is involved is done with cash. As a result of this, payments to or from the state need to be directly targeted by these measures. Furthermore, it is a problem that the costs of the payment methods are usually included in the price of the services or goods, as this means that the true costs of payment remain invisible to consumers. Moreover, these costs are mostly included in the price in an undifferentiated way, so a consumer using a less costly, electronic payment instrument is likely to pay for the more expensive, cash-based instrument as well.

In the payment card market card acceptance has significantly increased in recent years. However, card issuance, when compared on a European level, is still underdeveloped. While the number of POS terminals per one million inhabitants is 17 561 in the EU, the same number is only 7844 in Hungary. According to the national bank, the expansion of card acceptance is of high importance as it is currently only possible to make payments using cards in 30% of retail outlets.

Card usage patterns have also shown signs of improvement in recent years as more and more purchases are being made using payment cards. In late 2011 the rate of purchase transactions was almost the double of that of cash withdrawals. The majority of purchases by households are, however, still being made using cash and the average amount of a cash withdrawal is three times the average amount of a card-based purchase.

The number of payment cards has witnessed an increase of around 1 million since 2006, but the growth has slowed down considerably. There is, however, a shift inside the market, as the rate of credit cards is constantly decreasing in comparison to debit cards, a major factor being the economic crisis of recent years. The vast majority of domestic payment cards are issued by two major international card schemes, Visa and MasterCard. In the last couple of years MasterCard has gained a significant market share from Visa, predominantly due to a big interchange fee differential between the two companies.²

Mobile payments are still considered to be a rather exotic instrument of payment in Hungary. While the total amount of wire transfer transactions reached 200 000 billion HUF, and the amount of payment card transactions topped the 3500 billion HUF mark in 2011, mobile transactions amounted to a mere 12 billion HUF, 75% of which were purchases related to the mobile phone itself. There is, however, significant potential for growth, as both the number and the amount of mobile purchases increased by more than 40% in 2011, as compared to 2010.³

2. MIF cases in Hungary

Payment cards have developed into being an important instrument in domestic payments in recent years. The Hungarian market has faced problems which are both similar and unique to the problems faced in other European markets. This section provides a summary of the major market developments from a competition perspective, with an emphasis on competition law cases and their effects.

² Domestic payments in numbers, Hungarian National Bank (MNB), November 2011.

³ Domestic payments in numbers, Hungarian National Bank (MNB), November 2011.

2.1 *The first Hungarian MIF case*⁴

On 31 January 2008 the Hungarian Competition Authority initiated an enforcement action ('competition supervision proceeding') against twenty-three commercial banks and payment card schemes Visa and MasterCard, as the GVH presumed that the MIF agreement concluded between the Hungarian banks was capable of restricting competition within the Hungarian market. The GVH investigated payment card (debit and credit cards) transactions. The decision did not explicitly distinguish between consumer or commercial cards and referred to 'payment card transactions' due to the relatively limited number of commercial cards in Hungary.

The GVH found that the banks had infringed competition rules by setting uniform interchange fees for Visa and MasterCard payment card transactions. The practice of the payment card schemes was also found to be contrary to competition rules because it facilitated the conclusion of the anticompetitive agreement by the banks. The banks admitted that the two payment card schemes facilitated the conclusion of the agreement.

The Competition Council decided that the agreement restricted competition in the Hungarian market by its effects and also by its object. The object was established by the GVH with respect to the fact that uniform price setting regarding the two payment card schemes eliminated one of the most important factors of competition between the two schemes. Moreover, the agreement reduced competition between acquiring banks regarding merchant service charges. The GVH established that the agreement on uniform interchange fees concluded between the banks indirectly influenced the commissions paid by merchants accepting payment cards.

Even though the parties offered commitments, they were rejected by the Council as they were considered inappropriate for remedying the infringement. The commitments were aimed at improving the functioning of the acquiring market in Hungary. In its September 2009 decision the GVH imposed a fine on all the undertakings that were actively involved in the conclusion of the agreement. The agreement was concluded between competitors with the explicit aim of restricting competition and had a lasting impact. Seven banks were fined a total of 968 million HUF (approx. 3.57 million EUR), while the two payment card schemes, Visa and MasterCard were each fined 477 million HUF (1.76 million EUR each).

The parties fined by the GVH lodged an appeal with the Budapest Metropolitan Court after the final decision. The parties argued that the agreement was not contrary to competition rules and claimed that the GVH had not looked into the actual effects of the MIF agreement.

According to the parties the decision of the GVH should be amended or annulled. The judicial proceeding was suspended by the Budapest Metropolitan Court because the MasterCard case (T-111/08) was still pending at the CJEU.

2.2 *Impact of the European Commission's cases*⁵

Due to the GVH's decision in the case described above the domestic commercial banks abandoned the interbank agreement on interchange fees, and Visa and MasterCard introduced new domestic interchange fees, which were set by the card schemes themselves.

⁴ Vj-18/2008, Decision of the Competition Council, 24 September 2009.

⁵ Keszy-Harmath – Kóczán – Kováts – Martinovic – Takács: The role of the interchange fee in payment card systems, Hungarian National Bank – Hungarian Competition Authority, MNB Studies, 2011.

After the Commission's December 2010 decision to accept the commitments presented by Visa in the case brought against it in relation to cross-border multilateral interchange fees for debit card transactions, Visa had to introduce a limit to the weighted average of its domestic debit interchange fees in countries where interchange fees set by Visa itself were in force. In Hungary, one of the countries concerned, a lack of a level playing field arose within the Hungarian payment card market as Visa's main competitor, MasterCard, did not have to cap its domestic debit interchange fees.

In the MasterCard case the Commission decided the cross-border multilateral interchange fees of MasterCard were anticompetitive and ordered the card scheme to abolish them. The December 2007 decision, however, did not rule out the possibility of having an interchange regime which passes all the exemption criteria based on Article 101 (3) of the TFEU. As of April 2009 MasterCard unilaterally committed to capping its cross-border interchange fees, the cap, however, did not cover domestic interchange fees set by MasterCard – as is the case with Visa – but only those in force for cross-border transactions. The European Commission decided not to engage in further legal action against MasterCard for a violation of antitrust rules or for non-compliance with its 2007 decision.

The lack of a level playing field in relation to domestic debit interchange fees resulted in an interchange differential of around 0.5-0.8 percentage points in favour of MasterCard. Due to the fact that the Hungarian payment card market is run by universal banks where card acquirers are also card issuers, and the fact that banks expect and realise much higher revenues and profits from card issuance than card acquiring, it is safe to presume that domestic banks favour higher interchange fees. In this respect MasterCard has a major advantage on the market and this may be one of the reasons why MasterCard has been gaining market from Visa since the end of 2010.

These market dynamics and developments arising from the lack of a level playing field, and the fact that MasterCard has a market share above 75% in Hungary, led the GVH to initiate an enforcement action against MasterCard in June 2012 on the presumption that the company was using its dominant position within the Hungarian market to abusively foreclose the market through its interchange fees (Case number: Vj-46/2012., ECN Case number: 2691.).

3. Regulatory initiatives⁶

In 2009-2010 several regulatory initiatives were introduced regarding payments made with cards. The subject of the initiatives was the interchange fee and the merchant service charge on the one hand, and surcharging on the other hand.

At the end of 2009 Parliament adopted a modification to the already existing law on payments. The amendment was aimed at capping both the interchange fee and the merchant service charge. The law should have entered into force in March 2010 and would have capped the interchange fee at 0.75% for credit cards, 0.3% for debit cards and 0.8% for all other cards. However, before it entered into force, Parliament amended the regulation and completely left out caps on interchange fees. In May 2010 only a cap of 2% for the merchant service charge was introduced.

Experts on the subject and authorities involved in the pre-regulation discussions expressed their concerns as the regulation lacked economic reasoning and effects analysis. The regulation ended up being a failure as several market players already had lower merchant service charges and those with higher charges were able to circumvent the new rules by applying so called “administrative fees” for services such

⁶ Keszy-Harmath – Kóczán – Kovács – Martinovic – Takács: The role of the interchange fee in payment card systems, Hungarian National Bank – Hungarian Competition Authority, MNB Studies, 2011.

as POS maintenance and rental, which were previously included in the merchant service charge. The regulation was finally abolished in December 2010.

Surcharging was another regulatory issue that was dealt with between 2009-2010. In accordance with an EU directive, Hungarian national law on payments allowed for surcharging/discounting of non-cash payments when it was introduced in 2009. However, as of January 2011, an amendment to the law annulled the right of merchants to use surcharging/discounting practices in case of cashless payments.

In 2011 the Hungarian National Bank became increasingly interested in the payment card market and aware of some problems that it faced. Based on the research it had undertaken, the national bank came to the conclusion that card acceptance is rather underdeveloped, quite possibly due to the high level of interchange fees. As the aforementioned lack of a level playing field in the market also highlights a problem related to the level of interchange fees, the national bank approached the regulator with a proposal to cap interchange fees. The MNB worked out a regulatory package of three elements with the aim of improving card acceptance and solving the lack of a level playing field issue. The three elements are (i) to cap and decrease interchange fees; (ii) provide state aid for the improvement of the POS infrastructure; (iii) introduce obligatory card acceptance in certain sectors of the economy. The proposals are currently under evaluation by the regulator.

ICELAND

1. Competition enforcement leads to significant changes

One of the factors that will play a key role in the resurrection of the Icelandic business sector after the banking collapse in 2008 is the manner in which financial activities are conducted in Iceland. Active competition on the financial market is particularly important for both the business sector and consumers.

Entry barriers to financial markets that have detrimental effects on competition have historically been high in Iceland. That is to a large extent due to the hindrances new competitors face when accessing the payment and card transactions market.

The structure and there amongst the ownership structure of undertakings operating on the payment card transactions market in Iceland has undergone extensive changes in recent years. The Icelandic Competition Authority (ICA) has spent much time and energy dealing with cases related to this market, especially with the aim of introducing new working methods, increase competition, reduce barriers to entry into the market and to work towards the aim of changing the ownership structure of the undertakings that operate on this market.

In chapter 1-4 a short description is given of major decisions of the ICA since 2008.¹ The cases have mainly dealt with various forms of barriers to entry in the form of collusion by the largest competitors and by the electronic payment system operator and abuse of a dominant position of the largest payment card company in Iceland.

These investigations and decisions have had an important effect on the financial market. Ownership structures in the payment card system have significantly changed during these investigations and following the decisions. Competition has been introduced into the market, as a rooted collusion was eliminated and an abuse of a dominant position of the largest player has been dealt with. As barriers to entry have been reduced, fees and charges levied on merchants have decreased, to the benefit of consumers. More importantly the decisions of the ICA have positively affected the behaviour of the market participants and set the tone for competition in the financial market in general, as the payment system is a one of the foundations of healthy financial operations.

2. Case 1 – Violations of the competition act by the agencies for VISA and MasterCard/Eurocard

Following ICA's extensive investigations initiated by dawn-raids in 2006, three undertakings operating on the payment card (credit and debit card) market made settlements with the ICA that led to the closing of the case in 2008. These undertakings were Greiðslumiðlun (agent for Visa in Iceland) (**hereafter named G**), Kreditkort (agent for Mastercard/Eurocard in Iceland) (**hereafter named K**) and Fjölgreiðslumiðlun (**FGM**, an undertaking that operates electronic payment systems for authorisation, collection of entries and clearance of payments relating to transactions involving payment cards). FGM

¹ The following description of the cases and their findings has no legal bearing, as the Icelandic version of the decisions apply.

was owned by banks, payment card companies and the Central Bank of Iceland. In the settlement G admits to having abused its dominant position on the market by actions that were aimed at a new entrant to the market (PBS/Kortabjónustan). In the settlement G and K also admitted to having had a long standing, wide ranging and illegal collusion. In the settlement with FGM the undertaking also admitted to having been in violation with the articles of the competition act that prohibits associations of undertakings to restrict competition. The undertakings agreed to pay administrative fines and to change their operations and behaviour on the market. The fine of G was about 3 million EUR (385 million ISK), the fine of K about 1,45 million EUR (185 million ISK) and the fine of FGM about 1,3 million EUR (165 million ISK).²

The case concerned the payment card market and its submarkets. G and K were competitors on the market for providing acquiring services. Acquiring involves the service to vendors (e.g. retail shops) to authorise the vendor to accept payment by means of payment cards, collecting their data and disbursing the proceeds when card holders have paid their bills.

Until the year 2002 G and K had provided virtually all the acquiring services relating to the use of payment cards involving Icelandic vendors of goods and services. In November that year, a Danish company, PBS International, began offering acquiring services in competition with these two undertakings. PBS has a partner undertaking in Iceland, Kortabjónustan ehf. (Korta), which is responsible for contracting with vendors and transmitting records. These companies will hereinafter be referred to jointly as **PBS/Korta**. The violations of the competition act were mainly the following:

2.1 Abuse of a dominant position

G was the largest player in the market and the only one that provided acquiring services for VISA transactions. The documents of the case show that the managers of G were hostile to the competition from PBS/Korta. In G, memos were composed and e-mail messages written revealing an intent to drive PBS/Korta out of the Icelandic acquiring market, and certain actions were decided for this purpose. The objective, according to documents from G, was to prevent the new competition from cutting into the profits of G derived from this line of business. At the same time, the exclusion of PBS/Korta was intended as a warning to any other parties proposing to start competing in the Icelandic market.

The actions taken by G for the purpose of driving PBS/Korta from the market were of various kinds, and this abuse continued during the years 2002 – 2006. They included f.ex. unlawful exclusive price cuts, illegal bundling, technical barriers and more frequent disbursements, which were not generally available to vendors doing business with G. In some cases, offers were also made of reduced rent for POS terminals, or even free use of such terminals, which constitutes illegal bundling.

2.2 Collusion

G and K engaged in various forms of collusion. FGM participated to some extent in this collusion. This included:

- Collusion on actions and measures aimed at preventing the entry of PBS/Korta into the acquiring market in Iceland. G and K took the initiative in this collusion, while FGM participated, e.g. by providing information on the new competitor.
- Collusion between G and K on maintaining a mutual understanding that the companies should not seek franchises under each other's trade marks. This entailed a joint understanding that G

² Calculations into EUR based on the currency value at the time of decision.

would not compete with K in acquiring for MasterCard/Maestro cards, while K would not compete with G in acquiring for VISA/Electron cards.

- Collusion between G and K by agreeing that the latter company should not enter the POS terminal rental business in competition with G, against an agreement that K would instead be allowed to buy VISA instalment contracts. This means that the companies colluded on market sharing in a way that was designed to restrict competition in the POS terminal rental market.
- Collusion between G and K on issuers' shares in the commission from vendors for the use of debit cards.
- Collusion between K and G on reducing competition in offers to customers, in addition to colluding on marketing and promotion work. This consisted principally in discontinuing certain offers to customers.
- Collusion between G and K on establishing various terms relating to payment card activities and various aspects of vendors' business operations and consumers' interests.
- Collusion on exchanges of information concerning business-related matters, such as information on market share, prices and pricing plans. This exchange of information, e.g. on market share, had the effect of creating an anticompetitive transparency in this oligopolistic market.
- Collusion on various development and investment projects relating to payment clearance and acquiring. The objective was to defend the position of the companies in acquiring and payment clearance services and limit the risk of potential future competition.

In the case the companies maintained that some of their actions were necessary for the operations of the system and had benefitted consumers. The companies therefore maintained that the infringements were in some cases limited to the fact that they had failed to seek the approval of the ICA beforehand.

2.3 *Competition restrictions within operator for electronic payment systems (FGM)*

The FGM, the operator for electronic payment systems, operated a committee which was intended as a forum for co-operation. Its tasks included discussions of technical and security matters, standardisation and supervision of equipment certification. The committee was also intended to discuss business and contracts with vendors and to submit proposals to the board of directors of FGM concerning improvements, e.g. regarding acquiring terms to vendors.

The investigation revealed serious collusion resulting from this forum. The collusion consisted in decision making within the Committee, and sometimes also within the board of directors of the company, on issues which mostly related to competition between G and K. It is a common feature of all these matters that collusion regarding them is anti-competitive in the market for payment cards and thereby it has a potential impact on the available options and operating environment of vendors and on the interests of consumers.

2.4 *Instructions of the Icelandic Competition Authority*

As a part of the settlement of the case, the companies involved agreed to undergo detailed conditions, which were meant to promote active competition and prevent further instances of similar violations. The main features of the conditions included the following:

- K and G were instructed to cease all business co-operation with competitors unless the companies were granted an exemption by the ICA.
- K, G and FGM were to withdraw from all boards of directors, committees or decision groups which can provide a forum for collusion.
- K, G and FGM were prohibited from providing or accepting information which is capable of distorting competition.
- Ownership links between G and K had led to competition problems. Thus, the same companies had been represented on the boards of directors of both G and K. This provided for a basis for collusion between the card companies, which lead to serious distortion of competition. For this reason, parties were instructed to cut these management ties. Account was also taken of the fact that the boards of directors of FGM, G and K included representatives of undertakings engaging in competition with one another.
- Parties were instructed to rethink operations of FGM, as it entailed cooperation of competitors which resulted and facilitated serious collusion. Parties were to present to the ICA a new platform for the operations which would limit the danger of further collusion.

3. Case 2 – Competition-friendly changes to the electronic payment systems' operator

Following the settlement made in Case 1, described above, the operation of electronic payment systems was reviewed by the owners of the relevant systems. This led to major changes in the ownership of FGM, the operator of the electronic payment systems. Instead of being jointly owned by the Icelandic banks, savings banks, credit card companies and the Central bank, the Central bank became the sole owner of the company.

By a decision in 2011 the ICA authorised the acquisition of the Central Bank of Iceland of FGM. The takeover was however subject to a number of conditions aimed at excluding any barriers to entry into the market.

The conditions are detailed but include the following:

- FGM shall be operated according to independent business criteria as regards those aspects of the operation that are in the competitive market. The Central Bank of Iceland must ensure that the company's competitive operation is independent from the Bank's other statutory tasks. The Central Bank of Iceland must make public its policies as the owner of company. Board members of FGM must be independent of the customers of the company.
- FGM is obliged to ensure equal treatment and objectivity with respect to the parties requesting a connection to the systems and the services of the company. The company may not discriminate between parties in such transactions unless such discrimination is supported by objective reasons.

4. Case 3 - Conditions set for the operations of the banks' IT-service provider

Reiknistofa bankanna (RB) is an IT service provider for the commercial banks and the savings banks in Iceland. RB and all its owners, thereamongst the main commercial banks in Iceland, made a settlement with the Competition Authority in the year 2012 on the future operations of the undertaking. With the settlement these parties have accepted detailed conditions that are meant to ensure more effective competition and reduce the danger of barriers to entry into the financial markets. The conditions are also

meant to ensure that other IT companies will be able to offer financial institutions their services in competition with RB. The conditions are also aimed at facilitating cost reduction in banking operations.

The main points of the conditions are the following:

- New financial institutions as well as small financial institutions shall have full access to all systems and services of RB on the same terms as its owners, but the three big commercial banks are the largest of these. This is ensured by conditions on entry rules, price lists, prohibition on biased hindrances or discrimination and confidentiality in the application process.
- The conditions prevent that competitors on the financial markets can use the forum of RB in order to cooperate in a manner that restricts competition. The employees of different financial institutions are not allowed to sit on the board of RB and common user-groups of competitors on the forum of RB are discontinued. The present shareholders are in addition obliged to offer shares in RB regularly for sale in order to prevent that RB will solely be owned by competitors on the financial markets.
- It is stipulated that the RB will be operated as an independent undertaking with a normal required rate of return. By this, competitors on the financial market should be able to trust that the specific interest of the owners of RB will not create barriers to entry. The competitors of RB on the IT markets are ensured that the RB operates on a normal economic basis.
- Competition between RB and independent IT-providers in terms of services to financial institutions is facilitated. This is done by obliging the financial institutions that are shareholders in RB always to conduct price surveys in order to search for the most economic terms for the buying of IT service.

5. Case 4 – Interchange fees

Interchange fees are known in the Icelandic payments system. The ICA has been reluctant to acknowledge the legitimacy of the fees, and has taken into consideration recent findings of the EU Commission. In a case from 2008, the ICA investigated certain interchanges fees which the agent for VISA in Iceland intended to implement. In the case the VISA-agent failed to prove that the implementation of the fees did not entail unlawful collusion. Furthermore the agent failed to convince the ICA that the fee would not harm consumers. The ICA based its findings on EU precedents.

A case concerning alleged collusion of the issuers of debit cards and the payment card undertakings is pending. Current interchange fees are taken into consideration in this investigation. A statement of objections is being finalised.

INDONESIA *

Introduction

The credit card business has been growing rapidly in Indonesia, so that it could be one of the profitable business units for the banking industry. The development of a credit card in general based on usage, volume and value of transactions is increasing every year. For instance, the largest national bank in Indonesia accounted for monthly transaction value of US\$ 167.8 million (Rp 1.6 trillion). This increase indicates that today more and more Indonesian own and use a credit card. However, there is still a group of credit card holders who seldom use it.

In the aggregate, the credit card's usage continues to increase from time to time, especially when a lot of issuer (bank) provides attractive bargains or promotions for the consumers. By the end of 2010, the estimated number of credit card unit reached 13 million cards, with approximately 6.5 million card holders. The transaction value is predicted to rise rapidly, given the outstanding loans (total loans) disbursed to the banking industry in 2010 reached Rp 1,700 trillion, with loan growth of 22 percent. While undisbursed committed loan is around Rp 168 trillion. It means that there is enough room to be explored by the issuers in the future.

1. Market condition

In term of network platform, the network service provider in Indonesia reaches six companies as follow:

No	Principals	Networks
1	American Express	American Express
2	Japan Credit Bureue (JCB) Nusantara	JCB
3	Mastercard International Indonesia	Master Card
4	Visa International (Asia-Pacific) Ltd.	Visa Card
5	China Unionpay	CUP Card

Source: Indonesian Central Bank, 2010

The largest network provider for credit card is Visa and Master. In other word, on issuer bank may use both networks in the same time (duality). Meanwhile for the local network, there is additional one network provider in Indonesia, namely BCA Card. Based on conducted survey in six major cities in Indonesia, most of consumer (up to 79.7%) is having Visa Card (gold and silver grade). While the 30.3% of consumer uses Master Card (silver grade) and follow by BCA Card with 18.4% of consumer.

Even though the credit card business opportunity is wide open, however it is sophisticated that that not all banks are able and worthy to compete. Of 121 commercial banks in Indonesia, there is only 20 (twenty) credit card issuers, namely (in alphabetical order): ANZ Panin Bank, Bank Bukopin, Bank Bumiputera, Bank Central Asia, CIMB Niaga, Citibank, Bank Danamon, GE Finance, Hong Kong and

* The report is prepared by the Foreign Cooperation Division for the OECD Competition Committee Meeting (24-25 October 2012). For further information, please kindly visit our website (eng.kppu.go.id) or email us at international@kppu.go.id.

Shanghai Bank, Bank International Indonesia, OCBC NISP Bank Mandiri, Bank Mega, Bank Negara Indonesia, Bank Panin, Bank Permata, Royal Bank of Scotland, Standard Chartered, and UOB Buana. GE Finance is the only non-bank credit card issuer.

In the mid 2012, number of credit card issuer is reduced after GE Finance acquired by Bank Permata with takeover value of Rp 2 trillion. GE Finance's acquisition marked the exit of the only non-bank credit card issuer in Indonesia. This indicates that high economic scale is needed to survive the competition in credit card. It is estimated that the minimum number of consumer to survive is around 150,000 credit card users. So, it is easier for credit card issuer as a bank, which notably has developed its (captive) market for the existing banking products and services.

Of the oligopolistic structure, large market share owns by big national bank and foreign bank, including Bank BCA, Citibank, Bank Mandiri, and Bank BNI. As market leaders, the four banks create product developments in credit card for them to gain and sustain their market dominance. The market share for credit card of all four issuers is as follows.

Bank	Number of Cards	% Share
Mandiri	1,868,000.00	0.137609
BCA	2,100,000.00	0.1547
BNI	1,690,000.00	0.124497
Citibank	1,700,000.00	0.125233
Total 4 banks	7,358,000.00	0.542039
Others	6,216,673.00	0.457961
Total	13,574,673.00	

Source: Indonesian Central Bank, 2010

The table shows that, the four largest issuers obtain 54.2% shares with Bank BCA as the market leader with 15.47% of total card in circulation.

Generally, the credit card issuer will cooperate with network of merchants and provide facility and additional services to the card users. Information on limitation to merchant for having exclusivity is yet to be found. All merchant can accept most of credit card uses by the consumer (honor all cards rule), even in the existence of promotion or extra facility offers by certain credit card issuer.

For consumer, the most important issue is for the credit card issuers to increase their transparency and protection of interests. Detail information on interest, calculation process, and fine for delay, are main issues in relation between credit card issuers and consumers. High interest for credit card (4% per month) is significant to the consumer. Notwithstanding that the use of consumer database by the issuer bank to sell variety of other product and services (e.g. insurance and unit-link), which always raises consumer's complaint.

2. Recent developments

As the regulator, Indonesian Central Bank issued new regulation to reform the credit card industry, namely Central Bank Circular Letter No. 14/17/DASP on the Amendment of Central Bank Circular Letter No. 11/10/DASP on Implementation of Payment System by Cards. Through the circular letter, several changes made to create maximum welfare to the business and consumer in credit card industry. The changes involve as follows.

- *Minimum number of credit card owned by consumer based on monthly net income.* This limitation aims at preventing moral hazard and high non-performing loan (NPL) for credit card. Consumer having monthly net income less than US\$ 524 (Rp 5 million) is allowable to have

maximum two credit cards, the primary card and the additional card. Requirement will be lessened inline with the increase of consumer's monthly net income.

- *Maximum interest for credit card.* Starting from January 2013, the applicable monthly interest rate for credit card is 3%. This shall be an instrument to protect consumer interest and limit probability of abuses of market power by issuers.
- *Interest based payment and calculation of fines.* The regulation banned double interests to consumer for not meeting their monthly payment. Credit card issuer only allows imposing interest on the last balance/inquiry, not the initial or average or biggest balance. Additional late fine is also limited to maximum 3% from total balance or US\$ 15.7 (Rp 150,000).
- *Easier process for terminate the contract (closing the credit card).* In order to minimize the switching cost effect, the issuer must accept any request on termination of contract from consumer without any form of delaying the process or providing certain time limit. The termination process can not raise any fees or fines by the credit card issuer.

3. Possible implications

The new regulation will be effective by the start of 2013, but the implication can be anticipated. Number of credit cards will be reduced, since in average an Indonesian consumer used to have more than two credit cards. Before this regulation, the largest local bank in Indonesia accounted for 2.6 million and expected to grow to 2.75 million by the end of this year. Therefore, it is understandable that before the regulation is effective, all banks will try to increase their consumer base for credit cards.

Interest for credit cards might be set at a convergence rate of 3%, since most banks might put a maximum interest on credit cards. Currently, some issuers set an interest on 2.75% for certain types of credit cards, and most of them put more than 3%. Usually they set the interest at 3.5% to 4% per month. Through this regulation, lower interest for credit cards surely will create additional benefits to consumers, but on the other side will reduce incentives for consumers to use interest rates as one of their considerations in choosing credit cards. In macro level, lower interest might increase consumer spending and thus, will increase consumer-based income.

The new regulation might reduce their fee-based income by the business. It is known in Indonesia that fee-based income is treated as one of the main resources to generate profit. The largest bank in Indonesia recorded a fee-based income from credit cards for US\$ 94.3 million (Rp 900 billion) last month, and expected to grow to US\$ 125.8 million (Rp 1.2 trillion) by the end of this year.

It is interesting to know that the Indonesian payment system (for credit cards) in one way will create greater benefits for consumers with some adjustments to business behavior. However, it is believed that in the long-run, it also will benefit the business through a lower risk for failing consumers, and thus will lead to lower costs for risk management.

ISRAEL

1. The credit card switch in Israel

The Israeli Banking system consists of five major groups that control over 90% of the market: Hapoalim Bank, Leumi Bank, Discount Bank, The International bank and Mizrahi-Tfahot Bank. There are also a few smaller, independent banks such as Union Bank, The Jerusalem Bank, and several international banks that do not operate in the retail sector.

In comparison with other countries, the Israeli Banking system can be characterized as highly concentrated. Additionally, in the Israeli system there are multiple connections in different activities between the banks: for example, the same person holds major shares in both Bank Leumi and Union Bank; some banks purchase their computing services from other banks; and so on.

In Israel there are three major credit card companies that operate as both issuers and acquirers of credit cards. These three companies are controlled by the four largest banks: *Isracard* is controlled by Bank Hapoalim, *Leumi-Card* is controlled by Bank Leumi, while *CAL* is controlled jointly by Discount Bank and the International Bank. All companies issue payment cards under the brands Visa and MasterCard. In addition, Isracard issues payment cards under the brand American Express as well as payment cards for local use only that bear the name "Isracard"; and CAL issues payment cards under the Diners brand. Unlike most countries, where there are a large number of issuers and a small number of acquirers, in Israel the companies that issue the cards are also the ones that acquire the cards, including cards that were not issued by them (the "cross-acquiring").

At the heart of the credit card system is *Shva*, a joint venture established in 1979 and owned by the five major banks. Shva's main activity is the operation of the only credit card switch that exists in Israel; Shva also operates the only ATM switch in Israel. This structure gives rise to two potential competitive issues: first, a monopoly switch controls the gateway to the Israeli credit card system; and second, that monopoly is held by the five major banks – which, in turn, own the only three credit card companies that issue credit cards in Israel. That ownership structure may potentially inhibit entry to the Israeli credit card system.

2. Connection fees to the Shva credit card switch

Shva's system for collecting and approving transactions was established in 1986 for the two credit card companies that were operating at the time – CAL (that issued and acquired Visa and Diners cards) and Isracard (that issued and acquired Isracard, MasterCard, and American Express cards). The system was designed to allow businesses to use a computerized acquiring system instead of the manual system that had been in use at the time. In 1998 Alpha Card Company began issuing and acquiring cards of the Visa brand, in addition to CAL's activities. In May 2000, Leumi Card took Alpha Card's place in issuing and acquiring Visa cards.

In June 2002, the acquiring market for the Visa brand opened and allowed cross-acquiring between the three companies, in such a way that each company could acquire cards issued by other Visa issuers. At the same time the market for acquiring MasterCard opened, and allowed limited cross-acquiring. As there was no Interface for cross-acquiring, credit cards were processed in the international system as "tourist

cards". A local cross-acquiring interface was established in June 2007, and since then it is possible to fully cross-acquire cards using the Shva system.

One of the core activities of Shva is the operation of collecting and approving credit card transactions. When a card is swiped at a point of sale a process starts. The first step in the process is the transaction approval. Such approval is determined by the risk management tools of the credit card company using a wide vector of parameters that include the card type, the transaction type, the transaction value, etc. If the transaction is approved, the Point of Sale ("POS") is notified, the client receives the merchandise and the transaction is documented in the POS computer. The second stage occurs at a certain time on each business day: the POS sends to Shva all of the transactions of that day. The Shva system receives all the information from the various POS and sorts them by the ID of the relevant clearing identity that the POS works with. After that the clearing company transfers the transactions of cards that were not issued by them to a clearing interface.

Because Shva is a joint venture owned by competitors, it must be cleared by the Israeli Antitrust Authority. Given the potential of exclusion, in 2008 the exemption given to the Shva activity included conditions regarding the connection of new members to the system: "the banks and Shva will take all actions to enable any clearing identity access to collection, interface service and clearing service that are given through Shva and they will not deny working with any clearing company. The access will be given in terms that are not worse than the terms that apply to the owning banks... These conditions will not deny Shva the right to charge connection fees from whoever wants to use the system for switch services, clearing services, interface services, and collection services, that are all owned by Shva. This is in addition to all costs that are connected to supplying services".

The exemption also stipulated that when there is no agreement regarding the connection fees, the parties will turn to an arbitrator whose decision will be final.

In the past few years a number of parties turned to Shva asking to connect to the credit card switch. In one case an international bank wanted to access the Israeli market as a credit card company. The basic possibility to connect to the system was to recognize the cards as international cards that will appear as "tourist cards". This option was given for free because under this scenario, Shva would not make any adjustments or supply any services to the new credit card company. Nonetheless, the cards issued by the new company would not work by the local agreement of credit cards, which include payoff transactions, points and clubs. (These will be named "Special Transactions"). Even though only 30% of the transactions are "special", it seems that the possibility to carry out special transactions is very important for the Israeli customer and in its absence, it is hard for a company to enter the Israeli market. Another possibility to connect is through an existing credit card company that is already connected to the system. In this case the new entrant would not be an independent competitor and would potentially be subject to the existing capacity and to the terms stipulated by the credit card company that provides the gateway.

The final possibility is to connect independently to Shva's systems, which include perfect matching to the local scheme. Of course, this is the preferred scenario for a new entrant, but in order to do so Shva demanded a great amount of money in addition to the new entrant paying its share of all the historical system costs. Given these limited possibilities, the potential new entrant refrained from entering the market.

In light of these types of cases it was realized that the conditions imposed in 2008 do not prevent Shva from demanding large sums as well as a long preparation period for the connection to its systems. These two factors reduce the economic viability of the contract and thus blocked the competition of new issuers and acquirers to existing credit card companies. This block protects the credit card companies that are

subsidiaries of banks who are the shareholders of Shva, due to the fact that without a direct connection, it is difficult if not impossible for new issuers and acquirers to enter the market.

Accordingly, and in renewing the exemption of Shva, the Israeli Antitrust Authority dealt with the price that was reasonable for Shva to collect from a new issuer who wants to connect to its systems, while receiving services that are no less than those provided to existing companies in the market. However, such price regulation proved to be complicated. According to Shva, a new entrant must bear two types of fees: first, a “system fee” that depends on the cost of reconstructing the system. Second, a connection fee that depends on the direct cost of connecting another member to the system.

System fee: Cost of adjustments - this cost is an estimation of the cost of reconstructing the system, assuming the new member holds 7% of the market.

Direct costs: payment for the direct cost required from Shva in order to add a new member to the system. The amount of the payment is based on the characterization of the actions required in order to add the member, including the working hours of project managers, information systems analysts, programmers and QA testers – all of which are mostly unverifiable.

Our position is that there is no justification to allow Shva to charge a fee based on the cost of reconstructing the system. There is no doubt that in a competitive market, Shva would not take into account this cost because it is a fixed cost by definition. Collection services and confirmation of transactions are non-rival services and the use by new factors does not diminish the service that they provide to existing members. Therefore, there seems to be no incremental cost of adding a new issuer or acquirer.

Regarding the direct cost, it seems that there is nothing wrong with charging a new acquirer the costs that Shva carries to connect it to the system. However, it is important to ensure that the cost of connection reflects reasonable costs that would be placed before the party wishing to connect to the system as if Shva were operating in a competitive market. However, the cost born by Shva are hard to observe and are endogenous to the structure of the system: for example, Shva could conceivably build a system that would be more expensive but would lower the marginal cost of adding new members. It seems that in a competitive market, it would have been a good strategy for a switch owner to upgrade the system so that is easier to add new members cheaply and promptly.

In light of all these issues, the recent exemption given to Shva (22/09/2012) only applies for six months during which the operation of Shva as well as its ownership structure will be revisited. In particular, the Israeli Antitrust Authority will examine (1) whether there could be competition on credit card processing rather than a single monopoly switch, and (2) the role of the switch being owned by banks (and credit card companies) in deterring entry and inhibiting competition.

LATVIA

1. Experience in analyzing payment card systems in Latvia

At present there are three most used card payment systems in Latvia – VISA, MasterCard and American Express. Several years ago have been terminated operation of domestically introduced debit card by switching to international payment cards. Number of issued payments cards in Latvia at the end of 1st half 2012 are ~ 2.3 million. There are ~ 21 issuing banks and 9 of them are acquirers. One commercial bank has more than 40 % market share both in issuing and acquiring market.

From 2009 to 2011 the Competition Council (CC) conducted investigations on multilateral interchange fees for transactions with VISA and MasterCard payments cards collectively set by domestic commercial banks. On 3 March 2011 CC adopted a decision establishing a prohibited agreement between 22 commercial banks and imposing a fine totaling to EUR 7 800 000. Due to the infringement the multilateral interchange fee (MIF) on card payments at POS and Internet was fixed for a lengthy period thus fixing the lowest level of commission fees applied to merchants who accept card payments – merchant service charge (MSC). Prohibited agreement referred also to the interchange fees for cash withdrawals at ATM, cash withdrawals at branches and balance inquiries at ATM. The prohibited agreement was in force from 1 December 2002, up to 7 January 2011.

During the investigations the CC concluded that MIF has actually fixed the minimum MSC set by the acquiring banks to merchants, thus restricting the acquiring banks capabilities to set lower MSC than MIF, i.e. to set the service price based on free competition. Thus in 2009 MIF reached 75% of MSC in case of debit cards and 100% in case of credit cards. Respectively agreement on MIF without relating it to actual costs has distorted the competition, allowing banks not to fight for new clients – merchants – by applying lower MSC.

The CC concluded that MIF has not been economically sound and it was not adjusted, as the situation in the market changed and costs lowered. Alongside with a growing number of bank card payments resulting in banks revenue, the MIF had remained flat during more than eight years.

The CC has declined bank's arguments that MIF was necessary in order to ensure cards payment system and to promote the use of card payments. The CC concluded that MIF was not necessary for the cards market promotion. During the investigation of the case the CC repeatedly asked banks to provide evidence that the benefits of the multilateral agreement counterbalanced restrictions to the competition. Nevertheless the banks had not provided such evidence. Instead - banks explained the necessity of cards payments that was not questioned by the CC, therefore banks failed to justify the necessity to keep the fixed MIF for such a long time. In CC's view banks has sufficient incentive to promote cards issuing without additional stimulators like MIF. The banks own view is that cards usage is so wide that without cards issued they are not competitive. Issuing of cards banks sees as an instrument for attracting consumers. It is possible that in case of zero MIF, banks would like to increase cards annual fees, but it should not worry while competition pressure exists to annual fees. It is also plausible that banks would cross subsidize card issuing as they do for other services.

CC found that Honour All Cards Rule (HACR) and No Discrimination Rule (NDR) are applicable in Latvia. CC analyzed HACR and NDR as additional rules hindering pressure to MIF from merchant's side. Since 2010 Payment Services Law states prohibition to apply of extra charge for using specific payment instrument.

Regulation excludes pressure to fees for payment cards and argument that merchants will automatically introduce extra payment in absence of ban is false. It is less plausible that merchants would see card payment as a service and would apply fee in general. Respective decision to apply extra charge without taking into account competitive pressure from other merchants could significantly harm merchant's competitiveness.

Evidence showed that MIF's is set the same for payments with VISA and MasterCard payment cards and the same was reflected in MSC. Therefore agreement on MIF left impact also to competition of payment systems (VISA and MasterCard).

CC concluded MIF impact to on-us transactions respectively banks applied MIF in setting MSC's for on-us transactions making them equal with off-us transactions in general.

Banks argued that MIF plausibly comply with tourist test or merchant indifference test, but did not provide acceptable evidence.

The CC also investigated the part of the multilateral agreement which set fixed interchange fee for cash withdrawals at other bank's ATM, other bank's branches and balance inquiries at ATM. As a result of the prohibited agreement the competition was distorted - multilateral agreement had a direct impact on the charge which banks applied to their customers (cardholders) for these services. Empirical evidence confirmed that issuing bank's charges were not set lower than the interchange fee. The CC also concluded that the absence of multilateral agreement would have ensured consumers lower service fees for cash withdrawals, because that: 1) banks have agreed on a lower interchange fee in cases of bilateral agreements. Following by argument that lower interchange fees can be set only between ATM banks due to possibility use each others ATM network, in addition of cost analysis CC found that the interchange fees established by bilateral agreements were lower not only for banks which has ATM's at their possession, but also for those banks which do not have ATM's, 2) the issuing banks in fact have applied lower service fees to their customers (cardholders) for cash withdrawal at those bank's ATM with whom they have bilateral agreement in comparison to charges for cash withdrawals at those bank's ATM with whom they only have a multilateral agreement.

For cash withdrawals in ATM's cost analysis showed that markup for the interchange fee was in the level of 253% or 289% depending on the fee applied in 2008. Therefore the interchange fee for cash withdrawals at ATM has been established at a level substantially higher than the service costs as well as by taking into account VISA's and MasterCard's fees without proper justification. Impact of the agreement was especially important at an early stage of the agreement in 2002, when there were less non-cash payments, moreover, the number of bilateral agreements between banks was smaller as well - within a due time banks have concluded bilateral agreements which have left positive impact on the market because the banks have reduced or even removed the charge applied to their customers for such services.

After the decision has been taken part of banks has paid the fines imposed, but remaining banks have appealed the decision. Nevertheless part of banks in appeal has already entered into administrative agreements (the Latvian Competition law empowers CC to conclude an administrative agreement for termination of the proceedings in the Court) and some other banks currently negotiate with CC on administrative agreements. The upstarted negotiations were a reason why the first hearing in the Court was postponed (as requested by the banks concerned). The next hearing in Court will be in 11 October 2012 (in case if no more administrative agreements will be concluded).

After CC's decision prohibiting MIF's set by domestic banks most of banks have concluded bilateral agreements on IF's for domestic transactions, but for part of domestic transactions MasterCard's and VISA's MIF's are applicable due to the lack of bilateral agreements.

LITHUANIA

Since 2011 the Competition Council of the Republic of Lithuania ('the CC') has carried out an investigation on payment cards charges in Lithuania. In the process of investigation we are collaborating with banks and merchants that provide us with valuable information on the payment systems. A part of received non-confidential information shall be used to prepare this paper.

Due to the fact that current investigation is not finished yet, the answers provided below should be treated as provisional and should not be considered as the final opinion of the CC.

Before submitting answers to the OECD questionnaire on Competition issues in payment systems, the CC intends to give a brief overview of a current situation in this sector in the Republic of Lithuania.

In 2011 in total, 20 banks (including 12 foreign bank branches) and 75 credit unions operate in Lithuania. At the end of 2011, AB bank SNORAS activity was suspended and the bank was later liquidated. According to the Bank of Lithuania, the concentration in the Lithuanian banking sector is high: the market share of the three largest banks by assets made up 69.1 per cent in the first quarter of 2012¹, a year-on-year increase of 9.0 percentage points. Rather high concentration is also indicated by HHI, which is 1,966 points (400 points more than in 2011). However, in some market segments, the concentration is even higher: for example, two main banks issue around 80% of all payments cards. Among market players, in 2011, five banks and five foreign bank branches reported profit, while other three banks and five foreign bank branches suffered losses. Foreign branches are required to follow a lower number of prudential requirements (in accordance with the EU common market requirements); therefore, they are considered to have a competitive advantage over the local banks in the domestic Lithuanian market. An entry of e-money systems or other payment systems could enhance the competition in the market.

The number of payment cards in Lithuania was around 4 million by the end of 2011, what is down by 8.8 per cent, compared to 2010². This was largely determined by the suspension of activity (and further liquidation) of AB bank SNORAS. The number of credit cards declined considerably more than the number of debit cards. 3.5 million debit cards were used in 2011. Cards issued under Visa scheme dominated both debit and credit cards markets. Over the years, the volume and the value of payments made by debit and credit cards have grown steadily. In 2011, over 100 million payments were made by cards with the value of nearly 7 billion LT. Compared to 2010, the total volume of cards payments increased by 9 per cent, while the value of cards payments rose by 16 per cent. However, many Lithuanian citizens use their payment cards primary to withdraw cash from ATM instead of paying for services or purchases, e.g. in 2011 the value of ATM transactions was 3 times higher than the value of point-of-sale ("POS") transactions. In general, Lithuanian cashless payment system can be considered less developed than in many other European Union countries, for instance, Scandinavian countries. Among other factors, the reason for payment cards market underperformance could be the lack of financial literacy of consumers, as consumers could be better acknowledged how to use progressive payment technologies and what advantages such payment systems can bring to them.

¹ http://www.lb.lt/information_on_credit_and_payment_institutions_activity_and_their_supervision_in_2011

² http://lb.lt/review_of_cashless_payments_2011

1. Structural conditions

The CC has not carried out an analysis of social costs and benefits of different payment systems as well as new technologies, permitting consumers to make payments without a card platform. However, recently the Bank of Lithuania prepared the analysis of the costs of different payment platforms including costs of cash and cashless payment systems. Under the analysis two types of costs were defined: direct costs, resulted from the activities directly associated with a payment service, and indirect costs, associated with bank's overall business. Calculating cash payment system costs, a number of factors were taken into consideration, including ATM maintenance and its depreciation, cash collection and transportation, cash management and storage, fraud control, losses due to robberies and proceedings of customer complaints. For payment cards costs calculations, payment cards authorization, identification, security, marketing, and risk analysis costs were evaluated among other costs. The results of their analysis suggest that in Lithuania cash payments are the most costly and, therefore, the most unprofitable method of payments for banks among all payment systems. Payment cards³ are cheaper to serve compared to cash, but still they are more expensive than direct debit transactions. Direct debit transactions are considered to be the most effective payment mechanism as their costs are very low. However, consumers use them listlessly.

Retail payment systems in Lithuania operate and develop under the Law on Payments in the Republic of Lithuania⁴. It states that payment services in Lithuania may be provided by banks, foreign banks branches, credit unions, e-money undertaking and payments undertakings. In 2011, ten banks (including foreign bank branches) as well as one credit union issued payment cards. Meanwhile, 6 banks offered POS services to merchants with 38 thousand POS being in use. Currently, new payment technologies such as e-money services or contactless payment cards have not reached the large group of consumers. Moreover, national payment cards were never issued in Lithuania. Until 2007, banks, operating in Lithuania, offered only Visa and MasterCard cards. Though, in 2007 Parex Bank (from 2010 onward AB Citadele bank) began issuing and accepting American Express cards in Lithuania⁵. Under an exclusive cooperation agreement between American Express and AB Parex Bank, AB Parex Bank became the sole official representative of the financial services corporation and the sole American Express cards issuer in Lithuania. Among others, AB Citadele bank is responsible for establishing POS serving American Express. As a result, even though at the end of 2011 AB Citadele bank issued only around 18 thousand American Express cards, according to the Lithuanian bank association⁶ the bank took rather significant share of the POS market (around 30 per cent). However, the higher competition in POS market has not led to the significant reduction of merchant fees as the service of American Express card remains to be the most expensive among all payment card networks.

Considering, the new payment technologies development in Lithuania, the Law on E-money and payment institutions licensing⁷ sets requirements for institutions willing to serve e-money in Lithuania. Under the law, to get a license to run e-money business the minimum capital (350 thousand Euros) and minimum equity in the venture are required. Owners and managers should be of fine reputation and have the necessary competence. Applying for the license, the undertaking must provide evidences that e-money holders' funds will be protected. E-money should be issued and operated exceptionally in Lithuania as well

³ On average, in general tems Lithuanian banks experienced more costs serving debit card than credit cards. However, per transaction one debit cards transaction is seven times cheaper than a credit card transaction.

⁴ http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=416620

⁵ The most recent entry in the payment cards area.

⁶ http://www.lba.lt/go.php/eng/Payment_cards/431

⁷ http://www3.lrs.lt/pls/inter3/dokpaieska.rezult_l?p_nr=&p_nuo=&p_iki=&p_org=&p_drus=1&p_kalb_id=1&p_title=elektronini%F8%20pini%F8%20%Elstaig%F8&p_text=&p_pub=&p_met=&p_lnr=&p_dnr=&p_es=0&p_tid=&p_tkid=&p_t=0&p_tr1=2&p_tr2=2&p_gal=&p_rus=1

as the undertaking headquarters should be located in Lithuania. Among others, credit institutions, post offices, allowed transferring money (i.e. giro), and e-money companies are allowed to issue e-money in Lithuania. Recently in 2012, the first company, an e-money company, got permission to issue e-money in Lithuania. The company is currently launching its services.

2. Fees and charges

The main charges paid in payment cards system are cardholders charges, paid to a card issuing bank, merchant fees, paid to a card acquiring bank, and interchange fee, paid by card acquiring bank to a card issuing bank. Besides these charges, card networks also charge their own fees both card issuing and card acquiring banks. All mentioned charges are set to ensure efficient market activities. They aim also at balancing the payment cards demand.

Since 2008 the overall level of merchant fees has decreased but marginally. In some cases, the merchant fees can be over 2 per cent per transaction, but we suppose that the average fee is around 1.5 per cent in 2011. According to the Bank of Lithuania 17 per cent of total debit cards costs incurred by banks results from transactions processing (authorization and clearing). However, in general, banks do not differentiate merchant fees according to payment cards: debit card charges are equal to credit card charges. In most cases, according to banks, the merchant charges depend on the merchant size (e.g. smallest merchants tend to pay the most), economic sector, POS ownership, and on the intensity of bank-merchant cooperation in other areas. Even so, merchants consider cashless payments more expensive than cash payments, due to merchant fees and POS maintenance expenditures. Faced with the high fees, some small merchants have refused to accept payments cards, i.e. coffee shops. However, it is rather an exemption than the rule. In general, merchants (especially petrol station networks and retailers) feel obliged to accept cards even though they consider the charges as loss making. The reason is that a part of consumers finds more convenient to pay by cards than by cash. Deciding whether to buy a certain product or service, a customer considers not only the product or service itself, but also a number of additional factors such as an ease of payment. If the customer prefers to pay by card, then the merchant refusing to accept the card payment would lose its customer. By losing its customers, a merchant will suffer losses.

Considering interbank charges, on average in Lithuania interchange fee ("IF") is around 1 per cent. Mainly, banks charge 0.94 per cent of transaction value for debit card transactions and 1.07 per cent of transaction value for credit cards transactions. Compared with neighboring countries the level of interchange fees is higher in Lithuania. For instance, on average IF in Lithuania is higher by [0.3-0.6] percentage point compared to IF applied to debit and credit payment cards transactions in Estonia and it is higher by [0.2-0.5] percentage point for credit cards transactions and by [0.3-0.6] for debit cards transactions in Latvia. However, the interchange fees set in Poland are higher than in Lithuania as Polish IF exceeds 1 per cent per transaction.

Banks in Lithuania insist that IF is a necessary incomes source for them. They insist that as payment cards issue remains unprofitable⁸, abolishment of IF charges would result in higher price for consumers and less investment in new technologies. In 2011, debit cards issuers got 21.7 million LT revenues from IF and credit cards issuers received 2.4 million LT revenues from IF⁹. Even so, small banks stress that they do not get profits from IF and operate at a loss. As a result, one small bank in Lithuania does not issue payment cards, as it is too costly for it. Therefore, without carrying out an in-depth cards payments

⁸ In 2011 revenues from payment cards do not cover all direct and indirect costs associated with payment cards circulation. Debit cards incomes covered 75 per cent of costs associated with debit card circulation and 99 per cent of credit cards costs were restored.

⁹ This also means that in 2011 banks, accepting payment cards, incurred 24.1 million LT losses due to IF.

analysis, it is impossible to say whether constrained or limited interchange fees would be beneficial for the Lithuanian payment systems development and the economy.

The increase in consumer use of cards had little impact on interchange fees. Initially, until 2000-2002 the DIF (“domestic interchange fee”), set by Visa and MasterCard, was used to reckon among banks. Later, banks started to set IF bilaterally. In Lithuania IF level remained unchanged for almost 7 years until 2011, when banks started to revise their agreements. The supervision and regulation of payment systems is the responsibility of the Bank of Lithuania. The Economics and Financial Stability Service of the Bank of Lithuania¹⁰ is responsible for financial stability policy, monitoring and forecasting of economic processes and a smooth development of financial market infrastructure and payment instruments in Lithuania. However, currently IF, merchant charges and payment cards fees to consumers are not regulated and they are set independently by banks under bilateral agreements.

According to the recent study of the costs of different payment systems¹¹ conducted by the bank of Lithuania, in 2011 banks incurred 45.3 million LT costs in total serving payment cards. POS management accounted for 24 per cent of them (i.e. 10.92 million LT), while payment authorization and clearing took up 20 per cent (i.e. 9.06 million LT) of payment cards service costs. Meanwhile, actually merchants paid 77.9 million LT to banks for payment cards services. Comparing the numbers, we see that merchants pay more to banks than actual costs are (they pay 77.9 million LT, while actual POS management and payment authorization and clearing cost 19.98 million LT). Therefore, we could expect that cost-based fees would result in fewer profits for banks than it is now. However, as it was noticed before even applying higher current merchant and IF charges banks already issue payment cards in loss. Therefore, the introduction of cost-based fees or a complete elimination of interchange fees might slow down payment cards system development in Lithuania. Further analysis of the charges costs would be necessary.

3. Tying

In addition to merchant fees, the banks also apply payment card acceptance rules to merchants. The rules are set by merchant-bank agreements. Some of the rules indicate what payment cards a merchant should accept and what additional charges a merchant may apply for card transactions. In Lithuania, a merchant cannot charge a customer using a card additional amount, even though merchant may experience some additional costs accepting cards. “No-surcharge” rule is set under agreement between merchants and banks. However, the agreements generally do not indicate whether a merchant may offer additional discount for cash payments (“no-discount rule”). The CC do not have information that “no-discount” rule is used in our country (although, there is no information either that merchants offer customers using cash an extra discount). In addition to “no-surcharge” rule, merchants are not allowed to set minimum and maximum amount possible to be paid by cards. Another rule (“honour all cards” rule) is that, banks require merchants to accept all payment cards, valid and properly submitted, regardless it is either a debit or a credit card. Moreover, the banks ask for a lower merchant fee if cards issued by them are used (“on-us” rule).

As no-discount rule and no-surcharge rule are applied in Lithuania, non-card users are likely to cross-subsidise card users. It happens because merchants ask all consumers to pay the same amount for products. In general, merchant fees may account for 9-40 per cent of product mark-up. In some cases, merchants even sell at a loss. It happens when banks set a fix charge for the transactions that are smaller than a certain amount (for instance, a payment for a candy). As merchants cannot ask for a “surcharge” for card transactions, they cover the cashless transactions costs and restore profits by asking identical prices for all consumers.

¹⁰ http://www.lb.lt/economics_and_financial_stability_service_established_at_the_bank_of_lithuania

¹¹ The study has been conducted using the methodology of the European Central Bank.

Even though the payment cards acceptance rules as well as the cross-subsidies might raise competition concerns, currently under its investigation of IF the payment cards the CC mentions in passing acceptance rules and the distributional effects of merchant fees on non-cardholders.

4. Information limits

In general, merchants should follow confidentiality clauses provided for in agreements with banks that restrict sharing of any confidential information that was learned from the agreement, this would likely also including information on card transaction costs, with consumers or any other third party. The only exceptions for this rule are situations when another party of the agreement allows disclosing confidential information or disclosure is necessary due to the requirements of laws.

Though, some merchants and banks disclose some information on charges through media channels, but it is done in an aggregate and non-confidential manner. For instance, there were several announcements in the mass media that retailers must pay, for example, 10 cents from the price of one liter of petroleum for banks, as well as one of the major banks advertised merchant charges for new clients on the bank's internet site.

Under the payment cards charges investigation, we have asked merchants to assess and compare costs of cashless and cash payments. The participated merchants did not face difficulties in presenting costs for both payment systems. They identified that for them because of high merchant fees and POS maintenance costs cash payments are cheaper to process than cashless payments. Moreover, when companies are active in other countries than Lithuania, generally they can compare costs across countries. However, consumers usually are not aware of the card payments costs for merchants, therefore they cannot compare the impact of paying by cash and payments cards, especially across countries.

5. Membership in joint ventures: Exclusivity and duality

In general, currently in Lithuania exclusivity arrangements between different card platforms do not exist. Any bank operating in Lithuania decides what cards it intends to issue itself. Most of the banks operating in Lithuania issue both MasterCard and Visa cards. Some smaller banks choose to issue cards of only one type, but according to them it is due to financial issues (for example, expensive licenses from card platforms), and not influenced by exclusivity clauses. The CC does not possess any information that could disclose if exclusivity agreements existed before.

As to joint ventures, in Lithuania banks cooperate to jointly provide ATM services to their clients. The two joint activities were formed to reduce ATM maintenance costs and to attract more clients. The first joint venture was formed in 2003 and until now it includes two banks. Another joint venture was formed in 2006 when two rather small banks formed a joint venture to also provide ATM services to their clients (later three more small banks joined the joint venture). Under such cooperation by using an ATM of cooperating banks consumers pay the same fee for withdrawal of money as the ATM would belong to their bank. Clients of other banks (beyond the cooperation) can withdraw money too, but different rates of charges are applied in these situations. We do not dispose information whether exclusivity agreements were used.

Regarding duality issues, MasterCard Lietuva governance, being a part of MasterCard Worldwide, does not include members from card-issuing banks, because in 2006 MasterCard Worldwide launched a new corporate governance and ownership structure. Meanwhile VisaEurope and, consequently, VisaEurope Lietuva, is a membership organization. VisaEurope board of directors includes, for instance, senior vice president and head of acquiring of Nordea Bank Norge ASA (Nordea bank also operates in Lithuania). Currently we do not dispose further information on VisaEurope Lietuva governance. Moreover,

in Lithuania interchange fees, set by Visa Europe and MasterCard Worldwide do not differ significantly for different kinds of operations.

6. Competition law

Since 2011 the CC has been conducting an investigation concerning interchange fees, agreed bilaterally between banks that operate in Lithuania. The investigation falls under cartels enforcement. The CC investigates IF for the transactions transacted with Visa and MasterCard payment cards. We do not consider American Express payments cards as they belong to the three-party payment cards scheme and therefore do not apply explicit IF. We investigate *inter alia* the ATM interchange fees and other related fees too. However, our investigation does not concern interchange fees set by Visa and/or MasterCard directly to the banks. Moreover, the investigation does not aim at assessing the competition aspects of payment card schemes.

The Visa and MasterCard payment cards operate in two sided markets as payments cards are used by card holders and merchants. The two users' groups provide each other with network benefits. Banks, issuing cards, serve card holders, while banks, providing POS services to merchants, satisfy merchants' demand. It might be considered that card issuers and card acquirers operate jointly by serving a joint demand for payment cards. However, another approach would be to divide the market into several relevant markets. The first market is a card issuers' market, where card issuers compete with each other for card holders. The second market would be the card acquirers, who compete with each other to serve merchants. Due to the fact, that under current investigation the CC has its primary interest in assessing interchange fees and other charges that one party (card issuers) apply to another party (card acquirers), we have preliminarily divided the payment card market into two related markets: the market for issuing of payment cards and the market for acquiring of card payment services. Currently, we focus mainly on the platform and merchants' benefits, paying less attention on cardholders. However, as the investigation is still in progress, we cannot discuss ultimate findings.

Regarding joint ventures by merchants, generally, broad merchant participation in a new payment system is welcome; however, the formation of a merchants' joint venture for the development of a new retail payment instrument might raise some competition law problems (for example, sharing sensitive information between competitors, creating barriers to enter the market for those merchants that are not members of joint venture, etc.). Such issues would be treated by the Competition Council subject to all the relevant circumstances of the case. For example, if such joint venture (its activities) could be regarded as a hard-core infringement of competition law, it would be treated as a cartel. Whereas if it did not fall within the scope of hard-core infringement, it could be assessed in the light of Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union ('TFEU') to horizontal co-operation agreements¹².

Moreover, if such a joint venture by merchants would infringe the requirements of competition law, but at the same time fulfilled conditions for exemption under Art. 6 of the Law on Competition (they are essentially identical to Art. 101 (3) of TFEU), it may not be viewed as a competition law problem.

¹²

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011XC0114\(04\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011XC0114(04):EN:NOT)

NEW ZEALAND

1. Purpose

This paper sets out the New Zealand Commerce Commission's experience of payment systems.

2. Structure of this paper

The structure below does not follow the questions about competition issues in the OECD call for country contributions. The paper first sets out the approach the New Zealand Commerce Commission (the Commission) took in our credit cards (interchange fees) litigation under the Commerce Act 1986 (the Act). The paper then answers specific questions that are not addressed as part of our approach to that litigation. Attachment 1 sets out more detail about the investigation of interchange fees in New Zealand.

3. Credit cards litigation

In 2006, following an investigation, the Commission brought proceedings against Visa International Services Association, Visa Worldwide Pte Limited (Visa), MasterCard International Incorporated (MasterCard), and a number of banks operating in New Zealand who provide credit card issuing and acquiring services.

These proceedings were brought under sections 27 and 30 of the Act. Section 27 of the Act prohibits provisions in a contract, arrangement or understanding that have the purpose, effect or likely effect of substantially lessening competition. Section 30 of the Act deems provisions that have the purpose, effect, or likely effect of fixing, controlling, or maintaining the price of goods or services to substantially lessen competition in breach of section 27. The Commission alleged that the rules of the Visa and MasterCard schemes providing for the payment of Multilateral Interchange Fees (MIF), together with the related rules, amounted to price fixing and thus breached section 27 (pursuant to section 30) of the Act.

The Commission did not allege that there was any collusion between Visa and MasterCard, but there was an arrangement in respect of each scheme which set out interdependent and interlocking agreements with the card issuing banks relating to the operation of that scheme. The Commission challenged a number of specific provisions of those agreements.

- The MIF rules governing the setting of the MIF, (which had to be paid by an acquirer to a card issuer), through a collective agreement between the scheme and card issuing banks.
- The No Surcharge Rules (NSR) which prohibited surcharging of credit card transactions by merchants.
- The No Discrimination Rules (NDR) which were closely related to the NSR and prohibited certain forms of discrimination between card payments and other payments, and between cards from different schemes and/or card issuers.
- The Access Rules which restricted who could act as an acquirer of Visa and MasterCard transactions.

4. The Commission's theory of the case

The Commission's view of the MIF rules was that the fixing of the MIF by each of the schemes and the card issuing banks was anti-competitive and set a collectively agreed 'floor price' for the merchant service fee charged by acquirers to merchants. The merchant service fee is the total fee for the bundle of credit card/debit card services provided by acquiring banks to merchants. The MIF represented about 80% of the merchant service fee charged by acquirers to merchants. The collective agreement was artificially increasing the costs of credit card services.

The NSR and NDR were also anti-competitive as they worked to eliminate opportunities for merchants to create incentives for the card issuing banks to charge lower MIFs. The rules shielded credit cardholders from the cost of their payment choice and prevented merchants from recovering the cost or steering cardholders to a preferred method of payment.

The combined effect of these rules was that the scheme banks could collectively set high interchange rates without fear that consumers would switch to other payment options. Merchants could not charge consumers for credit card usage and, given the extensive use of credit cards in part driven by loyalty schemes, were compelled to accept credit cards. The high interchange rates would flow through to higher prices for all consumers.

The Commission considered that the scheme rules relating to access were also anti-competitive as they hindered entry by specialist acquirers or self-acquirers (generally large merchants), which reduced competition by the four main card-issuing banks that acted as acquirers in New Zealand.

5. Settlement of proceedings

In 2009, the Commission resolved the proceedings with all parties by agreeing a number of changes to the Visa and MasterCard scheme rules. We were one of the first agencies to achieve a wide-ranging settlement that addressed fees and scheme rules around interchange fees. It was the Commission's view that these changes would benefit New Zealand consumers.

- Credit card issuing banks were to individually set their own MIFs for transactions using their own cards, subject to a maximum level set by the schemes. These individually set MIFs were to be published on the banks' websites. The Commission's view was if there was a MIF it needed to be subject to competitive pressure.
- The NSR and NDR were not to apply in respect of card transactions acquired in New Zealand. The intention was to give merchants the ability to decide whether they would pass on the cost of accepting credit cards to specific users, rather than being bound to charge all consumers the cost of these products. If merchants decided to surcharge then it had to be disclosed to the customer at the time of purchase, and bear a reasonable relationship to the cost of accepting Visa or MasterCard credit cards as a form of payment. The intention was not that merchants would have to surcharge but that the threat of surcharging by merchants would constrain the interchange rate.
- The access rules were changed so that acquirers did not also have to be issuers or indeed financial institutions.

Also, as part of the settlements merchants were to be offered unbundled merchant service fees showing the different merchant service fees for accepting Visa or MasterCard as a form of payment. The Commission was of the view that this would assist transparency of the differing costs between Visa and MasterCard. In addition, merchants were to be offered fully unbundled merchant service fees which is known as 'interchange plus' whereby merchants see the exact amount of MIF, scheme and related fees applicable to each card type transaction separate from the acquirer's margin. The Commission's view was this would assist merchants in negotiating the MIF, surcharging or steering.

The “honour all cards” rules in operation as part of the Visa and MasterCard schemes were not altered as a result of the settlements.

The Commission anticipated that as a result of the settlements, retailers would benefit from significant new product offerings, MIFs would be lower on average with downward pressure continuing whilst ensuring those fees remained transparent and open to competitive forces in the future. The Commission further anticipated savings to merchants of between 70 to 80 million New Zealand Dollars in the period 2010-2013 with some merchants adding a surcharge or negotiating better deals with banks. Also importantly, consumers would make an informed choice.

6. Post Settlement

Since 2010, the Commission has been monitoring the effects of the settlements and is collecting data from relevant parties so we can assess the impacts in the short, medium and long term. It is anticipated that work will be completed in 2015/16.

Early indications are that surcharging is happening in New Zealand. The average MIF has lowered since the settlements and merchants are negotiating lower merchant service fees.

7. Answers to specific questions not covered above

We have endeavoured to answer all the questions as part of the above narrative. Where relevant to New Zealand we have answered specific questions not already addressed, below.

7.1 *Question 1 on social costs and benefits of different payment systems*

No domestic estimates were produced at the investigation or proceedings stages of the relative costs of different payment systems.

7.2 *Question 2 on exit and entry*

In terms of exit or entry in the retail payments area, the above settlements allowed for access by new acquirers. However, to date no new acquirers have commenced operations in New Zealand. There are ‘aggregators’ who provide complementary services to acquiring who have commenced operations, such as DPS. New forms of payment such as the ‘Snapper’ card have been introduced since 2011. The Snapper card allows for transportation or other small purchases to be made on a reloadable card that funds can be deposited on at a number of retail outlets.

7.3 *Question 4 on merchant charges*

Since the settlements, merchant charges, in particular merchant service fees, have fallen in line with the anticipated savings of 70 to 80 million New Zealand Dollars.

7.4 *Question 6 on regulation of fees*

Fees payable by merchants are not regulated under the settlements as the Commission does not have the required statutory authority. If in the future it was determined that credit card fees should be regulated then the Reserve Bank of New Zealand has the statutory authority to do so.

7.5 *Question 15 on joint activity by merchants*

In New Zealand we have co-branded cards between retailers and banks, for example between The Warehouse (a large retailer), Westpac Bank and MasterCard.

ATTACHMENT 1

1. Background information on the New Zealand Commerce Commission’s investigation of interchange fees

1.1 Multilateral Interchange Fee

A typical credit card transaction involves four parties:

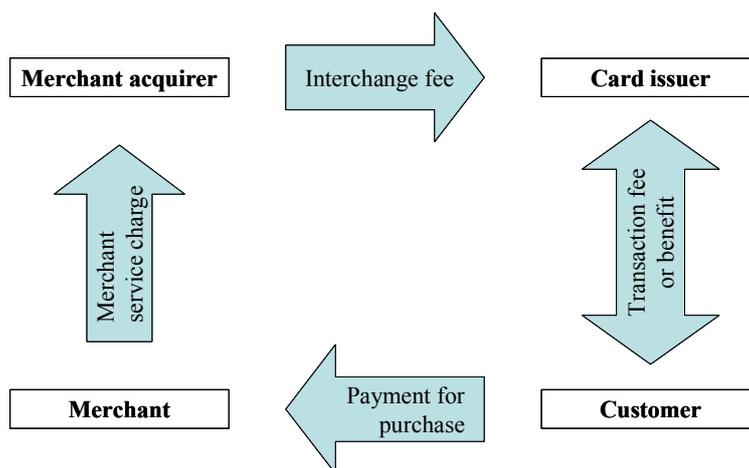
- the cardholder;
- the cardholder’s bank (card issuer);
- the merchant; and
- the merchant’s bank (merchant acquirer).

When a consumer attempts to pay for a purchase by credit card, the accepting merchant relays the transaction information to the merchant acquirer with which it is contracted. The merchant acquirer processes that information and transmits it to the cardholder’s issuing bank – the card issuer. The card issuer approves the transaction subject to the cardholder having sufficient credit. Approval is sent by the card issuer to the merchant acquirer, which in turn relays it to the merchant.

An interchange fee applies when the card issuer is a separate institution from the merchant acquirer. In these instances, interchange fees are fees that card issuers charge merchant acquirers for each approved credit card transaction accepted by the merchants. So once a credit card transaction has been approved by the card issuer, the merchant sends a request for payment to its merchant acquirer. The merchant acquirer forwards the payment request to the card issuer, and the card issuer then pays the merchant acquirer the amount requested, less the interchange fee.

Figure 1 illustrates the flow of payments.

Figure 3. Flow of Payments in a Card Transaction



The Visa and MasterCard scheme rules provide for a collectively agreed interchange fee to be payable from the merchant’s acquiring bank to the cardholder’s issuing bank in respect of all domestic transactions in New Zealand. This is known as a multilateral interchange fee (MIF).

The MIF is a feature of membership schemes (Visa, MasterCard), not proprietary schemes (Amex, Diners). Proprietary schemes have no explicit mechanism to shift revenue between card issuing and acquiring.

It is important to note that the MIF is a payment between scheme members, not from members to the scheme operator. Nonetheless, the MIF is set for the whole network by the card association.

There are three main types of interchange transactions:

- inter-regional interchange which is relevant to credit card transactions where the issuer and acquirer are located in different regions (i.e. Asia/Pacific to North American);
- intra-regional interchange where the issuer and acquirer are located in different countries within the same region (ie Singapore to New Zealand); and
- domestic interchange which is incurred for credit card transactions that take place when the issuer and the acquirer are located in the same country.

Our investigation focused on domestic MIF rates in New Zealand.

1.2 The Merchant Service Fee (MSF)

The merchant acquirer pays the merchant for the cardholder's purchase but deducts a Merchant Service Fee (MSF) for processing costs. The MIF is a substantial component of the MSF.

1.3 The Rationale for having Interchange Fees

Two arguments are generally offered by way of rationale for interchange fees. First, it is argued that the fee is needed to allocate the costs of processing a transaction to the parties willing to pay for that transaction. Second, the interchange fee is needed to balance demand from the two sides of the market for transaction services – cardholder and merchants – to optimise network size.

The first argument is essentially that interchange is a mechanism by which merchants, via their acquiring banks, compensate issuers for costs and risks for which issuers would not otherwise be reimbursed, and that without this mechanism transactions would not go ahead. The following example shows how this might be the case:

Issuer cost – 2 cents	Cardholder benefit – 1 cent
Acquirer cost – 2 cents	Merchant benefit – 5 cents

In this example, the total benefits of the transaction (6 cents) exceed the total cost of the transaction (4 cents) so the transaction is economically efficient. However, the benefit to the customer is less than the cost to the issuer, so the customer is not willing to pay the issuer for processing. The transaction will go ahead only if some side payment is made.

However, there are a couple of observations that run counter to this explanation.

- The explanation assumes that merchants benefit from customers paying by card and would like to encourage more credit card transactions. In fact merchants generally argue that credit card transactions are more expensive for them than cash transactions.
- The explanation is inconsistent with the card schemes' practice of prohibiting surcharging. If merchants could surcharge, they could subsidise cardholders directly to ensure that economically efficient transactions did go ahead.

The second argument is essentially that interchange rebalances the revenues and costs incurred within the credit card network in such a way that the size of the network is maximised. If the MIF were set too low, issuing activity would cease. As the MIF directly impacts on the level of the MSF, if the interchange fee were too high merchants would cease accepting credit cards as a form of payment. Therefore the argument runs that the MIF must be set at a level to encourage cardholders and merchants to participate in the system, thus maximising the value of the network for all participants.

1.4 Card issuers

The responsibilities and functions of card issuers include marketing new accounts, card issuing, credit processing and risk management, processing credit card applications, producing and distributing cards, and dealing with costs of credit losses and fraud.

The main sources of revenue for card issuers are fees and interest charges that are levied on card holders and MIF from merchant acquirers.

1.5 Merchant acquirers

The responsibilities of merchant acquirers include merchant acquisition, supervising and monitoring merchants to ensure they are acting in a risk averse manner and not putting the card scheme at risk, providing installation, servicing and training for electronic equipment, providing vouchers and voucher imprinters for merchants using paper based systems, processing outgoing interchange, and settling with issuers.

Merchant acquirers' main revenue source is the MSF which is negotiated bilaterally with merchants as part of the acquiring services provided by the merchant acquiring banks.

MSF's are generally set via matrix pricing, or at a fixed rate. Under matrix pricing the MSF is calculated with reference to factors such as the merchant's average ticket size, monthly sales volumes and reflects the bank's current pricing strategies. Fixed rate contracts are generally used for medium to higher volume merchants and are determined with regard to processing costs, likely credit card income from the merchant, the level of risk associated with that merchant accepting credit cards, the bank's own pricing strategies and the merchant's overall banking relationship with the merchant acquirer bank.

As previously noted, the MIF comprises a substantial component of the MSF. The main argument offered in favour of having the network (and thus the members, collectively) set a MIF is that it is an important pricing tool for the network, which needs to maintain the right balance of incentives for merchants and cardholders to participate. Given the externalities involved in participation in a payment card system (the more merchants are on board, the more attractive the system is to customers, and vice versa), it is claimed that coordination is required to get the price signal right. It is also argued that the MIF helps membership schemes compete on an equal footing with proprietary schemes, which can set fees to merchants and cardholders directly.

1.6 Competition issues

The competition concern in relation to the setting of the interchange fee is that the collective agreement of the MIF, together with the other scheme rules, allows the member banks to set a price to merchants that reflect the market power of the scheme as a whole, rather than the market power of the individual member banks. In this sense the effect on merchants is similar to that of a cartel among card acquiring banks.

However, the behaviour is not a straightforward case of price fixing. Specifically, it is not the case that if the banks simply stopped collectively agreeing the interchange fee, a competitive outcome would result.

In a straightforward price-fixing case, if the firms were not fixing the price in question, you would expect them to be competing on it – if the cartel fell apart, each player would have an incentive to offer a lower price to undercut their competitors. The key point here is that the interchange fee is not subject to this kind of competitive pressure.

Essentially this is because there is no scope for an acquiring bank to favour the services of one issuer rather than another within a scheme, on grounds of price or any other factor – the acquirer just has to deal with whichever issuer has issued the card that the customer presents. This means that issuers have no incentive to offer a lower price to acquirers – they cannot win any more business that way. Competition between issuers drives down the price to the customer, who makes the decision about which card to carry. However, merchants and their acquiring banks just have to live with that decision, so there is no downward pressure on the price to acquirers.

The reason there is no scope for acquirers to choose which issuers to deal with is that other scheme rules (the “honour all cards” and “no surcharge” rules) prevent merchants from steering customers towards, say, paying with a Visa card from one bank rather than another bank’s Visa card.

The competition problem could thus be characterised as the ability of the individual member banks to leverage the market power of the scheme as a whole to extract rent from merchants via the interchange fee.

A mature credit card scheme such as Visa or MasterCard has significant market power over merchants, who cannot afford to refuse credit cards for fear of turning customers away. Although the schemes themselves are non-profit organisations and as such do not exercise this market power directly, the way the schemes work essentially means that each issuing bank enjoys the market power of the scheme as a whole in setting the interchange fee payable in connection with transactions on its credit cards.

The acquiring banks are able to pass on the interchange fee more or less directly to merchants. Since all acquirers are (to a greater or lesser degree) also issuers, this means that most if not all member banks, considering their issuing and acquiring businesses together, have an incentive to increase the interchange fee to the monopoly, profit-maximising level. The banks can either take the interchange fee revenue as profit, or use it to subsidise credit card use (for example through loyalty schemes) to increase the volume of credit card transactions and thus interchange fee revenue.

Furthermore, it is arguable that, because of these arrangements, competition pushes interchange fees up, not down. The theory is that schemes exercise their market power over merchants to extract rent to subsidise card issuing. The greater the number of cards issued, the greater the market power of the scheme with respect to merchants and so on. It has been suggested that Visa and MasterCard in effect bid up each others’ offline debit card interchange fees in the US in 1998. Visa announced it would increase its fee by 20 percent, in response to which MasterCard announced its fees would rise by 9 percent. Visa then announced a further 5 percent increase. Credit card interchange fees are said to have risen by 5% in both 1998 and 1999 for similar reasons.¹

¹ David Balto, *The Problem of Interchange Fees: Costs without Benefits?*, European Competition Law Review, Issue 4, 2000.

NORWAY

1. Structural condition

1.1 *Social costs and benefits of different payment systems*

In 2009 the Norwegian Central Bank (Norges Bank) conducted a costs study in the Norwegian payment system.¹ The analysis covered social costs associated with payment cards, giro and cash. The social costs for using and producing these payment services were estimated to NOK 11.16 billion in 2007, equivalent to 0.49 % of GDP.

Card payments accounts for about half the social costs, when distributing social cost on cash, cards and giro. The household survey indicated that cash payments accounted for 14 % of the value of payments and 24 % of the number of transactions at point of sale in Norway. Compared to other countries this is relative low figures. In spite of this, cash represented 31 % of social costs. Cards represented 48 % and giros 21 %.

The private cost for payments services produced by banks was NOK 7.1 billion in 2007. The corresponding income was NOK 5.2 billion, a cost recovery of 71 %. Income is based on prices per payment transaction and fixed, periodical fees from payers and payees. Cost recovery increased to 87 % when cash services were excluded from the calculation.

Calculation of social costs per instrument showed a relatively low per transaction cost of cash payments compared to costs of card payments, NOK 1.80 and NOK 5.93. However, when costs for withdrawals/deposits were included, cash was more expensive per transaction, at NOK 7.06.

2. The Norwegian payment card system

2.1 *BankAxept – the national debit card scheme*

The Norwegian payment card system is heavily influenced by the national debit card system BankAxept. BankAxept, owned by banks operating in Norway through the banking association FNO, functions without an interchange fee. Banks operating in Norway (holding a banking licence is a requirement) can join the BankAxept scheme by paying an access fee.

Fees in the BankAxept scheme are very low for both merchants and cardholders. Merchants typically pay a per transaction fee between NOK 0.0 – 0.30 and a monthly merchant fee of about NOK 125. Fees for cardholders differ for customers in and outside banks' customer loyalty schemes. In loyalty schemes, customers are given discounts against payment of a fixed annual fee or related to particular accounts or services. At the beginning of 2012, the average annual fee in Norway for BankAxept cards combined with the international card VISA was approximately NOK 208 for loyalty scheme customers and NOK 260 for non-loyalty scheme customers. This is an increase of 6% and 9%, respectively, on the previous year. The

¹ Norges Bank (2009), "Costs in the Norwegian payment system", Staff Memo nr. 4/2009.

average fee for goods purchases using BankAxept also rose in 2011 and at the beginning of 2012 was NOK 0.10 for loyalty scheme customers and approximately NOK 1.80 for non-loyalty scheme customers.²

The market shares of BankAxept in 2011 were 82 % in number of transactions and 75 % in value. The international schemes corresponding market shares were 17 % and 24 %. At EFTPOS terminals the market share of BankAxept was even higher, constituting 87 % of the number of transactions compared to 11 % of transactions by international cards.³

In addition to the low fees, the so-called "preference rule" in the by-laws of the BankAxept scheme is a likely explanatory element of the high number of BankAxept transactions in EFTPOS terminals. The "preference rule" in the by-laws of the BankAxept scheme states that EFTPOS terminals which accept BankAxept card shall give preference to the BankAxept scheme when cards presented at the EFTPOS terminal are cobranded with other payment schemes e.g. Visa or MasterCard.

2.2 International schemes

The Finance Ministry instructed the Financial Supervisory Authority of Norway (FSA) in 2004, 2007 and in 2011 to conduct a survey of the market for international card schemes and especially to examine the forming and development of the fees, both the interchange fee and the merchant service charge. On all three occasions the FSA was asked to constitute a working group consisting of members from the FSA, the Central Bank of Norway (Norges Bank) and the Competition Authority (Konkurransetilsynet). The following is based on findings in the recent report (the report) published in January 2012.⁴

The international schemes operating in Norway are Visa, MasterCard, American Express, Diners Club, JCB and UnionPay. Visa is issued by the bulk of banks operating in Norway (136 issuing banks in 2010), and often cobranded with BankAxept. MasterCard is issued by about 20 banks and finance institutions. American Express is issued by DNB, the by far largest Norwegian bank, and Diners Club is issued by Diners Club Norge. JCB and UnionPay are not issued in Norway.

Among the international card schemes the aggregate market shares of the two major card schemes has been stable around 90 % the past decade.

There are six acquirers of international card schemes in operating in Norway (2011). The two largest operators Teller and Elavon, who are pure acquirers, acquire Visa, MasterCard and JCB. Teller is the sole acquirer of American Express and UnionPay, as Diners Club Norge is the proprietor acquirer of Diners Club transactions in Norway. The three banks Nordea, Handelsbanken and Swedbank also acquire Visa and MasterCard transactions in the Norwegian market. Teller and Elavon have a combined market share above [50-80 %] (2011).

The international card schemes annual growth in volume is double that of BankAxept. In terms of number of transaction the growth of the international card schemes is 60 % higher than the corresponding growth of BankAxept. The difference in actual and potential income from fees in the BankAxept scheme compared to the international card schemes may induce the banks to prefer the latter and may also hamper innovation and promotion of the BankAxept scheme.⁵

² Norges Bank (2012), "Annual Report on Payment Systems 2011".

³ Ibid.

⁴ Report to The Finance Ministry by Finanstilsynet, Norges Bank og Konkurransetilsynet (2012), "Vurdering av tiltak i markedet for internasjonale betalingskort i Norge" (Published in Norwegian only).

⁵ Norges Bank (2012), "Annual Report on Payment Systems 2011", page 8-9.

2.3 *Policy of fees*

At present neither the interchange fees nor the merchant service charge of the international card schemes are subject to any direct regulatory measures by Norwegian authorities.

The Norwegian Competition Act article 10 is harmonized with TFEU article 101 and EEA article 53. In response to the MasterCard decision by the Commission in 2007 the Norwegian Competition Authority (NCA) opened cases against both Visa and MasterCard in 2008. The cases are still pending. However, the competition rules and the mere possibility that the NCA at any time may enforce them is in itself a passive regulation. The owners of the international card schemes are at any time obliged to comply with the prevailing competition rules.

The legal uncertainty regarding the application of competition rules on the determination and fixing of interchange fees has been somewhat amended by the May 2012 General Court ruling in the MasterCard case but will not be clarified until MasterCard's appeal is tried by the courts. Also, economic theory and the discussions regarding the relevant method used to fixing the interchange fee are still in progress. The legal uncertainty and the ongoing evolution of economic theory and method may to a certain degree affect the effectiveness of the enforcement of competition rules.

Pending clarity the Norwegian Competition Authority (NCA) choose advocacy towards the Visa and MasterCard card schemes. In addition to monitor the development of the fees in Norway the main focus for the NCA has been to ensure that Visa and MasterCard comply with the conditions agreed upon in their settlements with the Commission and the Payments Directive, i.e. usage of the Merchant Indifference Test methodology, abolishment of no-surcharge rules and the unbundling of merchant service fees.

The uncertainty towards legal clarity may induce a need for direct regulatory measures towards the setting of interchange fees in international card schemes. However, the uncertainty of economic theory and method as foundation for a direct regulation will meet challenges equivalent to those present when applying competition rules.

Direct regulatory measures will itself lead to a higher level of legal clarity. However, there is a risk of erroneous regulation. Economic theory indicate that there are no guarantees that direct regulation will lead to levels of the interchange fees that are more welfare enhancing than the private setting of interchange fee levels.

The Norwegian Ministry of Finance pays close attention to the development of the different fees and executes investigations into questions regarding regulation of the international card schemes at regular intervals, as mentioned above.

2.4 *Surcharge*

After implementation of the Payments Service Directive into Norwegian Law⁶ card schemes operating in Norway is prohibited from denying merchants the possibility of surcharging use of payment cards. However, in the report (2012) the response from the issuers showed that surcharge was used by "none, to a few" merchants, and mostly over the Internet.

The working group behind the report (2012) pointed to the fact that both acquirers and suppliers of EFTPOS-terminals have done little to arrange for the possibility of surcharging. In the follow-up of the report, NETS Norway, the largest supplier of EFTPOS-terminals in Norway, informed the NCA that their

⁶ The Norwegian Finance Agreement Act, article 39b, first section.

Nordic payment solution (Nets Merchant Solutions) support surcharging. However, a specific configuration of the software at each merchant is required for the solution to function.

In addition there are other conditions which may impede merchants from surcharging use of payment cards. First, a well arranged and efficient pricing system is costly for merchants requiring additional costs and adjustments to the payments infrastructure, i.e. EFTPOS-terminals. Second, merchants who face competition may have good reasons to assume that price differentiation will deter demand from cardholders and consumers in general. Consumers who experience that price differentiation are troublesome and complicated to relate to will seek to avoid merchants who carry out this practice if there are alternatives, hence leading to loss in sales and revenue.

A widespread use of surcharging may require some sort of coordination either by the merchants association or by the large market players. Competition rules that prohibit coordinated agreements that restrict competition may be a hindrance of such an undertaking.

3. Interchange fees

3.1 Structure, level and development

Visa and MasterCard use the "issuer-cost" method based on cost studies when setting the interchange fees in Norway. Application of the "merchant indifference test" method on the interchange fees would lead to much higher levels of the fees they argue. The high level of wages and excessive costs of processing in Norway is the main explanatory factors.

Results from the report (2012) show that the levels of interchange fees in both Visa and MasterCard have decreased steadily the past decade.

For Visa debit cards the average interchange fee has decreased by 8.6 % from 2008 to in 2011. The equivalent interchange fee on credit transactions has decreased by 30 % over the same period. The weighted average of the interchange fee of all Visa transactions have decreased by 15.9 % from 2004 to 2011.

The interchange fee as a weighted average for MasterCard consumer cards has decreased by 27.6 % from 2005 to 2011. However, for corporate cards the trend is the opposite with the weighted average of the interchange fee increased by 5.6 % from 2005 to 2011. The interchange fee as a weighted average for all MasterCard transactions has decreased by 19.7 % over the same period.

In Norway there is a large distinction between the interchange fees for certain business sectors. The grocery stores typically have a lower interchange fee than other sectors. These differences is likely motivated by some business sectors prolonged reluctance against the international card schemes compared to the BankAxept scheme, with its low fees and widespread use.

The major international card schemes have changed the structure of the interchange fees for debit transactions from a pure *ad valorem* pricing to a structure with a *fixed* price plus a lower *ad valorem* element. Based on the prevailing methods for cost calculations of the interchange fees this is not surprising. Debit transactions have a large proportion of fixed costs related to infrastructure. With a high volume the marginal cost of a transaction will approach the average fixed unit cost. In relation to the increasing use of transactions with low amounts a fixed price element may contribute to a more efficient price structure in the scheme. Transactions with credit cards bring about other cost elements and a price structure with a *fixed* price plus an *ad valorem* element may be more efficient.

4. Merchant fees

4.1 *Level and development*

Findings in the report (2012) show a steady decrease in the merchant service charges (MSC) for Visa and MasterCard in Norway since 2002. With both schemes priced at [2.15-1.85 %] as a weighted average in 2002, the MSC for one scheme has decreased by 35.3 % (2011) while the MSC for another scheme has decreased by 24.9 % (2011).

American Express operates with a substantially higher MSC than the other three party and four party schemes in Norway. However, it has had a downward trend decreasing with 12.7 % from 2002 to 2011. For Diners Club the decrease has been more modest with 4.2 % over the same period. JCB however, has increased their MSC by 2.3 % from 2005 to 2011.

In the case of the three party schemes the data suggests that the levels of fees have a proportionate development, the MSC decrease when the "issuer rate" decreases, and vice versa. Despite of the lack of intra-system competition the data imply that the MSC's in the three party schemes seems to be influenced by the development in the corresponding MSC's of the four party schemes.

Results from the report (2012) indicate that the acquirer's margins have declined. The spread between the MSC and the interchange fees has narrowed, indicating a high level of pass-through.

POLAND

1. Introduction

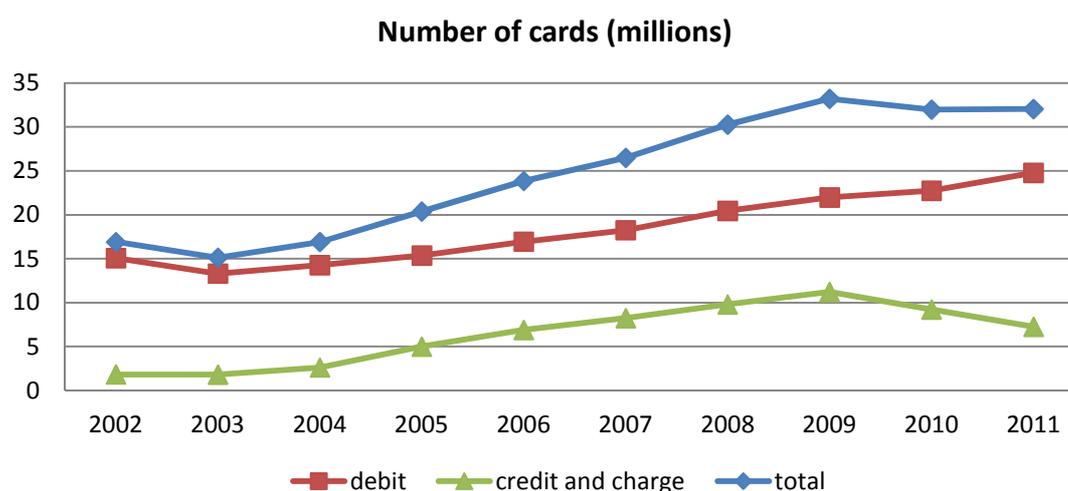
Payment systems are an important part of the financial infrastructure. They streamline transactions, allowing for smoother exchange of goods and services. Progress in this field allows various entities, including consumers, to utilize their purchasing power more efficiently. However, the characteristics of such systems, retail ones in particular, make them unlikely to function efficiently without effective regulation.

The sources of potential inefficiencies include scale economies, which allow only a few players to thrive in the market and may lead to problems with market power. For retail payment systems which rely on access to customers' accounts additional distortion may come from a monopoly which banks enjoy over accounts held by their customers, without access to which a payment system may not be able to make a transaction. Other distortions may be a result of externalities arising from system rules blunting price signals reaching users, as well as opacity of charges collected within the systems.

This contribution will focus on issues associated with card systems, as they are the most popular modern retail payment system in Poland, attracting lots of attention from regulators and legislators.

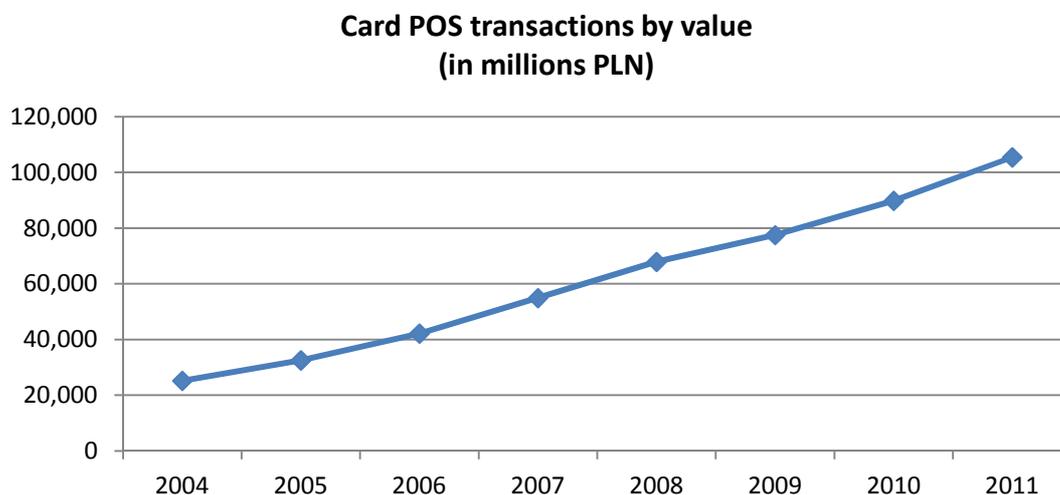
2. Short overview of the Polish card market

The Polish card market has been growing fast in the last decade. The developments in the number of cards are shown below.



Source: National Bank of Poland

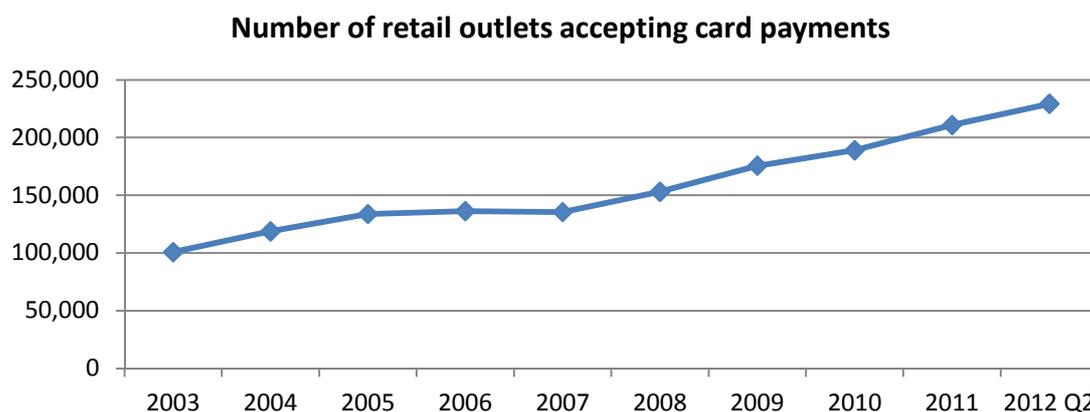
Most of the cards in circulation are debit cards. Credit cards, after steadily gaining market share until 2009, have been in retreat recently, as issuing banks rebalanced their portfolios, taking account of credit cards' higher levels of risk. There has been a steady increase in the value of card POS transactions, as shown below.



Source: National Bank of Poland

In 2011 the value of POS transactions stood at over 100 bln PLN (ca. 25 bln EUR).

An increase in the number of retail outlets has been lagging the increase in the number of cards issued. At the end of June 2012 the number of such retail outlets amounted to ca. 230 thousand. The development in the number of retail outlets accepting card payments is shown below.



Source: National Bank of Poland

An initiative by Visa, funded by banks, which started in 2010, aims to increase the acceptance network by temporarily and conditionally subsidizing marginal merchants, who would be unlikely to accept cards without subsidies. Visa aims to double the acceptance network - relative to its size before the start of the program - by 2015.

Polish card market is dominated by Visa and MasterCard, which at the end of the second quarter of 2012 accounted for 98,6% of all cards in Poland, split into 63% for Visa and 35.6% for MasterCard. The impact of other card systems, in particular three-party ones, on the market is negligible.

Acquiring market is structurally competitive, with 16 acquirers in the market (though only several of them with substantial market presence). General opinion – also among retailers – seems to be that acquirers compete vigorously for merchants, who are able to shop around for best offers. Polish Chamber of Commerce, an organization of retailers, has established that an average Merchant Service Charge (MSC) among 4,5 thousand shops it polled stands at 1,91%. It is not clear, however, to what extent this result is representative.

There are no reliable estimates of the costs of various payment means. Retailers claim that card payments are much more expensive than cash ones and are accepted mainly because of consumer demand for them.

3. Competitive characteristics of the card payments sector

Most competition issues in the card sector result from an interaction between fees collected within the system, other system rules and properties of the sector itself, in particular its relative lack of transparency for customers and less than competitive structure.

Interchange fees (IFs), paid (usually) by an acquirer servicing a transaction to a card's issuer on every card transaction concluded, are set by card issuers themselves or by a card system. They are thus hardly negotiable, as those, who may ultimately bear their costs are either unable to influence their level (merchants) or unaware of their very existence (cardholders). The ability of merchants to resist high IFs is further weakened by rules that limit their ability to differentiate their prices according to the costs associated with a given payment means (*no surcharge rule, no discrimination rule*), or force them to accept all cards – also those with high fees – or none at all (*honour all cards rule, HACR*). Merchants ability to act on price signals may also be impaired by blending, whereby information on acceptance costs of different types of cards issued within different systems is aggregated, making it impossible or at least difficult to see how various cards influence merchant's acceptance costs.

Though there may be noticeable competition for banks among the card networks (to a large extent by means of promising higher interchange fee revenues), the specificity of the card sector leads to there being practically no competition among them for merchants. The latter, in practice, do not face a choice between accepting Visa and MasterCard cards, but between accepting cards as such, or not at all. Cards of different systems are – from merchants' point of view – rather poor substitutes, since consumers, as a rule, don't seem to be carrying cards of both major systems (it is costly to have two debit cards and the choice of the debit card's brand is often imposed by a bank). Under such conditions, accepting only cards of one of the major systems is likely to lead customers with the “wrong” cards in their wallets and preferring to pay with a card, to visit another merchant. In practice, cases of merchants accepting exclusively MasterCard or Visa cards are extremely rare.

Under such conditions it is reasonable to expect that fees collected from merchants (and to a larger or smaller degree, passed on to consumers) will be high and other distortions may be introduced. When merchants are unable to steer consumers towards lower cost payment means, the selection pressure works in favour of costly methods, which are able to offer higher rewards to its user. In addition, as the payment costs are passed on to consumers, those who use cheaper payment method subsidize the users of more expensive ones. Such a market may in fact promote inefficient solutions. In the long run, a system that offers the possibilities of achieving high rents may stifle innovation. As banks are very important players in the payments market, their participation in new initiatives may be crucial for their success. Faced with a

choice, however, they will be unlikely to seek alternatives to a system which allows for high fees, and even less willing to support such alternative schemes.

Many of the restrictions mentioned above are defended as measures to promote efficient cashless payments and protect consumers. There are important problems, however, with such arguments. As already mentioned, preventing merchants from being able to steer consumers towards lower cost payments promotes more costly ones. If card payments are indeed more efficient relative to other payment means, it should be possible to set prices for various participants in the system – including merchants – at a level at least as low as that of alternatives, which would eliminate the need for or at least discourage surcharging. The point is not to support card payments, regardless of their costs to the participants of the system, but to make payment systems more efficient.

In that context it should be noted that most transparency-enhancing measures, like making IF rates public, relaxing no-surcharge and honour all card rules, as well as steps taken to unblend cost information provided to merchants were undertaken by card systems under pressure from regulators or legislation. It demonstrates to a large extent indispensability of sensible regulation in this area.

4. Developments in Poland

4.1 *Interchange fees*

Controversies concerning card payments are either directly or indirectly associated with interchange fees. In Poland, Visa and MasterCard have different arrangements for setting the above-mentioned fees. Visa IFs are set by banks issuing Visa cards; MasterCard followed a similar model until the setting of IFs was taken over by a regional organization – MasterCard Europe. First IFs set by the latter organization became effective in April 2008.

In 2001 an association of merchants (Polish Organization of Trade and Distribution, POHiD) lodged a complaint with the competition authority (UOKiK), alleging that Visa, MasterCard and Polish banks were involved in price-fixing and creating artificial barriers to entry to the payments market. In December 2006 the authority issued a decision finding agreements on IFs to restrict competition, while clearing banks and card organization of the second charge.

The restrictive effect of the IFs was found in the acquiring market, where they created a de facto floor for the fees collected by acquirers from merchants (MSCs). According to the data collected by UOKiK during investigation, IFs accounted for over 80% of the MSC, making most of it non-negotiable in practice. The agreements were not indispensable for the functioning of the card system, as transactions could have been cleared at par, no interchange fees being subtracted from the amount sent to merchant's bank. UOKiK also considered efficiency claims, as the parties maintained that even if the multilateral IFs are not necessary for the functioning of a card system, they contribute to making it more efficient and thus merit exemption from the prohibition on restrictive agreements. They also produced cost studies, purporting to show that Polish IFs met the exemption criteria. Upon closer examination, those claims turned out to be unconvincing.

On appeal, the first instance court reversed the decision, claiming that the restriction did not take place in the relevant market identified by the competition authority, i.e. acquiring market, but in some other market, which the court did not define. The appellate court found the opposite, remanding the case to the first instance. It is currently suspended, awaiting final judgment in the MasterCard case pending before the EU Court of Justice.

Since the decision, Visa's IFs were not revised downwards, banks claiming to be afraid of being found in breach of competition law. MasterCard IFs, after the powers to set them was transferred from Polish banks to MasterCard Europe, were slightly raised.

In an attempt to broker an agreement on the interchange fees, in October 2011 the National Bank of Poland (NBP) set up a working group, attached to the Payment System Council, an advisory body grouping representatives of the payments industry and regulators. The working group, chaired by the NBP, consisted of the most important stakeholders – issuers, acquirers, card systems and merchants, as well as state institutions (ministry of finance, financial supervision commission, ministry of economy and competition authority). The starting point for discussion was a report on Polish interchange fees, prepared by the NBP, which found, inter alia, that:

- debit IFs in Poland (ca. 1,6%) were the highest and credit IFs (ca. 1,5%) among the highest in the EU,
- estimated issuers' revenues from IFs amounted to 1,4 bln PLN (ca. 330 mln EUR) in 2011,
- since 2007 banks' IF revenues have been rising faster than the value of card transactions, which indicated that effective IFs have increased,
- the development of acceptance network was lagging the general market development and imposed a constraint on its further growth; under such conditions lowering IFs in order to stimulate cards' acceptance was highly desirable.

After several meetings, the central bank proposed a formula for lowering IFs, by means of a progressively decreasing caps. The first, unconditional decrease of the IFs to 1,1% (debit) and 1,2% (credit) was to take place by 1.01.2013. For further three years yearly decreases of 10 bps (debit) and 9 bps (credit) were to be conditional on the development of a weighted average of three variables (number of POS, number of POS card transactions and their value) relative to its forecast based on current trends. Final and unconditional decrease to an average EU domestic IF level were to take effect on 1.01.2017.

Further obligations were to be imposed on other participants in the system. Card organizations were not to increase or introduce any country specific fees that would have an effect similar to that of the IF (marketing fees, processing fees, etc.), with issuers obliged not to automatically raise other fees to compensate for "lost" interchange revenue. Acquirers were to pass on the reductions in the IF to their customers - to that end caps on the MSC were to be introduced – as well as to inform customers of the decrease in the IF and to phase out blended fees in favour of "interchange plus" and "interchange plus plus" arrangements, clearly showing the levels of interchange, scheme fees and acquirer's margin, or, alternatively, to inform merchants on the level of respective MSC components. Retailers were to pass on their cost reductions to customers, not to surcharge card transactions or undertake other, additional steps to promote the use of cash. Each participant in the system was obliged to take steps to promote cashless payments. The NBP's proposal also suggested taking similar steps leading to a decrease in the MSCs with respect to three-party systems.

An agreement, though initially accepted by an overwhelming majority of participants, proved elusive, mainly due to the position of MasterCard, who expressed strong reservations concerning compatibility of any contemplated agreement on interchange fees with competition law, having dropped their participation in the working group early on. Consequently, the agreement foundered. Nevertheless, both Visa and MasterCard declared they would substantially lower their IFs as of the beginning of 2013.

The issue of interchange fees has been taken over by the Parliament, where currently there are several draft bills capping IFs or MSCs at a level substantially lower than is currently the case and lower than the above-mentioned decreased rates foreseen by Visa and MasterCard.

4.2 *No surcharge rule and HACR*

No surcharge rule has been a subject of a heated debate in mid-2011, accompanying implementation of the Payment Services Directive, with banking sector and card networks coming out strongly against a prohibition on surcharging restrictions and retailers strongly in favour. It was decided that the issue would not be regulated at that point in time and would be revisited if the efforts to decrease IFs failed. HACR is currently being addressed by an amendment to the payment services act, which allows merchants to choose the type of cards they will accept.

4.3 *Conclusions*

Complexity of interactions within payment systems, as well as their economic characteristics make them unlikely to function efficiently absent proper regulation. Controversies concerning interchange fees and network rules are also felt in Poland, where legislative solutions are being implemented to address them.

ROMANIA

Important non-cash payment instruments in Romania are payment cards. Cheques are of limited usage, and alternative technologies experiment a slower development. Therefore, our submission will focus only on the payment card industry.

1. Context of the research in the payment card industry

On 22 February 2011, the Romanian Competition Council (hereinafter referred as *RCC*) opened a sector inquiry in the payment cards industry. This inquiry was mainly triggered by the EC's interventions and continuous attention paid over the last years to the activity of the international organizations Visa and MasterCard, especially that relating to the set-up of the multilateral interchange fees and its impact over the well functioning of payment card networks. Another reason that prompted this inquiry was the fact that the level of domestic interchange fee in Romania is set by the representatives of the banks which are members of Visa and MasterCard, holding over 75% aggregated market share.

The investigation targets the 28 banks, members of Visa/MasterCard which issue and accept payment cards, 22 undertakings operating in different fields such as tourism agencies, restaurants, hypermarkets, etc and the international organizations Visa and MasterCard. Information on acquiring and issuing was collected through a questionnaire sent out to the target group of the inquiry. As regards the type of products and services covered by the questionnaires, it should be noted that the questions put to acquirers and issuers addressed consumer and commercial cards.

The sector inquiry is currently ongoing. Once it is finalized, a report will be adopted by *RCC*, which will be published on its website. Depending on the final findings of the inquiry, the *RCC* will decide on the most appropriate measures to be taken.

The general objective of the sectoral inquiry is to identify alleged anticompetitive practices on the Romanian market of banking payment services as well as the potential distortions with negative effects on consumer welfare and to improve market knowledge. In dealing with the above subject matter, the enquiry examines the setting of the interchange fee on the market of payment cards and payment systems; the setting of the fees and taxes paid by the merchants to the acquiring banks for the services provided, the profitability in the payment cards sector and the payment systems, the structure, degree of concentration and integration of payment cards and payment systems and the effects of the rules adopted by the payment schemes and acquiring banks over the merchants and final consumers.

The remaining of *RCC*'s submission draws substantially from the preliminary findings of above mentioned ongoing sector inquiry.

2. Development level of the Romanian card industry

Non-cash payments are nowadays important means of doing commercial transactions featured by an ascending trend both at European and national level. The Romanian payment card market is a market in development.

The overall picture of the payment card business in Romania first reveals the absence of the banks exercising only the function of card acceptance. This situation may be explained by the policies of card payment schemes owners. More exactly, the owners of card payment schemes may implement a pyramidal system of attracting banks permitting only to the institutions benefiting from card issuing license to become card acquirers within the respective schemes.

Second, another important observation is that many card issuer credit institutions recently entered the card acquirer market. Thus, if in 2006, there were 7 mixed banks (issuer and card acquirers at the same time) on the payment card market, their number recorded a constant increase in the following years so that in 2011, it amounted to 20. That may mean that in the Romanian card market there is room for considering the increased use of on-us transactions where the interchange fee plays no role. This may pose a major obstacle to market entry on the acquirer side and provide a significant competitive advantage for the major acquirer(s) already present on the market due to the relative cost advantage of the card acquirers who are also card issuers.

On the issuing card market, the number of financial institutions providing card issuing activity decreased from 18, in 2006 to 10 (7 banks and 3 non-banking financial institutions), in 2011. This decrease is due to the migration of certain banks from the issuing activities to the payment card issuing and acquiring activities.

3. Changes in the number and function of the payment cards

In terms of the structure of banking cards market, it appears that debit products still make up the largest weight in the total number of payment cards. If at the end of 2006, debit products represented 90% of the total number of the cards issued, in 2011, their number declined to only 84%. Despite aggressive advertising campaigns for credit products, the number of credit cards in Romania falls significantly short of the European average. This is presumably attributable to the fact that banks subjected potential credit cardholders to more rigorous credit assessments caused by worsening economic difficulties.

Apart from the significant increase in the number of cards issued, the development of the Romanian card business is owed also to the gradual investments made by banks in the infrastructure for banking cards acceptance in the period 2006-2011. If at the end of 2006, there were 5,074 ATMs and 34,917 POS terminals, in the middle of 2011, they accounted for about 11,000, respectively 220,000. However, none of the banks active in the market of cards acceptance operates POS terminals abroad.

4. Frequency of payment card use

With the exception of stalling growth attributable to the global economic crisis, in 2011, 66% of the total number of the card transactions represented cash withdrawals while the remaining were purchase transactions conducted with payment cards. The picture is less favourable in relation to the transaction value. Thus, 87% of the domestic transactions value represented cash withdrawals while the rest represented payment transactions.

The number of payments made by cards far exceeds the number of payments made by other non-cash instruments. However, in terms of transactions value, credit transfers relative to other non-cash instruments record the highest figures.

5. Domestic interchange fees in Romania

A domestic card scheme serving the country's home market did not emerge in Romania. Therefore, the national card markets are generally served by Visa International/Europe and MasterCard and in a small weight by American Express.

That means that the relationship between the banks and the banks strategies concerning cardholders and merchants are influenced to a large extent by the international card payments organizations, Visa and MasterCard. Actually, these international organizations are the ones setting out the level of the interchange fee, the terms for granting the license as well as the access conditions for its members.

Visa is the first international payment card scheme who entered Romanian market at the beginning of 90's. The first Visa card was issued in Romania in 1995. Since then, Visa International/ Europe has had a continuous development, especially in the last years. Thus, in 2011, the number of Visa cards in Romania amounted to 6.5 million.

MasterCard started its business in Romania in 1995. It is actually the main competitor of Visa regarding debit and credit cards, in terms of both number of cards issued and value of the transactions. The number of cards issued in Romania under the MasterCard brand was about 5.8 million in 2011.

According to the rules of the international card payments systems Visa and MasterCard, a specific interchange fee may be applied to domestic transactions distinct from that applied at regional or inter-regional level. At the domestic level, interchange fees may be set multilaterally by the banks participating in a payment card system. Bilateral agreements on interchange fees between issuers and acquirers are also permissible in Romania albeit not used.

In Romania, the level of the domestic interchange fee is the result of a multilateral agreement among the banks holding about 98% of the domestic card market. Thus, the domestic interchange fee equalled 0.5%+2.5 lei (0.56 EURO) in relation to ATMs transactions and 1.00% (standard), 1.50% (e-commerce), respectively 0.7% (petrol) in relation to payment transactions conducted through POS terminals. Till the end of 2011, the level of domestic interchange fees mentioned above was the same for the cards irrespective of their brand, i.e. Visa or MasterCard. However, starting with 2012, MasterCard decided to independently set the interchange fees applicable to the domestic payments in Romania (instead of the agreement between the banks) and applied by its members.

6. Components of Domestic Interchange Fees

In general, the level of the domestic interchange fees is set on the basis of a certain rationale i.e. the reimbursement of certain costs incurred by the banks. Typically, the following cost elements are among others taken into account, namely: the costs related to the transaction fees set by the international card companies, the operating costs, e.g. the costs related to the issuing and use of cards for the POS transactions, the national costs of processing the transactions, ATMs and POS costs related to the acquisition, fixing, maintenance, and security costs, e.g. fraud prevention costs, and so on.

7. The merchant service charges (MSCs)

This fee is subject to bilateral negotiations between acquiring banks and merchants. The evidence derived from the replies of the responding merchants, points to different charges for merchants depending on the size of merchants, the business sector involved, the forecasted volume of card transactions, the merchant' general relationship with the acquiring bank, the level of the interchange fee. In terms of merchants' size, the evidence suggests that smaller merchants, i.e. SMEs, tend to get less favourable deals in terms of merchant service charges than larger merchants. Also, the level of the merchant service charge appears to be situated on average between 0.1% - 1.4% in the case of On Us transactions and between 0.5-2.5% in the case of Off Us transactions.

When analysed across the economic sectors, the highest average MSCs are charged in sectors such as Car Rentals, Restaurants, Hotels, and tourism agencies.

The inquired banks explained that this differentiated treatment of the merchants is justified by the costs variances incurred in their relationship with larger versus smaller merchants, fraud risks, etc. For instance, larger merchants bring higher transaction volumes and therefore may significantly scale down the fixed costs. The lower price may therefore reflect the lower costs incurred with larger merchants. Therefore, the very fact of observing different pricing for smaller merchants versus larger merchants may be an indication of market power but it may not constitute “discriminatory” treatment in itself.

At a first glance, it appears that the acquirers will be tempted to redeem the losses incurred due to the higher level of the interchange fee paid to the issuers by increasing the merchant charges. However, the data presented by the interviewed merchants (the merchant charges) and banks (interchange fees) shows that there are situations in which the merchant charges are below the interchange fees. This occurs in the case of on-us transactions where large acquirers are also active players on the card issuing market. In such situations, it appears that the banks may recoup the negative difference between the merchant charge and interchange fee in order to earn some profit, either by levying other fees to the card holders such as the annual card administration fee or by higher returns obtained from performing other activities (cross-subsidisation).

8. Blending

The preliminary findings of the inquiry also show that the acquiring banks’ practice of charging businesses the same level of merchant fee, irrespective of the card used for payment known as ‘blending’ is wide-spread. Thus, 80% of the banks interviewed responded that they charge the same MSC irrespective of the card used for payment and/or card scheme. The merchants confirmed as well that banks do not discriminate and uniformly apply the same MSC for the cards of different companies.

Therefore, it is possible that this practice of blending might be a factor that may restrict merchants’ ability to accept only selected cards belonging to the same payment system because they are unable to distinguish the individual cards and their costs. It may also impede merchants to experiment surcharging of payments made by certain types of payment cards. Moreover, blending of prices may weaken inter-brand price competition, which in turn may lead to businesses paying higher acquirer fees.

Merchants have been offered the chance to express their views also about some other standard clauses defined by the card schemes. These include the “no surcharging” rule, and the “honour all cards” rule.

9. Regulation relating to surcharging

The “no surcharge rule” explicitly prohibits different pricing for cards. Surcharging occurs when the merchant charges an additional amount to clients paying with a card instead of cash, or gives a discount to clients paying with an alternative payment instrument.

The Payment Services Directive 2007/64/CE (PSD) provides that *the payment service provider shall not prevent the payee from requesting from the payer a charge or from offering him a reduction for the use of a given payment instrument*. However, when transposing the Payment Services Directive (PSD) 2007/64/CE into the national legislation, the Romanian legislator exercised the option of forbidding surcharging¹ taken into account the need to encourage competition and promote the use of efficient payment instruments.

Most of the merchants participating in the survey confirmed that one reason for which the merchants prefer not to apply pricing differentials is that the merchant has to recalculate the price according to the

¹ Government Emergency Ordinance no. 113/2009 on payment services.

payment media and this makes the execution of the transaction longer. Another reason for merchants to refrain from surcharging is that it entails a risk of moving to cash, which also has a cost for merchants. Last but not the least, merchants inquired (supermarkets, hypermarkets) argued that surcharging may be limited to a few business segments/industries, e.g. ticket agencies for on line events, e-commerce or on-line commerce, tourism agencies and the airline industry where the fraud risks are higher.

The preliminary findings reveal that the no-surcharge rule may prohibit merchants from establishing prices that are different depending on the mode of payment. At the same time, the answers of the inquired merchants show that the decision to ban or allow surcharging involves a complex trade-off between considerations in the field of efficiency, consumer protection, transparency and competition that needs careful examination by RCC.

The “honour all cards” rule (merchants are obliged to accept all the brands issued within a single card scheme, irrespective of the level of merchant fee and, therefore, the interchange fee)

Most of the merchants participating to the survey confirmed that they are obliged to accept all the brands issued within a single card scheme and that they would welcome the chance to be allowed to accept only certain card products. A smaller proportion of respondents expressed the concern that such a freedom would mean merchants’ temptation to accept lower-cost card products which would negatively impact consumers.

10. Profitability of the sector

Persistently high rates of profitability across an economic market may be an important proxy for establishing that the market is less than fully competitive. Such an assessment may indicate the existence of certain competition distortions such as a monopoly or lawful or unlawful agreements between companies.

Analysis of the profitability in both issuing and acquiring activity appears to be subject to an important caveat i.e. banks allocate common costs to several activities. For instance, issuing activity of debit cards may be linked to current accounts services. Under these conditions, estimation of the proportion of wage expenditures in each activity may be difficult to be performed.

Banks operating in the issuing and acquiring side of payment card system have been asked to answer several questions regarding the issue of returns and expenditures specific to the activities of card issuing and card acquiring. It appears from the data processed that most of the banks are not accustomed with measuring returns and expenditures incurred on each activity, card issuing, and respectively card acquiring. This situation makes impossible for RCC to make a reliable profitability rates analysis on both card issuing and acquiring markets.

Further, a low number of banks provided RCC with information on the returns and expenditures related to the interchange fees. Their motivation was that they do not hold information detailed on type of activities in their own informatic system. The same issue arose when asking merchants about the costs incurred when accepting cash or card.

11. Exclusivity

From the information gathered through the survey, it appears that no card platform has signed exclusively contracts with card-issuing banks.

12. Entry barriers

Entry barriers on the banking payment services market are first of regulatory nature and consist in getting a license from the National Bank of Romania as well as from the respective international payment organization. A new entrant faces high financial barriers for the development of a working network. The existence of a multilateral arrangement for setting the banking interchange fee on the card payment services market might enable potential entries as long as a new entrant is not required to negotiate with each card issuer for the setting of the interchange fee.

The National Bank of Romania is the Romanian regulatory body which is competent to authorize Romanian payment institutions, supervise the activities performed by the payment services providers such as credit institutions, e-money institutions, post office giro institutions and payment institutions and monitor the activity of such entities.

13. Conclusion

There has been no recent competition enforcement activity in Romania in this field, but the RCC is closely monitoring this sector.

As shown throughout the paper, there are several issues that might justify a RCC's intervention in this market, which are currently under consideration in the sectoral inquiry.

First, the vertical integration of many national payment card players may have the potential to impede new entrants at different levels of a payment card system's value chain. Second, a high level of interchange fees may negatively affect competition, by setting down a threshold over which the merchants' costs for accepting payment cards will be considered, inflicting increased prices for goods and services delivered to the final consumers; Third, there are in place certain rules and practices adopted by the payment schemes and acquiring banks which may weaken merchants ability to exert a competitive pressure over the acquiring banks when negotiating the MSC level. Fourth, the presence of price discrimination is also a signal for some possible market problems in the pricing pattern of the industry.

Against all these challenges, RCC will contemplate to possible solutions that could give merchants more power when negotiating with acquiring payment services providers, in particular the MSC level, whilst at the same time improving the ability of merchants to influence consumers' decisions.

In conclusion, RCC looks forward to any insights and contributions, arising from this roundtable discussion, which will assist the Romanian competition authority with its inquiry and with finding an answer to the question of whether or not a centrally set interchange fee restricts competition either as an agreement between undertakings or as decisions taken by associations of undertakings, or as an abuse of a dominant position.

RUSSIAN FEDERATION

1. Level of development of payment systems in Russia and major issues in this sphere

In the Russian Federation issues related to large volume of cash turnover, existing natural barriers of development of noncash payments are still urgent and actual. According to expert opinion the cash turnover is 2-2,5 times larger than in the developed countries. Noncash payments are used approximately by the 25% of the banking services consumers.

It is worth mentioning that international payment systems have the most significant influence on functioning of noncash payments market in Russia (with the market share of approx. 90%).

Bearing in mind that the functioning of such payment systems, complex procedure of tariff establishment, the amount of it and quantity participation of the majority of Russian banks in such payment systems is unprofitable. The consequence of it is unprofitability of implementation of usage of such systems as cashless payment method for goods and services at retail (service) enterprises as well as negative impact of pricing of such goods (services).

The elaboration and introduction of legislation in 2012 on the national payment system (the Federal Law №161-FZ “On national payment system” of 27.06.2011) has great importance for development of the sphere of the cashless payments. The legislation defines legal and institutional grounds of the national payment system, regulates procedures of payment services providing and activities of subjects of the national payment system, and describes requirements of foundation and functioning of payment system.

At the same time the state takes other measures that would stipulate the development of cashless payment system including usage of bank cards, growth of efficiency of payment system, lowering of the costs for usage of payment systems for consumers and transition to digital technologies.

Aiming at these goals the necessary corresponding amendments to the legislation are elaborated with participation of authorities and specialized associations of participants of the national payment system. Fundamentally such amendments would be for transaction conduction inclusive by means of tax burden lowering.

2. Conditions for establishment and functioning of payment systems

At present there are more than 60 local and international payment systems in the market of the Russian Federation. The international systems have approx. 90% of the Russian market of payment cards emission. Moreover the majority of Russian credit institutions are members of such international payment systems as Visa and MasterCard.

The principal restrictive factors for entry into the payment systems (in the opinion of the Russian credit institutions) are small turnover of merchant acquiring at retail (service) enterprises and high commission costs established by payment systems.

Above all the large quantity of participants in the market of cashless payments and in payment systems, as well as the number of credit institutions have positive influence on competition development in this sphere.

The Law on the national payment system (which came into force in 2012) determines that a bank or any other institution has the right to operate a payment system (to establish it) only if such organization has a registration certificate issued by the Central bank of the Russian Federation.

Such Certificate is issued if certain criteria are observed, e.g. possession of the set amount of the net assets, if there is professional qualification (degree) of the head of the organization, accountant and experience in the sphere not less than two years, the defined personnel should not be convicted of any criminal offence, as well as provision of particular documents inclusive of the rules of the payment system that have to adhere to the requirement of the law.

Moreover, having in mind the rapid development of the specialized payment systems in Russia and the specifics of its functioning, there may be imposed additional requirements to the operators of the payment system. An example of such additional requirements can be obligatory provision of the guarantee (assurance) by the operator of the payment system to the recipient of the payment in the form of the bank guarantee.

3. The regulations of the payment system

The Legislation on the national payment system imposes a list of obligatory requirements to the content of the payment system rules. The fundamental requirement is the presence of the established procedure of interaction between participants of the payment system, ways of executing control and obligations in case of violation of the rules of the payment system, criteria for eligibility for participation, termination or suspension of participation, methods of payment conduction, system of risk management, and requirements to protection of information, the order of payment system regulations changing.

The regulation of the payment system is the agreement which is concluded by joining the system in general. The operator of the payment system can unilaterally introduce changes into the regulations in case the participants are provided with facilities to become familiar with any forthcoming changes and have possibility to give feedback within the time limit not less than a month, as well as establishment of time of introduction of changes which is not less than a month since the end of the term for overview of the changes.

Moreover, according to the new legislation the rules of the payment systems inclusive of its tariffs have to be publicly available.

4. Ensuring creation of competitive environment in the sphere of payment systems functioning

Russian antimonopoly authority took active part in elaboration of the Law on the national payment system; upon the initiative of the FAS Russia the Law has provisions that are aimed at prohibiting of restriction of competition in activities of the subjects of the national payment system.

Particularly the provision of prohibition of establishment of unsubstantiated requirements in the rules of the payment system that restrict participation in the payment system is instituted; the requirement of nonparticipation in any other payment system as well as minimum and (or) maximum level of fees for transferring the moneys by clients.

It is worth pointing out the regulations of the Law that are vital for development of competition in this market, such as:

- the operator of the payment system is obliged to provide the rules of the payment system to organization intended to participate in the system for preliminary preview without any fee with the exclusion of costs involved in reproduction (copying) of the rules of the payment system;
- the rules of the payment system inclusive of its tariffs and fees are publically available.

Non-observance of the defined regulations can become grounds for initiation of antimonopoly investigation in regards to market participants (inclusive of the payment systems).

It is worth mentioning that the body (that can execute the right to issue decisions on conformity of activities of banks, operators of payment systems and payment infrastructure to the antimonopoly legislation) is the joint Commission of the Federal Antimonopoly Service of the Russian Federation (the FAS Russia) and the Central bank of the Russian Federation (compared to the general procedure for antimonopoly case initiation which is the decision of the Commission that includes only representatives of the FAS Russia).

5. New technologies

Currently Russian banks issue chip and pin cards and also magnetic cards.

As not all retail (service) institutions are equipped with facilities to read chip and pin cards banks issue mainly combination cards that have a chip and a magnetic stripe.

Moreover, recently the volume of payments processed with the help of cards equipped with the function of electronic money (cards with built-in chip that has some funds as a result of pre-payment) has risen.

However the Russian Federation has issues related to infrastructure for making payment by cards as the facilities for that are present mainly in the capital and large regional cities.

The accessibility of the infrastructure of Russian card payment systems is restricted by differences of the used standards and technologies in the payment system that lead to incompatibility of the similar functions of payment instruments and as a consequence impossibility of cards usage issued by the bank participating in one payment system in cash machines or other service terminals of the bank that are members of the different payment system.

At the same time the elaboration and entry into force of the Law on the national payment system introduced legal definiteness of cashless payments (including those performed with the use of the electronic payment) and allow predicting more active implementation of new technologies in cashless payments.

6. Interbank commission (fee)

Interbank commission is a fee paid by the acquirer bank to the bank of issue upon payment for good (services) at retail (service) enterprises.

In the Russian Federation operators of local payment systems establish the amount of interbank commission on the basis of the level and methods of tariffing used in the international payment systems

that cover approx. 90% of the Russian card market. In particular the largest share of the market belongs to international payment systems Visa and MasterCard.

The amount of interbank commission is set by the payment systems themselves in the majority of cases (with consideration of adherence to the antimonopoly legislation). Moreover, the participating banks are free to agree on usage of other tariffs.

At present in the Russian Federation the interbank commission is on the average 1,5% of the sum for all types of cards transactions.

Presently the cost for cash collection from the premises is low (0,3% - 0,8%), thus current interbank commission for card transactions and other tariffs depending on it for merchant accounts implicate additional expenses for retail (service) enterprises and make the noncash payment with use of bank cards less profitable for them.

7. Antimonopoly legislation and its application in the sphere of payment systems

7.1 General provisions

Antimonopoly regulation in the sphere of activities of payment systems at present is directed according to the Federal Law of 26.07.2006 № 135-FZ «On protection of Competition».

The Law prescribes a number of prohibitions violation of which can be grounds to initiation of antimonopoly case and application of administrative liability to violators.

Major prohibitions include those that prohibit activities of economic entities related to occupying of dominant position in the market and prohibition of conclusion of anticompetitive agreements.

Application of the named prohibitions to the equal extent is valid for activities of payment systems and activities of such systems participants, inclusive of banks, operators of payment systems and payment infrastructure.

State authorities are also can be found guilty of violating antimonopoly legislation if their activities lead to elimination or restriction of competition (which includes sphere of activities of payment systems).

7.2 Research

7.1.1 *Agreements between banks and retail (service) enterprises on entitlement of discounts to clients in case of bank card usage as means of payment for goods (services)*

In 2009 the FAS Russia (within the frameworks of the meetings of the Expert Council and specially established Working Group within this Council) conducted investigation on compatibility (conformity) with the antimonopoly law of agreements between banks and retail (service) enterprises on issues of provision discounts to their customers in case of making a payment with the use of cards. The Expert Council and the Working Group consist of representatives of federal authorities as well as market players.

The necessity of such research was determined by the fact that such agreements were widely used as means of support and development of business activities of each agreement participant.

The research in particular testifies to the fact that conduction of such agreements on discounts (upon payment for goods/services with cards) facilitates the enlargement of the clients' list inclusive of those from the party of the agreement; rise of the volume of goods/services sold for parties in the agreement; rise

of the client services; loyalty strengthening of the existing customers; creation of motivation for potential clients to buy goods/services from members of the agreement; creation of a positive image and recognition of the brands of agreement members.

Customers of the members of agreements on discounts as a result of such agreement get a possibility to economize money upon payment of goods/services and alongside this use a vast spectrum of the banking services.

At the same time use of this instrument by retail (service) enterprises have risks of possible violation of antimonopoly legislation which until 2012 provided for prohibition of agreements between economic entities per se, if such agreements lead to establishment of discounts. The provision of possibility of agreements (restricting competition inclusive of those when customers acquire equal benefits as economic entities that concluded the agreements) and such agreements did not exist.

After research of terms and conditions of procedure to give discounts within the frameworks of the agreement between banks and retail (service) enterprises as well as other cases of such cooperation the working group came to conclusion that in some cases such agreements may lead to restriction of competition in the market of bank services and the relevant markets of retail (service) enterprises (bank partners in the agreement).

This finding is relevant in case if one of the following conditions is present (or several of them):

- agreement provide for cancellation or restriction of discount programs of the retail (service) enterprises which do not depend on any agreement;
- - agreement contains a clause about termination of the discount programs of retail (service) enterprises with other banks (in the form of agreement) and verse versa termination of discount programs of the bank with other retail (service) enterprises (prescribed in the agreements);
- agreement does not limit retail (service) enterprise in its ability to introduce discount programs, which does not depend on any agreement, however, presupposes that such discount programs does not include more profitable conditions compared to the program described in the agreement and (or) determines any limitations in regards to size of discounts offered to customers according to own discount programs which does not depend on any agreements;
- agreement does not limit retail (service) enterprise in its ability to introduce discount programs prescribed in the agreements with other banks however presupposes that such agreements does not include more profitable conditions compared to the program described in the agreement and (or) determines any limitations in regards to size of discounts offered to customers according to discount programs prescribed in the agreement with other banks;
- agreement does not limit the bank in its ability to introduce discount programs, prescribed in the agreements with other retail (service) enterprises however presupposes that such agreements does not include more profitable conditions compared to the program described in the agreement and (or) determines any limitations in regards to size of discounts offered to customers according to discount programs prescribed in the agreement with other retail (service) enterprises.

Since 2012 the prohibition per se is applied to agreements on discounts between economic entities – competitors.

Correspondingly the activities of banks and retail (service) enterprises in regards to agreements on discounts currently can be considered a violation of antimonopoly legislation only in case if there is enough evidence to prove restriction of competition. Moreover such agreements can be considered permissible if they stimulate progress in one or the other economy sectors and allow customers to get proportionate benefits as a result of the agreement.

At the same time elaborated decisions on the subject matter (despite of described amendments to the law) are actual at the moment and in current work of the antimonopoly authority.

7.1.2 Merchant acquiring

Currently the FAS Russia conducts analysis of condition of level of development of the market of merchant acquiring. The results of the research can be the basis of initiation of antimonopoly case in regards to such payment systems as Visa and MasterCard that has most significant influence on general conditions of functioning of the Russian market and state of competition as they have the largest market share.

Activities of these payment systems on the territory of the Russian Federation are under monitoring of the FAS Russia. The main subject of attention is the methods of calculation of interbank commission and its influence on merchant accounts.

SWITZERLAND

1. Introduction

The following document is based on a former contribution of Switzerland to the OECD Roundtable on “Competition and Efficient Usage Of Payment Cards” in February 2006, which remains valid and relevant for the current roundtable.

The Swiss payment sector has been the object of numerous procedures of the Swiss Competition Commission (ComCo) in the past years. One of the main topics is interchange fees in four party credit and debit card schemes. It is a mentionable particularity that in Switzerland the only international debit card scheme (Maestro) is functioning with a zero interchange fee. The subsequent Table 1 gives an overview of our investigations in the payment card sector, their content, state of the procedure and the bibliography of published decisions.¹ Subsequently you will find a summary of our most important cases, beginning with the cases concerning interchange fees (1), followed by the other cases in the payment card sector (2).

Date	Title	Content	State of the procedure	Published
1999 - 2002	Credit cards – Non-Discrimination Rule (NDR)	abuse (collective dominance acquirers)	decision 18.11.2002 decision of Appeals Commission for Competition Matters (09.06.2005) appeal in front of the Swiss Federal Supreme Court (abandoned)	RPW/DPC 2003/1, p. 106 ff. (ComCo) RPW/DPC 2005/3, p. 530 ff. (Reko ²)
2003 - 2005	Credit cards – Domestic Multilateral Interchange Fee (KKDMIF I)	cartel (issuers & acquirers)	decision 05.12.2005 settlement expired on 01.02.2010	RPW/DPC 2006/1, p. 65 ff.
2003 - 2005	Credit cards – Merchant Service Charge	abuse of dominant position of an acquirer: - predatory pricing - bundling	preliminary injunctions (declined) preliminary investigation closed without followings	RPW/DPC 2004/4, p. 1002 ff. (ComCo) RPW/DPC 2004/2, p. 625 ff. (Reko) RPW/DPC 2004/4, p. 1193 ff. (BGer ³)

¹ All decisions are published on our homepage: www.weko.admin.ch/dokumentation/00157/index.html?lang=de.

² Appeals Commission for Competition Matters.

³ Swiss Federal Supreme Court.

2004 - 2006	Debit cards - Domestic Multilateral Interchange Fee	cartel (issuers & acquirers), planned introduction of a DMIF for Maestro	preliminary investigation closed with a final report (04.07.2006) decision not to open a formal investigation decision confirmed by Administrative Federal Court and Swiss Federal Supreme Court	RPW/DPC 2006/4, p. 601 ff. (ComCo) RPW/DPC 2007/3, p. 478 ff. (ComCo) RPW/DPC 2008/2, p. 361 ff. (BVGer ⁴) RPW/DPC 2009/1, p. 109 ff. (BGer)
2005 - 2006	ATM Service Fee	cartel	preliminary investigation, closed without followings. final report 06.06.2006.	RPW/DPC 2006/3, p. 420 ff. (ComCo)
2005 - 2006	ep2-specification	Abuse of dominant position	notification	not published ⁵
2006 - 2010	SIX/Payment Terminals with the DCC-Function	abuse of dominant position of an acquirer: - refusal of interface information - leveraging	decision 29.11.2010 fine of CHF 7 Mio. appeal in front of the Administrative Federal Court (pending)	RPW/DPC 2011/1, p. 96 ff. (ComCo)
2008 - 2009	Debit cards – Domestic Multilateral Interchange Fee for V-PAY	cartel (issuers & acquirers)	Final report 27.04.2009	RPW/DPC 2009/2, p. 122 ff. (ComCo)
2009 - 2011	Debit cards – Domestic Multilateral Interchange Fee for Maestro and MasterCard Debit		Final report .31.05.2011	forthcoming
2010 -2012	Maestro Development Fund (MDF) and Maestro Volume Fee (MVF)	Abuse of dominant position of MasterCard	preliminary investigation, closed without followings. final report 11.07.2012.	forthcoming
Since 2010	Credit cards – Domestic Multilateral Interchange Fee (KKDMIF II)	cartel (issuers & acquirers)	Preliminary injunctions 15.07.2010 Appeal against Preliminary injunctions in front of the Administrative Federal Court (declined) Investigation ongoing	RPW/DPC 2010/3, p. 473 ff. (ComCo) RPW/DPC 2010/3, p. 592 ff. (ComCo)

⁴ Administrative Federal Court.

⁵ A short summary of the content is included in Switzerland's contribution to this roundtable of 2006.

2. Cases on interchange fees

2.1 Credit Card-Interchange Fees I (KKDMIF I)⁶

- **Parties:** Swiss Issuers and Acquirers of Visa and MasterCard (banks), Verein Elektronischer Zahlungsverkehr, VEZ (merchant association).
- **Legal basis:** Article 5 Sections 3 (a) and 1 Swiss Cartel Act (price fixing agreement).
- **Subject:** Domestic Multilateral Interchange Fees (DMIFs) for transactions in Switzerland using Visa and MasterCard branded (consumer and commercial) credit cards.
- **Outcome:** Settlement (5 December 2005), publication in RPW/DPC, 2006/1, p. 65 ff.

In Switzerland, the DMIFs are fixed by two bodies, the Issuer/Acquirer Forum Visa (IAFV) and the Card Committee MasterCard (CC). As in Switzerland at that time all Issuers and Acquirers offered both Visa and MasterCard branded credit cards (“dual branding”), the same companies were represented in both bodies. The cartel investigation was opened against all members of these bodies, specifically against the following companies: The four domestic Issuers (UBS, Swisscard [a subsidiary company of Credit Suisse], Viseca Card Services SA [Viseca is a joint enterprise of the small and medium-sized Banks] and Cornèr Banca SA) and the two domestic Acquirers (Telekurs Multipay AG [nowadays SIX Multipay AG] and Aduno SA (a subsidiary company of Viseca). Not involved as parties were the two German Crossborder-Acquirers (ConCardis GmbH and B&S Card Service GmbH) that are active on the Swiss market.

COMCO qualified the DMIF as a price-fixing agreement and argued that the DMIF is the most important cost component for the acquirers, as it is an essential element of the MSC (around 70%). The level of the DMIF thus had a direct effect on the range available to the acquirers for setting prices. In practical terms, the DMIF was considered to be a minimum price in the acquiring business. Likewise, COMCO brought forward that the DMIF also influences the range available for setting prices on the issuing side, albeit in the opposite direction. The revenues from the DMIF amounted to a fifth of the issuers’ overall revenue.

With respect to the argument that interchange fees have a balancing effect in the two-sided markets for credit cards, COMCO could show that several raises of the interchange fees’ level did not lead to lower fees for cardholders. Thus, raising the DMIF has primarily increased the revenue of the issuers.

Nevertheless, COMCO accepted that in this four-party system, this type of multilateral procedure could have efficiency advantages. In particular, it could simplify market entry for foreign acquirers and save transaction costs compared to a bilateral system. According to the COMCO, however, the advantages of the multilateral procedure only outweigh its disadvantages if the DMIF is limited to the cost elements which are directly linked to operating the network. In other words: an issuer-cost-based approach was chosen, similar to the decision of the Reserve Bank of Australia and the “Visa II”-decision of the European Commission.

Due to these circumstances the parties agreed to base the level of the DMIF only on measurable network cost elements. For this purpose, they accepted a cost scale based on measurable cost elements relating to operating the network. In particular, the costs of the interest-free period as well as the costs of credit losses in terms of the payment guarantee have been excluded. The same applied to the costs of the Merchant Marketing and Spend Incentives programs.

⁶ A more detailed summary of this decision was integrated into Switzerland’s contribution to this roundtable of 2006.

The amicable settlement with the parties (“Einvernehmliche Regelung I”; EVR I) included the following points:

- Immediate decrease of the weighted average DMIF of 0.2% from 1.7% to 1.5%. Afterwards decrease of the weighted average DMIF in stages to a level of 1.3% in 2008. After 2008, capping of DMIF at the level of average issuer-costs.
- Abolition of the “non-discrimination rule” (NDR). The NDR was already the subject of a decision in the year 2002 (cf. below II.A.)
- Creation of transparency: The acquirers have to disclose to merchants (on request) the (sector) relevant interchange fee rate.
- Prohibition of the exchange of data within the card committees.

In Switzerland, fines for infringements of the Cartel Act have only been possible since the amendment of the Cartel Act in the year 2004. As the parties signed the settlement before the expiry of the transition period for the revised Cartel Act and had expressed their intention to implement it immediately, no fines have been imposed.

There was no appeal against COMCO’s settlement-decision.

The settlement expired on the 1st of February 2010.

2.2 Credit Card-Interchange Fees II (KKDMIF II)

- **Parties:** Swiss Issuers and Acquirers of Visa and MasterCard (banks), Visa and MasterCard (schemes), Verein Elektronischer Zahlungsverkehr (merchant association).
- **Legal basis:** Article 5 Sections 3 (a) and 1 Swiss Cartel Act (price fixing agreement).
- **Subject:** Domestic Multilateral Interchange Fees (DMIFs) for transactions in Switzerland using Visa and MasterCard branded (consumer and commercial) credit cards.
- **Outcome:** Preliminary injunctions (25 January 2010), publication in RPW/DPC, 2010/3, p. 473 ff.; pending investigation

Due to the expiration of the settlement of 2005, the COMCO decided on the 15th of July 2010 to open a new investigation to reassess the consequences of the DMIF for credit cards. The aim of the current investigation is to examine if the considerations and results of the decision from the 5th of December 2005 are still applicable, whether the objectives of the amicable settlement I (EVR I) were achieved and whether the methods of fixing the DMIF should be kept as it is or if another approach would better fit the current market situation. In this context the international developments have to be considered, particularly the experiences of the European Commission with the merchant indifference test.

In order to avoid a time period without regulation of the DMIF and to give legal certainty to the parties, COMCO concluded a new amicable settlement (“Einvernehmliche Regelung II”; EVR II) with the parties in the form of preliminary injunctions.

The EVR II is primarily a continuation of the EVR I, as an evaluation of the effects of the EVR I led to the following results:

- Reductions of the DMIF were fully passed on by the acquirers to the merchants. In the time period 2005 to 2008, the merchants saved 70 to 90 Mio. Swiss Francs. The number of merchants

accepting credit cards increased considerably. Particularly the two largest retailers began to accept credit cards.

- Surprisingly, the cardholder-fees decreased at the same time realizing cumulated savings for the cardholders of about 200 to 250 Mio. Swiss Francs for the years 2005 to 2008. This can be interpreted as indication that the balancing function of interchange fees was not yet effective and that the price level was still too high. Issuers argue that there is no causality between the EVR I and the development of the issuing-market. This is not completely true, as the introduction of credit cards without annual fee was initiated by the two largest retailers (in cooperation with issuers). At least one of the retailers informed COMCO that the decision to accept credit cards and even to launch an own credit card only was possible after the reduction of the DMIF.
- Three new issuers (Postfinance, GE Money Bank and Jelmoli Bonus Card) entered the market. All three considered that the decrease of the DMIF had facilitated market entry.

However, some adjustments of the EVR I had to be made. The average issuer-costs only decreased marginally from 1.313% to 1.282%. This was due to the fact that a minority of the issuers had increased the costs considerably while the majority of the issuers showed limited to strong declines of their costs. The interpretation of this result is delicate as the costs were collected only one time, three years after the adoption of the decision. Therefore the EVR I has been adjusted as follows:

- Changes to the weighting of the individual issuer-costs. While in the EVR I basically an average of all issuer-costs was calculated, the EVR II focuses on the two most efficient issuers (those with the lowest individual issuer-costs). The most inefficient issuer is not included in the calculation. This new calculation method will prevent the excessive impact to the overall result by an individual issuer with especially high costs. Eliminating the highest costs will also minimize the incentive for issuers to strategically allocate costs so that their costs are at an extraordinary high level during a survey year. The increased emphasis on the companies with the lowest costs is intended to create an incentive to invest in additional cost reduction measures.
- The issuer-costs are surveyed and the cap adapted every year instead of every three years.

The adjustment of the calculation method led to an immediate reduction of the average DMIF from 1,282% to 1,058% for the year 2010. Due to the yearly adaptation the average DMIF another reduction took place for the year 2011 from 1,058% to 0,990%.

One of the new issuers appealed against the preliminary injunctions but the administrative court decided that this issuer was not legitimated to appeal as he had not signed the settlement.

The preliminary injunctions will be in force until the procedure will be closed with the final decision.

2.3 *V PAY*

- **Parties:** Visa Europe.
- **Legal basis:** Article 5 Swiss Cartel Act (Unlawful anti-competitive agreement).
- **Subject:** Introduction of a DMIF for the debit card system Visa V PAY.
- **Outcome:** No opening a formal investigation during market entry phase, publication in RPW/DPC 2009/2, p. 122 ff.

In 2009, the Secretariat of the COMCO completed a preliminary investigation concerning the introduction of a DMIF for the Visa debit card "V PAY" (which is, however, not yet present in the Swiss

market). The Secretariat of the COMCO concluded that there is no reason to intervene during a market entry phase of up to three years and as long as the market share of “V PAY” remains below 15% and the DMIF does not exceed 0.20 Swiss francs per payment transaction.

2.4 *Maestro and Debit MasterCard*

- **Parties:** MasterCard Inc., MasterCard International Inc. and MasterCard Europe SPRL.
- **Legal basis:** Article 5 and 7 Swiss Cartel Act (Unlawful anti-competitive agreement and Abuse of a dominant position).
- **Subject:** Maestro Fallback Interchange Fee und Debit MasterCard Interchange Fee.
- **Outcome:** Renouncement of opening a formal investigation during market entry phase for Debit MasterCard and threat of immediate opening of a formal investigation in case of introduction of interchange fees for Maestro.

In June 2011, the Secretariat of the COMCO closed a preliminary investigation against MasterCard regarding the implementation of an interchange fee for its debit cards “Maestro” and “Debit MasterCard”. Besides cash payments, “Maestro” is the most frequently used payment system in Switzerland. In contrast to other European countries, the Maestro system in Switzerland has previously operated without any interchange fee. In December 2008, MasterCard formally announced the introduction of a Domestic Fallback Interchange Fee (DFIF) for the Maestro system. Due to the opening of the preliminary investigation, MasterCard has provisionally refrained from the implementation of a DFIF. The Secretariat of the COMCO concluded that an interchange fee for Maestro could violate the Cartel Act, but stated that an interchange fee for the new “Debit MasterCard” might be possible within certain limits. Concretely, the Secretariat of the COMCO declared that it would not request the COMCO to open an investigation during the introduction phase of up to three years of “Debit MasterCard” provided that this card does not exceed a market share of 15 per cent and that its interchange fee, on average, amounts to no more than 0.20 Swiss francs per payment transaction. MasterCard accepted to comply with these conditions, which correspond to the conditions imposed on VISA in 2009 for its debit card “V PAY”.

Concerning Maestro the Secretariat of the COMCO argued that there is no reason for an interchange fee in a mature system which has previously been functioning without such a fee.

3. Other cases

3.1 *Credit Card-Acceptance Business (NDR-Decision)*

- **Parties:** Swiss Acquirers of Visa, MasterCard, Amex, JCB and Diners credit cards (banks).
- **Legal basis:** Article 7 Section 2 (c) Swiss Cartel Act (Abuse of a dominant position).
- **Subject:** imposition of the Non-Discrimination-Rule (NDR) by the acquirers to the merchants.
- **Outcome:** Prohibition of the NDR, publication in RPW/DPC, 2003/1, p.106 ff.

This was the first of COMCOs decisions related to credit cards. Therefore several questions were examined for the first time and the reasoning in this case is still of some interest. Particularly the basic concept for the definition of the relevant markets was developed in this decision. COMCO concluded that access to monetary transactions via credit card cannot be substituted with other payment systems (e.g. cash or debit cards). Rather, there is a complementary relationship between these means of payment.

Subject of the investigation was the “Non Discrimination Rule” (NDR) prescribing the non-discrimination with respect to prices between different means of payment (e.g. cash vs. credit card) as well as different credit card systems. At that time all actors in the Swiss acquiring market specified such a NDR.

The NDR-Case had a special and until then unique approach, as the unlawful restraint of competition was not based on an agreement between competitors but on a collectively dominant market position of the acquirers. Such a collectively dominant market position can either be reached by explicit or tacit collusion. COMCO examined several criteria (market concentration, transparency and stability; interest, product and cost symmetries and the position of the demand side of the market) and concluded that the four big players in the Swiss acquiring market were in a position to coordinate their behaviour in a collusive way. According to the Swiss cartel law, using a dominant market position for the enforcement of inadequate business conditions is discriminating. COMCO considered, that the imposition of a NDR profoundly constrains the possibility of the merchants to independently set their prices and, therefore, has to be qualified as an inadequate business condition prohibited under the Swiss cartel law.

The parties appealed the decision. The Competition Appeals Commission referred the case back to the Competition Commission for re-examination in June 2005. The grounds for doing so were mainly related to changes in market conditions in the acquiring business since the decision. COMCO in turn appealed the decision of the Competition Appeals Commission. The appeal was still pending before the Swiss Federal Supreme Court when the acquirers agreed in the “KKDMIF I”-Case (cf. above I.A.) to abolish the NDR.

3.2 *Maestro Development Fund (MDF) and Maestro Volume Fee (MVF)*

- **Parties:** MasterCard Europe SPRL.
- **Legal basis:** Article 7 Swiss Cartel Act (Abuse of a dominant position).
- **Subject:** Acquiring Fees on Maestro-Transactions.
- **Outcome:** closed without followings.

In June 2010, the Secretariat of the COMCO has opened a preliminary investigation in order to determine whether there are indications that MasterCard could possibly have abused a dominant position in introducing and maintaining the acquiring fees Maestro Volume Fee (MVF) and Maestro Development Fund (MDF).

The preliminary investigation was closed in July 2012 without followings. One of the reasons of this result was the lowness of these fees. MDF and MVF are not comparable with interchange fees (no circumvention of the zero interchange fee for Maestro).

3.3 *SIX / Payment Terminals with the DCC-Function*

- **Parties:** SIX Multipay AG (acquirer), SIX Card Solutions AG (payment terminal manufacturer), SIX Group AG (parent company).
- **Legal basis:** Article 7 Swiss Cartel Act (Abuse of a dominant position).
- **Subject:** Refusal to provide interface information needed for interoperability with the DCC-Functionality offered by SIX Multipay to its merchants.
- **Outcome:** Decision to fine (29 November 2010), publication in RPW/DPC, 2011/1, p. 96 ff.; pending appeal.

The Dynamic Currency Conversion (DCC) functionality, which was launched by SIX Multipay AG in 2005, allows holders of a foreign credit or debit card to have the price of a transaction converted to their local currency when making a payment in a foreign currency. It thus offers the opportunity to such holders to decide, directly at the terminal, if they wish to make their payment in Swiss francs or in their national currency. In the latter case, the cardholder knows both the conversion rate and the final amount that will be charged. For the merchant, the DCC function is interesting due to shared revenues from the currency conversion.

The procedure was initiated in 2006 following a complaint from the card terminal manufacturer Jeronimo (nowadays CCV-Jeronimo). Jeronimo complained that the DCC function offered by SIX Multipay AG was available only on the terminals of its sister company SIX Card Solutions AG and that SIX Multipay AG refused access to the interface information needed to establish interoperability of the DCC function with other payment terminals. The investigation showed that SIX Multipay had refused to provide the interface information not only to Jeronimo but to all competitors of SIX Card Solutions that had asked for access.

In its decision COMCO established that SIX Multipay AG holds a dominant position in the markets for acquiring Visa and MasterCard credit cards and Maestro debit cards. The market shares of SIX Multipay at the time of the refusal (2006) amounted to 60–70% for Visa and MasterCard credit cards and over 90% for Maestro.

As a result of SIX Multipay's refusal to give access to interface information, merchants with an acquiring contract with Multipay could not offer DCC service to their own clients, unless they accepted to have a SIX Card Solutions payment terminal. As in the years 2005 and 2006 most merchants had to change their terminals due to a new standard, the terminals from SIX Card Solutions had a considerable competitive advantage compared to the other manufacturers of payment terminals which was not based on its own merits. Due to this distortion of competition the market share of SIX Card Solutions increased from 40–50% up to 60–70% to the detriment of its competitors.

COMCO qualified the behavior of SIX as an unlawful leveraging of market power from a dominated to an adjacent market. The behavior fulfilled several of the abusive practices listed in Article 7 Section 2 of the Swiss Cartel Act, specifically refusal to supply, discrimination, tying and restrictions on technical development.

COMCO imposed a fine of CHF 7 Mio.

The barrier to competition had ended already in December 2006 when, during the preliminary investigation, SIX Multipay accepted to open up access to the necessary technical information needed by competing terminal manufacturers.

SIX appealed the decision. The Administrative Federal Court closed the exchange of written submission in January 2012.

3.4 *ATM-Fees*

- **Parties:** Banks
- **Legal basis:** Article 5 Swiss Cartel Act (Unlawful anti-competitive agreement).
- **Subject:** Multilateral ATM-Fees.
- **Outcome:** Renouncement of opening a formal investigation, publication of the final report in RPW/DPC 2006/3, p. 420 ff.

In the year 2006 the Secretariat of the COMCO conducted a preliminary investigation in order to clarify if the multilateral agreement between banks on ATM-Fees can be qualified as a price-fixing agreement. ATM-Fees are fees which a bank has to pay when one of its clients uses an ATM of another bank. The preliminary investigation showed that even when the ATM-Fee between the banks was fixed on the same level, the passing-on of the fee to the customers varied from bank to bank.

4. Conclusions

The Swiss Competition Authority has been very active in the payment card market in the last decade. Several questions have been responded. Nevertheless the most controversial topic of interchange fees is still being investigated. For its decision Comco will not only consider the situation of the Swiss card payment markets but also the European and international developments in this area, particularly the MasterCard-judgment of the European Court and the experiences of the European Commission with the merchant indifference test.

In the last contribution to this roundtable Switzerland concluded, that the payment card sector is a difficult sector for antitrust authorities. Due to the special structure of the markets, common antitrust instruments often do not lead to desirable results. In such a framework, the optimal choice between “laisser-faire”, antitrust remedies and market regulation needs careful consideration and remains a challenging task. Accordant to this conclusion Comco tried in the last years to find case by case appropriate solutions, e.g. allowing V-PAY (and Debit MasterCard) an interchange fee for the market entry.

Finally Switzerland learned from the case “SIX / Payment Terminals with the DCC-Function” to be vigilant about the foreclosure and market entry barriers with respect to proprietary technical standards.

CHINESE TAIPEI

1. Recent developments in payment systems

In preparing the present submission, the Fair Trade Commission (the FTC) consulted with the competent authority, Financial Supervisory Commission, which is responsible for the financial industry.

Legally established banks and credit cooperatives in Chinese Taipei may issue ATM cards that, in addition to facilitating such transactions as fund withdrawals, fund transfers, account inquiries, and payments (including taxes), also permit card usage since January 2007, becoming a trusted instrument for e-commerce monetary payments. In addition, to avoid the inconvenience of the citizens to carry small change and assist the development of the payment system in the consumption of small amounts, the Act Governing Issuance of Electronic Stored Value Cards, promulgated in January 2009, permitted non-financial businesses to issue electronic stored value cards. As of the end of July 2012, one specialized electronic stored value card issuer has received approval from the Financial Supervisory Commission to operate electronic stored value card business.

No major changes have taken place across the credit card market since June 2006. According to statistics compiled by the Financial Supervisory Commission, Chinese Taipei had 36 card-issuing financial institutions (comprised of 33 banks and three specialized credit card companies), with a total circulation of 33.22 million credit cards, nearly 140,000 contracting merchants in both urban and rural areas, and an average of 3.74 cards held per household as of the end of June 2012.

2. Fees and charges in payment systems

2.1 *Merchant charges*

Merchant charges are negotiated between the acquiring bank (or electronic stored value cards issuer) and the merchant. Generally speaking, the acquiring bank works out different fee rates depending on the merchant's level of risk. For instance, if a merchant that offers deferred services or goods cannot provide goods or services as contracted, the acquiring bank must handle the subsequent refund of card charges. Due to the high risks involved, higher fees are negotiated, with the current average rate for merchant charges at 1.92% of the transaction. Further, in accordance with the Regulations Governing Institutions Engaging in Credit Card Business and the Rules Governing the Business of Electronic Stored Value Issuers, merchants may not refuse to allow a cardholder to use a credit card (or stored value card) for transactions without proper justification. Consequently, no merchants around Chinese Taipei are known to have refused to allow cardholders to conduct transactions with credit cards due to the level of merchant charges.

2.2 *Interchange fees and no-surcharge and no-discount rules*

To ensure that card-issuing institutions are able to cover operating costs, international credit card companies set interchange fees, to be paid by acquiring banks (acquirers) to card-issuing banks (issuers) at the time of settlement. Interchange fees are not subject to any restrictions in Chinese Taipei at present.

Different interchange fees paid by the acquiring banks to card-issuing banks would result in the credit card banks operating less efficiently and limiting credit card transactions to a smaller scale with less liquidity. Such credit card payment systems would not be competitive. At present, the interchange fee negotiated between the National Credit Card Center (NCCC) and Financial Information Service Co., Ltd. (FISC) has been set at 1.55% of the transaction.

To protect the interests of the consumers, the Regulations Governing Institutions Engaging in Credit Card Business prohibits participating merchants from charging cardholders additional fees.

2.3 Regulation of fees

The Financial Supervisory Commission issued Mandatory and Prohibitory Provisions of Standard Form Contract for Credit Card regarding certain general fees charged to cardholders by card-issuing institutions. For instance, fee caps are set on international transaction service charges, retrieval fees (for review of original receipts), loss card fees, and default charges, in order to balance the relationship between cardholders and card issuers. The Financial Supervisory Commission does not presently restrict the ability of card issuers to collect fees from merchants.

2.4 Cost-based fees

The Financial Supervisory Commission has required card issuers to evaluate capital and operational costs to set compound interest rate differential pricing for cardholders according to different levels of credit risk set by the credit rating system.

At present in Chinese Taipei the fees for interbank ATM transactions are between NT\$5 and \$15, which is comparatively lower than other Asian countries.

3. Tying

Special offers or discounts for IC cash cards issued by domestic financial institutions in combination with Visa, MasterCard, or Combo cards from international brands are either sponsored or supported by the international organizations or vendors, and do not follow identical offers or compel priority use of any payment method in particular.

4. Card platform joint ventures

In 1998 the Ministry of Finance along with public and private financial institutions jointly invested in the establishment of Financial Information Service Co., Ltd. (FISC). In accordance with the Regulations Governing Approval and Administration of Financial Information Service Enterprises Engaging in Interbank Funds Transfer and Settlement, the FISC formally undertook planning, establishment, and operation of interbank information systems for financial institutions to provide interbank transaction transfer and settlement services. At present, FISC is the sole government-authorized institution providing a value-added network for real-time settlement of interbank transactions between financial institutions to satisfy the public's demands for financial payments.

5. Application of competition law

5.1 Case 1: Concerted actions

In December 2011, eight publicly-held banks including First Bank, Cooperative Bank, Mega International Commercial Bank, Hua Nan Commercial Bank, Chang Hwa Bank, Land Bank, Chinese Taipei Business Bank, and the Bank of Chinese Taipei, proposed to form a Pan Publicly-held Bank Credit

Card Alliance as a platform for sharing joint preferred vendor plan resources to promote discount prices or free gifts offered by joint preferred merchants which accept credit cards. In accordance with Article 14 of the Fair Trade Act, a filing was made with the Fair Trade Commission (FTC) for approval of a concerted action exemption.

Following discussion of special offers between individual members of the alliance and joint preferred merchants, after agreements had been reached between all applicants and joint preferred merchants and cooperative contracts established, credit card holders of any applicant would be eligible to enjoy special offers provided by joint preferred merchants.

Upon review, the FTC concluded that the concerted action had such synergistic effects as lowering costs and improving efficiency; the concerted action therefore did not constitute joint determination of such core competitive variables as pricing, production, markets, or customers and thus did not transgress the bounds of necessary enhancement of efficiency; it raised the competitive strength of the credit card market; and consumers and contracting merchants could directly enjoy the results of the improved efficiencies engendered through the concerted action.

No exclusive preferential relationship existed between participating enterprises and preferred merchants, and it did not limit joint preferred merchants from transactions with their trading counterparts, or offering discounts to trading counterparts. Consequently, the concerted action did not constitute obvious exclusion. The FTC decided at its Commissioners' Meeting on 21 March 2012 that the concerted action benefits the overall economy and public interest, and carries insignificant impact on restriction of competition or unfair competition, therefore fulfilling the conditions for approval as stipulated in Subparagraphs 1 and 2, Paragraph 1 of Article 14 of the Fair Trade Act.

However, in order to eliminate concerns about competition restraints and facilitate effective supervision, undertakings were imposed in accordance with Paragraph 1, Article 15 of the Fair Trade Act:

- Applicants shall not employ the approval of such concerted actions to engage in other concerted actions regarding credit card terms of issue, collection of fees, and the rights and privileges of cardholders.
- Beyond the number of joint preferred merchants agreed upon, applicants may not further restrict individual preferred merchants or more preferable conditions offered to their cardholders.
- The applicants shall not refuse the withdrawal of any individual applicant from the concerted actions. The applicants shall notify the FTC in writing within 30 days of any changes to the makeup of the concerted actions.
- The applicants shall provide meeting information and minutes to the FTC in writing within 30 days of meetings of the Pan Publicly-held Bank Credit Card Alliance.

5.2 *Case 2: Mergers*

In December 2010, Chunghwa Telecom Co., Ltd., President Chain Store Corporation, and EasyCard Corporation filed a merger application with the FTC to establish the Diamond Points Integrated Marketing Corporation to undertake operation of bonus point reward programs. After investigation, the FTC concluded at its Commissioners' Meeting on 30 March 2011 that this merger was not prohibited in accordance with Paragraph 2, Article 12 of the Fair Trade Act, but additional conditions were imposed

The FTC indicated that the three enterprises participating in the merger operate in the telecommunications, chain convenience retail stores, and small sum payment instruments markets, respectively. Each of the merging parties faces fierce competition from competitors in the relevant market. The return rate on points redemption is extremely low, making it easily supplanted by other competition methods. Bonus points business does not constitute a tangible barrier to market entry. Thus this merger will not give rise to concerns of restriction on market competition in the telecommunications, chain convenience stores and small sum payment instruments markets over the short term. Moreover the merged enterprises may employ joint marketing to improve efficiency on the supply side and to satisfy consumers on demand side, both of which have economies of scales and can further advance overall economic benefits.

Nonetheless, in the long term, the merged enterprises and other future participating enterprises may use such bonus point reward programs as a platform to engage in other activities, such as concerted actions, boycotts, discriminatory treatment, restrictions on vertical transactions, or unfair competition conduct; thereby give rise to concerns of restriction on market competition in the telecommunications, chain convenience stores and small sum payment instruments markets.

In the effort to ensure that overall economic benefits of the merger outweigh the disadvantages resulting from its restraints on market competition, in accordance with Paragraph 2, Article 12 of the Fair Trade Act the FTC attached the following nine conditions for the non-prohibition of mergers:

- Merged enterprises and newly established enterprises may not compel allied merchants to refuse to supply, purchase from, or take part in other transactions with a particular enterprise so as to do it harm.
- Merged enterprises and newly established enterprises may not improperly prevent allied merchants of newly established enterprises from conduct exclusive dealing with itself.
- Merged enterprises, newly established enterprises, and allied merchants may not improperly restrict consumers' freedom to purchase individual goods via joint marketing.
- Merged enterprises may not obtain the personal and transaction information of newly established enterprise members.
- Newly established enterprises may not refuse merchants not participating in the merger to take part in alliances without proper justification.
- Newly established enterprises may not give discriminatory treatment to merchants not participating in mergers or collect undue management fees in its bonus points services without proper justification.
- Newly established enterprises shall provide to the FTC procedures for safeguarding the collection, processing, and usage of members' personal and transaction information one month in advance of recruiting members, and post the related guidelines online prior to their implementation.
- Newly established enterprises shall provide the FTC with guidelines regarding recruitment and bonus point reward programs one month prior to commencement of recruiting allied merchants, and post the guidelines online prior to their implementation.
- During the first five years following its establishment, each newly established enterprise must provide the FTC with the following relevant information by March 30 of each year: a list of changes to the shareholders register, sales turnover, number of members, points redemption value and redemption rate, the quantity and names of allied merchants, and new additional undertakings not listed in the application report over the previous year.

TURKEY

The share of credit card transactions has significantly increased in payment systems in all over the world and in Turkey. Since cheques and debit cards are not commonly used in Turkey, credit cards have gained increasing importance. On the other hand, in recent years, payment cards -credit cards in particular- which have two sided market feature; clearing commissions that enable income transfer between parties and justifications for government interventions in this field are generally being discussed in literature and increasing numbers of competition authorities have directed their attentions to the issue. The interest of Turkish Competition Authority (the TCA) to the subject dates back to the early ages of the authority, and in recent years this interest has focused on Interbank Card Centre practices.

1. Benkar decisions

The first decision related with online payment systems is Benkar-Fiba joint venture decision¹ and Benkar Investigation decision². In 1998, Benkar Consumer Financing and Card Services (Benkar) was the first undertaking in Turkey to launch the shopping cards system named "Advantage Card" which allows consumers to shop and pay in installments in member stores. Benkar, being the dominant undertaking, was dealing with the exclusive agreements in the market of credit cards that enable consumers to shop and pay in installments in the stores where the Advantage Card was valid. This case was initiated via the request of the parties concerning the authorization of the joint venture to be established between Benkar and Fiba Bank in the field of consumer banking and financial services. Mergers and acquisitions were dealt within the framework of Article 7 of the Act on the Protection of Competition (The Competition Act) and the Communiqué No 1997/1 on the Mergers and Acquisitions Calling for the Authorization of the Competition Board which was in force at the time. The Article 7 of the Competition Act prohibits those mergers, acquisitions and joint ventures that create a dominant position or strengthen an existing dominance as a result of which competition is significantly lessened. The relevant market was defined as "credit cards availing payment in installments". Having examined the market shares and entry barriers, the TCA concluded that Benkar benefited from its incumbent firm position in the relevant market, thus attained a quite high market share.

According to the exclusive agreement, when a store becomes a part of the Benkar system, that store could no more be a part of another system that provides similar services. Benkar had the widest store network then, especially among fashion stores. Thus, such an exclusive system was benefiting from the network externalities to a great extent. In addition to that, those member stores (most of which were either small or medium sized shops working on their behalf on a local basis) or store chains (which were relatively bigger enterprises working nation wide) were prevented from having membership agreements with banks that offered a similar system on better terms. Therefore, not only the store and store chains, but also consumers were suffering from such an exclusive system. The advantage arising from having a widest network was helping Benkar to enforce an obligatory term not to become a member of any other card systems. The TCA regarded this term as an entry barrier and decided to authorize the joint venture transaction, to which Benkar was a party, on the condition that the "exclusivity to one party" clause imposed by Benkar on members should be removed.

¹ Decision dated 18.09.2001 and numbered 01-44/433-111.

² Decision dated 15.08.2003 and numbered 03-57/671-304.

However, Benkar continued the exclusionary practices, so the TCA initiated an investigation. During the investigation process, Benkar was sold to HSBC Bank. At the end of the investigation, all such practices were decided to be preventing competition in the relevant market and were prohibited. At the same time, with the entry of several new banks to the market a more competitive environment was created.

2. BKM I decision³

Other comprehensive assessments about online payment systems were made in Interbank Card Centre (BKM) decisions. In the first case upon the complaint of Turkish Union of Employers of Gasoline Dealers and Gas Companies (TABGIS), the TCA initiated an investigation against BKM in order to determine whether there is an infringement of competition through fixing clearing commission rate by the banks under the body of BKM. In the investigation process, BKM requested an exemption⁴ for its practice of fixing the clearing commission rate, and as a result, assessment for exemption was included in the investigation proceedings.

BKM was a joint stock company carrying out clearing transactions between banks within the card payment system. In card transactions, BKM's Board of Directors determined the clearing commission rate paid by the acquiring bank to the issuing bank. Issuing banks were those which market credit cards and distributed them to customers; while acquiring banks were those which provided point of sale (POS) terminals for member stores by means of making agreements with these stores in return for a certain amount of commission (member store commission). Clearing commission obtained by issuing banks from acquiring banks were reflected on acquiring banks as cost and acquiring banks reflected this cost to member stores as member store commission. Clearing commission rate was charged in equal amount by all of the banks. Essentially, clearing commission was a service cost reflected first by the issuing bank to the acquiring bank and then by the acquiring bank to the member store; therefore it can be regarded as a price of the service paid the member stores.

In his plea, BKM argued that the practice of fixing clearing commission rates was not contrary to the Competition Act and that each of the items constituting the fixed clearing commission rate was an element of cost for the issuing banks. In this frame, it was stated that BKM was in need of a centralized clearing commission rate. In addition, payment guarantee provided by issuing bank included fraud risk, so this guarantee against fraud was also needed to be priced. Besides, funding costs resulting from the period between transaction date and payment date were creating another cost figure for the issuing banks.

During the investigation process, it was established that clearing commission fixes a part of the costs and the income of issuing and acquiring banks; determining a common clearing commission rate among banks impeded competition at issuing and acquiring levels; issuing banks could not follow an individual pricing policy for the services they provided for acquiring banks and that clearing commission which was the base price for member store commission was an important element of cost for member stores. In this frame, it was concluded that BKM was fixing clearing commission rates within the context of Company's Main Agreement; a practice which had a nature of a decision of an association of undertakings and which was regarded as a practice contrary to the Competition Act.

³ Decision dated 01.07.2005 and numbered 05-43/602-153.

⁴ Article 4 of the Competition Act aims at preventing the distortion or restriction of competition directly or indirectly in a particular market for goods or services by agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings; whereas, Article 5 empowers the TCA to issue both individual and block exemptions on the basis of the certain criteria. Accordingly, those agreements, concerted practices, and the decisions of associations of undertakings that prevent or distort competition can be exempted on an individual basis or through block exemptions on the condition that certain specific criteria are satisfied. Thus, the TCA can grant individual or block exemptions, when the relevant criteria are met.

In the assessment of exemption, it was evaluated that fixing the clearing commission rate through mutual agreements between banks included in the system required a lot of agreements and was not practical, so it was stated that the practice of fixing the rate could be granted exemption provided that a cost-based approach for the calculation of the fee was adopted. Moreover, in the investigation stage, BKM was required to have a consultancy firm making a clearing commission formulation study in order to employ a more objective method for the calculation. For the exemption assessment, the TCA considered also this on this study and stated that certain cost items in the formula presented by the consultancy firm needed to be adjusted in order to grant exemption to the practice.

In this framework, the TCA concluded that, fixing a common clearing commission by BKM meant a decision of an association of undertakings which was contrary to Article 4 of the Competition Act. It was also stated that in order for this practice to be granted exemption, the overnight interest rate determined by the Central Bank of Turkey must be taken as a basis in the formula applied by BKM for the calculation of funding cost and sunk cost should not be taken into consideration as an operational costs item. By his decision, the TCA not only presented a comprehensive assessment of credit card markets but also showed his approach to the two sided markets. On the one hand the TCA is searching for a clearing commission which makes all the parties get fair benefits from system and bear the cost, on the other hand he took steps for the creation of an audit mechanism of the market by other government agencies and initiated the termination of legal barriers for a competitive market structure.

3. BKM II decision⁵

After individual exemption period that was granted by *BKM I Decision* was over, BKM applied for another exemption in 2007. In the assessment the TCA asked for the opinion of banks that were members of BKM, of consumer associations, of chambers of commerce and of related regulatory authorities (mainly the Central Bank of Turkey and Banking Regulation and Supervision Agency) whether there was any regulation or investigatory process for clearing commission or not. In their responses, the Central Bank of Turkey stated that he did not have the power to regulate the clearing commissions whereas Banking Regulation and Supervision Agency stated that the supervision of the clearing commissions was made by him through the “Regulation on Bank Cards and Credit Cards”; and mentioned that this authorization would be used in coordination with the Central Bank of Turkey if there arises a need. It was stated in the decision that during the 2 year exemption period that was granted by the previous decision, BKM did not do any work on data reliability, however certain control mechanisms were utilized in the acquisition of data and data that deviated from the average were not included in the formula calculations. Also, the decision stated that BKM believed this responsibility would be given to the Banking Regulation and Supervision Agency, and pointed out that if an audit of the data forwarded by the banks was demanded, it would be more appropriate if this was conducted by the firms which carry out financial audits of the banks.

The decision stated that, in terms of granting an exemption to the interchange commission at this stage, in order to ensure the lowest possible harm to the consumers and member stores, an obligation must be introduced to announce to the public the currently applied interchange commission rates on the BKM website.

The decision also mentioned that in case data reliability can be ensured through public or independent audits, it might be possible to grant an indefinite exemption.

In the decision, it was also explained that according to the information in the file there were high concentration rates in both the issuer and the acquirer markets, and that market shares of the first 6-7 banks might well be in excess of 90 per cent.

⁵ Decision dated 17.01.2008 and numbered 08-06/63-20.

The decision concluded that setting a joint interchange commission might be granted an individual exemption until April 2009, provided certain conditions were met. The conditions for granting an exemption were as follows: in the formula applied by BKM, when calculating the number of funding days used in the funding costs section, payments days must be calculated as 10 days at a maximum, and the total rate resulting from the formula must be published on the website of BKM.

4. BKM III decision⁶

As a result of BKM's application to the TCA on February 2009 requesting an indefinite exemption for setting joint interchange commission rates for credit cards, an exemption examination was conducted and the relevant exemption decision was taken. The application of BKM also requested authorization for using Central Bank of Turkey overnight lending interest rates instead of overnight borrowing interest rates in the calculation of interchange commission rates and for reflecting Visa and Mastercard transaction fees in the interchange commission rates.

The decision stated that in case interest rates were adjusted as requested, funding costs would increase by 0.19 points, which would mean a hypothetical increase of 140 million TL in interchange costs for the year 2008; consequently, any request that could lead to an upward change in interchange rates should be assessed carefully. In this context, base interest rates must be: i) realistic, ii) consistent, and iii) determined in a deep capital market. As a result of the assessments conducted within this framework, it was stated in the decision that daily interest rates established in the Istanbul Stock Exchange repo-reverse repo market would be suitable for use in the calculation of the funding costs.

In assessing whether Visa and Mastercard logo costs should be added to the interchange calculation, mention was made of the criteria related to the cost items which should be included in the interchange commission, which were listed as follows: i) costs should belong to the card issuer bank, and ii) member businesses should benefit from the relevant cost. It was stated that the existence of Visa or Mastercard logo for the transactions made by domestic customers was not among the key conditions for the functioning of the system and therefore, it was concluded that logo fees paid to Visa or MasterCard for transactions made by domestic customers did not fulfill the aforementioned requirement of benefiting member businesses. However, it was also stated that, with respect to networks that had not yet achieved a certain size, such practices to increase the costs for one side in favor of the other might be deemed reasonable.

The decision also stated that the approach of public regulations to interchange commissions was gradually getting stricter worldwide. Particularly interesting were the statements in the decision that discussed the regulatory role of the TCA in this area, pointing out the public regulation responsibilities of other regulatory authorities in the sector and following an overview of the various state practices in the world. As a result, it was decided that an individual exemption might be granted to setting joint interchange commission rates for 3 years, provided that certain conditions were fulfilled. These conditions were laid out as the calculation of the interest rates used in the funding costs section of the formula applied by the BKM based on the daily interest rates established in the Istanbul Stock Exchange repo-reverse repo market; on the other hand, it was stated that these conditions would not be considered to be fulfilled in case overnight lending interest rates instead of overnight borrowing interest rates were used in funding costs, or in case Visa/MasterCard logo costs were included in the interchange commission formula. In addition, it was also decided that BKM officials should reorganize independent auditing procedures to ensure data reliability and to standardize calculations between banks by covering those banks holding at least 80% of the market (calculated according to the not-on-us transaction turnovers of issuer banks), and should certify these procedures within 3 months; further, data provided for the formula should go under regular independent audits each year within the framework of the new independent audits and the relevant independent audit reports should be forwarded to the TCA.

⁶ Dated 19.8.2009 and numbered 09-36/905-217.

UNITED KINGDOM

Introduction

This submission provides background regarding UK payments systems, outlines key market developments since the OECD roundtable in 2006, and provides an update on recent developments in relation to competition and regulatory issues in the UK.

1. Non-paper payment systems in the UK

1.1 *Payment card usage*

Payment cards are extensively held and used in the UK. In recent years the UK has accounted for more than 75 per cent of credit card spending and around 30 per cent of immediate debit card spending in Western Europe.¹

There are currently around 86 million consumer debit cards and around 55 million consumer credit cards in issue in the UK. The number of consumer debit cards in circulation increased by 60 per cent between 2001 and 2011 and UK purchases on debit cards increased by around 300 per cent over the same time period. Debit cards accounted for 77 per cent of all UK purchases in 2011, totalling 7.3 billion transactions with a total value of £334 billion. The volume and value of consumer credit and charge card transactions have also increased (albeit more slowly) over the last 10 years and accounted for £128bn in 2011.²

1.2 *Payment card schemes*

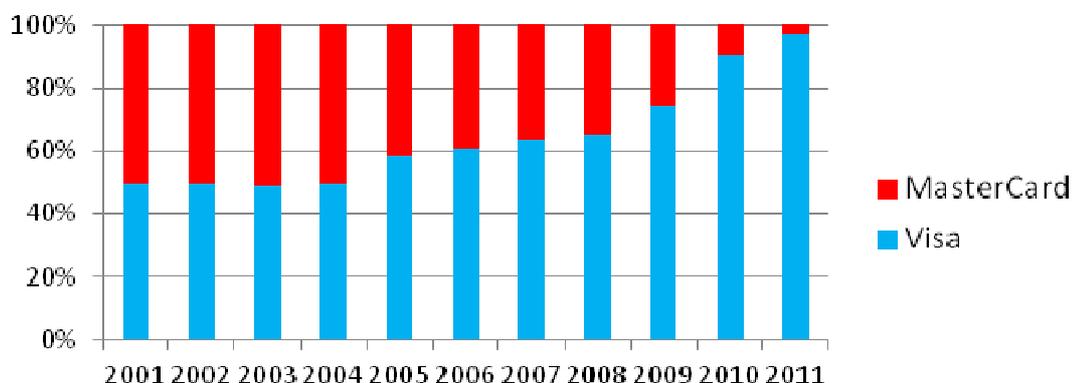
MasterCard and Visa dominate the UK payment card market and together accounted for 96 per cent of UK card payments in 2011. There are currently no other debit card scheme operators in the UK and competitors to MasterCard and Visa (namely, American Express and Diners Club International) have only a small collective share of credit card transactions. As a result, acceptance of MasterCard and Visa payment cards is often considered essential by merchants (that is, they are 'must-have' products) in order to avoid loss of potential custom.

Visa has significantly increased its share of debit card transactions since 2004. In 2011, Visa cards were used for 97 per cent of debit card transactions, by value, in the UK.

¹ 'Western European Cards and Payments Databook 2004', Datamonitor, October 2004, and 'European Consumer Credit 2007: Market Data and Forecasts', Datamonitor, March 2008.

² 'UK Payment statistics 2012', Payments Council, June 2012.

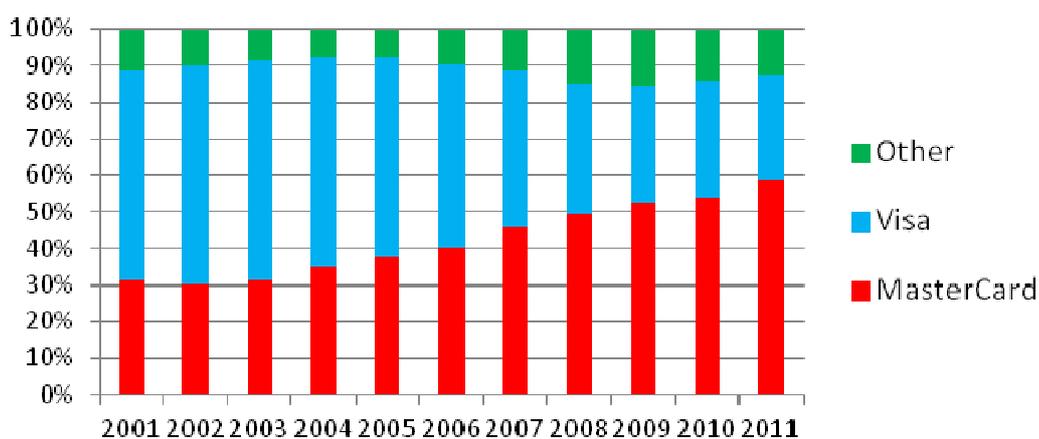
Share of UK debit card transactions by value, 2001-2011



Source: OFT analysis of 'UK Payment statistics 2012'.

MasterCard has increased its share of credit and charge card transactions from around 30 per cent of such transactions (by value) in 2002 to 59 per cent in 2011. Over the same time period, Visa's share of credit and charge card transactions halved to around 30 per cent.

Share of UK credit and charge card transactions by value, 2001-2011



Source: OFT analysis of 'UK Payment statistics 2012'.

1.3 The growth of 'premium' cards

There has been considerable growth since 2009 in the volume and value of transactions in the UK using MasterCard 'premium' cards, which attract higher multi-lateral interchange fees (MIFs) than those which apply to 'standard' credit cards. While MasterCard credit cards typically attract a MIF of 0.8 per cent of the transaction value, premium cards such as 'MasterCard World' and 'MasterCard World Signia' credit cards attract MIFs of 1.25 and 1.4 per cent respectively for Chip & PIN transactions and up to 1.85 per cent for certain other types of transaction. These premium cards typically provide cardholders with benefits and inducements, such as cash rewards and air miles.

Data collected from retailers by the British Retail Consortium (BRC) indicates that, in July 2011, more than nine per cent of all their customer credit card expenditure was carried out using premium cards, compared to less than two per cent in August 2009.

1.4 Contactless cards and contactless mobile payments

Contactless debit and credit cards began to be rolled out in the UK in late 2007 and are now accepted in a range of retail sectors including coffee shops, supermarkets, car parks and transport operators and general shops.

At the end of 2011, 22.5 million contactless cards had been issued in the UK and approximately 80,000 terminals were capable of accepting contactless transactions.³ However, in 2011, only 5 per cent of consumers reported that they had and used a contactless card, a slight increase from the 3.8 per cent in 2010.⁴

Typically, contactless cards can be used for transactions worth up to £20. The MIF rate for contactless Visa transactions is typically the same as, or (for very low transaction values) lower than, comparable Chip & PIN transactions.

There are a number of mobile phones on the market in the UK which support contactless payments using NFC technology and Visa has certified some of these phones for contactless Visa payments. Visa ran a limited trial of contactless mobile payments during the London 2012 Olympics. For contactless mobile payments, the money comes from the user's normal Visa debit or credit card which the user specifies and associates with the Visa Contactless Payments app.

1.5 Other mobile payments

The Payments Council⁵ is developing a central database that links mobile phone numbers to account details. This will open the possibility of making and receiving almost-instantaneous payments using a mobile without needing to know the recipient's account details.

The database is expected to be available to UK banks and building societies before the end of 2012 as a platform for them to build their own competitive service. Customers will register for the service through their own bank, with no need to share their details with a third party. Banks will use their own branding, although it is expected that there will also be a central brand identity to reinforce customer confidence in the service. Using the database, any UK bank that is connected to LINK⁶ or Faster Payments⁷ will be able to launch a mobile payment service for their customers that will make or receive payments seamlessly, even with customers of other banks. Payments will typically be received instantly, although in exceptional cases it could take up to two hours due to fraud and other checks.

Market research to date suggests that the types of payments for which the service will be most used are payments where the payer already knows the payee's contact details (such as a friend, relative or colleague) or where the payee knows where the payer lives (for example, a tradesman providing a service in a customer's home).

³ 'UK Payment statistics 2012', Ibid.

⁴ 'Contactless, Mobile, Online, and Prepaid in the UK', Datamonitor, July 2012.

⁵ The Payments Council sets the strategy for UK payments. It was set up by the payments industry in 2007 to ensure that UK payment systems and services meet the need of payment service providers, users and the wider economy.

⁶ LINK is the UK's cash machine network. Virtually every cash machine in the UK is connected to LINK, and all the UK's significant debit and ATM card issuers are LINK members.

⁷ The Faster Payments Service allows customers to make faster electronic payments, typically by phone or online banking, to transfer money between accounts or pay bills, or make regular standing order payments.

1.6 Online payments

Around 75 per cent of the UK population (equating to 37.6 million adults) purchased goods or services over the internet in 2011. During 2011, 836 million card payments were made online by UK consumers (compared to £34 billion in 2007) with a total spend of £63 billion. Of these payments, 56 per cent were made using debit cards and 44 per cent using credit or charge cards.⁸

2. Competition and regulatory issues relating to payment systems

2.1 OFT investigation of MasterCard's and Visa's MIF arrangements

In September 2005, the OFT issued an infringement decision (under Article 81 of the EC Treaty and the Chapter I prohibition of the Competition Act 1998) against the rule of MasterCard UK Members Forum Limited ('MMF') which set the MIF paid on purchases in the UK made using UK-issued MasterCard consumer credit and charge cards between 1 March 2000 and 18 November 2004. Appeals against the OFT's Decision were lodged with the Competition Appeal Tribunal by MMF, MasterCard International/MasterCard Europe and the Royal Bank of Scotland Group.

In October 2005, the OFT issued a statement of objections against Visa and its members (under Article 81 of the EC Treaty and the Chapter I prohibition of the Competition Act 1998) regarding an agreement on Visa's domestic MIF applicable to consumer credit card, charge card and deferred debit card transactions in the UK.

In June 2006, the OFT consented to the Competition Appeal Tribunal setting aside the OFT's infringement decision against MasterCard UK Members Forum Limited and the OFT withdrew the statement of objections against Visa. This allowed the OFT to focus its resources on carrying out simultaneous investigations in respect of MasterCard's and Visa's current arrangements, rather than continuing action on historic arrangements. In 2007, the scope of the investigations was expanded to include immediate debit cards.

The OFT considers that the European Commission's 2007 infringement decision concerning MasterCard's MIFs for cross-border transactions has a direct read-across as regards the legality of domestic MIF arrangements across the EU. The OFT is currently considering the implications for its investigations of the European General Court judgment of 24 May 2012, which upheld in full the Commission's decision, and MasterCard's appeal against that judgment (see further details on these below).

2.2 UK intervention in the MasterCard v Commission General Court case

The UK Government, with the OFT acting as lead department, intervened in support of the European Commission before the General Court in the appeal proceedings brought by MasterCard against the 2007 decision of the European Commission regarding MasterCard's, including Maestro's, intra-European cross-border interchange fee arrangements. The General Court hearing was held on 8 July 2011.

On 24 May 2012, the judgment of the General Court upheld the Commission's infringement decision against MasterCard in all respects. On 4 August 2012, MasterCard filed an appeal to the European Court of Justice (ECJ) against the General Court judgment.

The UK Government intends to submit a response to MasterCard's appeal to the ECJ by 31 October 2012.

⁸ 'UK Payment statistics 2012', Ibid.

2.3 *Response to the European Commission Green paper: 'Towards an Integrated European Market for Card, Internet and Mobile Payments'*

The OFT responded to the European Commission's 2012 Green Paper on card, internet and mobile payments. The response is available at: http://www.of.gov.uk/shared_of/consultations/11_04_12_EC.pdf

2.4 *Private damages actions by UK retailers*

On 23 May 2012, five UK retailers filed claims against MasterCard in the High Court for damages arising from MasterCard's allegedly anti-competitive conduct relation to 'the fixing and imposition of multi-lateral interchange fees' for credit and debit cards.

2.5 *Consultation on setting the strategy for UK payments*

In July 2012, HM Treasury published a consultation paper: *Setting the strategy for UK payments*.⁹ The paper states that the Government considers that the Payments Council¹⁰ should do more to respond to the needs of payments end users, and should ensure that wider views are fully taken into account when making decisions on payments strategy. As a result, the consultation invites views on options for reforming the regulation and governance of payments networks in the UK. It also sets out options for improving the way that payments strategy is made in the UK. The consultation ends on 10 October 2012.

2.6 *Payment surcharges*

Some businesses add a charge to the price of goods or services when the consumer chooses to pay by a particular method, for example by using a credit card or a debit card. These additional charges are known as payment surcharges.

In March 2011, Which?¹¹ made a super-complaint to the OFT which requested that the OFT investigate payment surcharges. Further to that investigation, the OFT recommended that the Government introduce measures to prohibit retailers from surcharging for debit cards.

In September 2012, the Department for Business, Innovation & Skills (BIS) launched a consultation on a proposal for early implementation of a provision of the European Union's Consumer Rights Directive. This will put in place legislation to ban businesses from imposing excessive payment surcharges on consumers. Businesses will remain able to add a charge only so far as it covers the actual costs of processing any particular form of payment.

The consultation is seeking views on the timing of the implementation of this legislation and how best to define the scope and application of the provision. The consultation will close on 15 October 2012.

⁹ http://www.hm-treasury.gov.uk/d/setting_strategy_uk_payments190712.pdf

¹⁰ In April 2012, the Payments Council published an independent review of its governance arrangements and performance which was carried out at the request of the Office of Fair Trading following its review of the Payments Council in 2009. The review made several specific recommendations, which have been agreed by the Payments Council Board.

¹¹ Which? is a product-testing and consumer campaigning organisation.

2.7 *OFT programme of work on retail banking*

In July 2012, the OFT launched a programme of work on retail banking, given concerns that the sector is not working well, with longstanding problems which hamper effective competition and innovation in the sector.

This programme of work will include consideration of the operation of payment systems, as well as work on personal current accounts, business banking and behavioural economic research into consumer decision-making.

UNITED STATES

The U.S. payment industry has evolved in several ways since the June 2006 Roundtable on Competition and Efficient Usage of Payment Cards. The use of payment cards continues to grow in the United States. Debit has grown particularly fast. In 2010, debit was estimated to comprise 21 percent of consumer payment purchase volume, up from 13 percent in 2005.¹ This growth in debit has come at the expense of checks and cash, which declined from 49 percent of consumer payment purchase volume in 2005 to 37 percent in 2010.² In addition, the card payment networks have restructured and some consumers are beginning to make payment-card transactions with their mobile phones. Finally, the U.S. regulatory framework governing the credit and debit industries was altered in 2010 as part of financial reform legislation.

During the past six years, the Antitrust Division of the U.S. Department of Justice (“Division”) has focused on the anticompetitive effect of conduct that restricts merchants’ ability to influence consumers’ payment choices and thus obstructs competition. The Division also has reviewed and halted at least one combination that would have resulted in both unilateral and coordinated effects. The Federal Trade Commission (“FTC”) has examined the effect of credit card disclosures on competition and has new authority to enforce regulations prohibiting network exclusivity arrangements and routing restrictions. The FTC also monitors U.S. payment systems for unfair or deceptive practices affecting consumers and brings law enforcement actions when necessary to stop consumer harm. As various modes of payment develop, it is important for consumers to understand the risks, benefits, and costs of alternative mechanisms so that they are in a position to choose the best method for them under their circumstances. To this end, it would be helpful to ensure that disclosures about alternative products are clear, and this may require testing along the lines of the FTC’s work on mortgage disclosures.³ Private plaintiffs continue to litigate cases based on allegations of price-fixing of interchange fees and on anti-steering rules.

1. Structural changes to the U.S. payment industry

1.1 *Restrictions on the issuance of competing cards*

As a result of the Division’s 1998 challenge to the Visa and MasterCard joint ventures, described in paras. 11-16 of the U.S. submission to the 2006 Roundtable (“2006 submission”),⁴ banks that issue cards

¹ Nilson Report, Dec 2011 (Issue 985).

² *Id.*

³ See Lacko, J. and Pappalardo, J., “The Failure and Promise of Mandated Consumer Mortgage Disclosures: Evidence from Qualitative Interviews and a Controlled Experiment with Mortgage Borrowers,” *American Economic Review*, May 2010.

⁴ [DAF/COMP/WP2/WD\(2006\)39](#). The Division alleged that the adoption of rules and policies that disadvantaged or excluded rival general purpose card networks, such as American Express and Discover/Novus, including rules or policies prohibiting member banks from issuing cards on the American Express or Discover/Novus networks, constituted a continuing combination and conspiracy to organize and operate general purpose card networks in a manner that restrained competition among general purpose card networks in violation of Section 1 of the Sherman Act. The court agreed, holding that the rules were

on the Visa and MasterCard networks are now permitted to issue cards on competing networks, such as American Express and Discover. According to an industry newsletter, the end of the “exclusionary rule” has led to eight banks acting as third party issuers of American Express branded cards in the U.S. in 2011, including Bank of America, Barclays, and Citigroup.⁵ The 2011 purchase volume on these cards was \$21 billion.⁶ Further, at least four banks act as third party issuers of Discover branded credit cards, with a 2011 purchase volume of \$14 billion.⁷ This growth shows the increased competition among issuers as consumers chose among the various characteristics and variety of card products that have become available.

1.2 Dual governance

While the Division did not prevail in its challenge in *Visa* to the joint ventures’ “dual governance” system, changes the associations subsequently made to their corporate structures have alleviated this concern. At the time of the 2006 submission, dual governance permitted the election or appointment of bank member governors of their associations that had material portions of their card portfolios on both the Visa and MasterCard networks, thereby reducing incentives for the two jointly-owned systems to compete vigorously in brand and product development.⁸ In 1998, the Division alleged this arrangement constituted a conspiracy in restraint of trade,⁹ although this allegation was not upheld in court. The dual governance system is no longer in effect, however, because in 2006,

*MasterCard became a publicly traded company with a board of directors with a majority of directors that are independent from their financial institution customers. Visa became a publicly traded company in 2008, and its financial institution members became common stockholders with a minority of shares.*¹⁰

These changes in corporate structure reduced the ability of issuers and acquirers to negatively affect Visa’s and Mastercard’s competitive decisions.

1.3 Changes in the U.S. regulatory framework

As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”),¹¹ Congress created important new legal obligations for the credit and debit card industries. The so-called “Durbin Amendment” to Dodd-Frank prohibits payment card networks from barring merchants from offering discounts or in-kind incentives to consumers for using a particular payment method, such as cash, checks, debit cards, or credit cards. These rules also forbid payment card networks from ceasing to deal with merchants who want to set a minimum dollar value for accepting credit cards (as long as the minimum dollar value does not exceed \$10).

unreasonably anticompetitive. See *U.S. v. Visa USA, Inc.*, 163 F. Supp. 3d 322 (S.D.N.Y. 2001), aff’d 344 F.3d 229 (2d Cir. 2003).

⁵ Nilson Reports, Jan 2012 (Issue 987), “American Express Results – U.S.”

⁶ *Id.*

⁷ Nilson Reports, Jan 2012 (Issue 986), “Discover Financial Services.”

⁸ See *U.S. v. Visa USA Inc., et al*, Complaint (Oct. 7, 1998) ¶¶ 40 - 100, available at: <http://www.justice.gov/atr/cases/fl900/1973.htm>.

⁹ *Id.*, at ¶¶ 155 – 158.

¹⁰ General Accountability Office, *Credit Cards: Rising Interchange Fees Have Increased Costs for Merchants, but Options for Reducing Fees Pose Challenges*, GAO-10-45 (November 2009), 3-4.

¹¹ Pub. L. 111-203.

Further, Dodd-Frank introduced three changes to the debit card market. First, the Board of Governors of the U.S. Federal Reserve (“Federal Reserve”) was granted the authority to cap debit interchange fees. The Federal Reserve subsequently promulgated a final rule capping these fees at 21 cents per transaction, plus an ad valorem upward adjustment for certified fraud-prevention programs. Second, Dodd-Frank and its implementing regulations require issuing banks and payment networks to allow merchants to choose between two or more competing debit networks to process transactions made with their cards. Finally, the rules prohibit issuers and payment networks from inhibiting merchants’ ability to select the debit network that processes their transactions.

Overall, these rules are designed to increase competition among debit networks. Previously, debit networks competed for issuing banks primarily by offering exclusive agreements and high interchange fees. With the requirement of multiple debit options, debit networks now also now compete for merchants’ debit transaction volume. Together with the cap on debit fees, this competition should work to discipline debit merchant fees.

Another legislative proposal that has not been adopted would seek to increase the bargaining power of merchants in their negotiation of interchange fees and terms of access to credit and/or debit card networks by creating broad antitrust immunity for merchants in their negotiations with the networks and the issuing banks. One version of this proposal¹² also provides that if the joint negotiations between banks and merchants do not produce an agreement on interchange rates and related terms, the member merchants and banks would be subject to an administrative procedure before a three-judge panel to determine the rates and terms for a three-year period.

The U.S. Department of Justice and FTC commented separately to Congress on this legislative proposal in June 2008.¹³ Both agencies expressed general opposition to the creation of sector-specific exemptions from the antitrust laws, and noted that the regulatory function of setting prices was alien to their mission and experience in enforcing the antitrust laws. The Department also commented on the complexity of regulating fees in two-sided markets, the risks of market power created by the proposed joint negotiations, and the perils of price-control legislation.

2. Division enforcement activity in the payments sector

2.1 *Visa debit card rule*

In response to a Division investigation, Visa Inc. in 2008 rescinded a rule that required merchants to treat Visa-branded debit cards differently when used as PIN-debit cards (and processed via non-Visa networks) from those same cards when used as signature debit cards and processed on the Visa network.

The Division had been investigating whether this Visa rule adversely affected competition by restricting certain PIN debit transactions, particularly the small-value and Internet ones, and by interfering with the introduction of new types of PIN debit services. The Division’s investigation revealed that approximately 70 percent of all signature debit cards in the U.S. carried the Visa brand, and virtually all Visa signature debit cards could be used to conduct PIN debit transactions. Cardholders could choose to use the card’s PIN debit network(s) rather than Visa’s signature debit network, indicating their preference

¹² H.R. 5546, the Credit Card Fair Fee Act of 2008.

¹³ Letter from Keith B. Nelson, Principal Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to the Hon. Lamar Smith, Ranking Member, Committee on the Judiciary, U.S. House of Representatives (June 23, 2008); letter from William E. Kovacic, Chairman, Federal Trade Commission, to the Hon. Lamar Smith, Ranking Member, Committee on the Judiciary, U.S. House of Representatives (June 19, 2008) (both providing the respective agency’s views on H.R. 5546, the “Credit Card Fair Fee Act of 2008”).

by either entering their PIN or signing the receipt; the merchant would then route the payment transaction to the cardholder's bank using the network selected by the cardholder. Visa had for some time authorized banks to permit some types of merchants to waive the signature requirement for certain signature debit transactions (those below \$25 and certain transactions initiated over the Internet). This action accounted for significant growth in debit card use, benefitted merchants and consumers, and encouraged adoption of contactless readers, a new technology at the point of sale. In contrast, the Visa regulation investigated by the Division permitted signature waiver, but prohibited banks from allowing merchants to waive entry of a PIN for most non-Visa transactions initiated from a Visa-branded debit card, including below-\$25 and almost all Internet transactions, potentially raising barriers to entry for new types of PIN debit services. Visa's rescission of the rule alleviated the Division's concern.

2.2 *Verifone/Hypercom*

In 2011, the Division challenged the acquisition of Hypercom Corp. ("Hypercom") by Verifone Systems Inc. ("Verifone"), two of only three significant sellers of point-of-sale (POS) terminals in the United States.¹⁴ The complaint alleged that the proposed transaction would eliminate important competition in the sale of POS terminals in the United States and likely result in both unilateral and coordinated effects. POS terminals are used by retailers and other firms to accept electronic payments such as credit and debit cards.

The Division's investigation revealed two distinct markets for POS terminals. The first market consists of countertop POS terminals, which are directly connected to credit card processors through a telephone line, internet connection or cellular network. Post-transaction, the combined company would have controlled approximately 60 percent of the countertop POS terminals market. The second market consists of multi-lane POS terminals, which are integrated into a merchant's cash register and integrated POS system. After the transaction, the top three players in this market for multi-lane POS terminals – Hypercom, Verifone and Ingenico – would have had a combined 90 percent market share. The complaint asserted that the acquisition

would likely result in unilateral effects in each relevant market as VeriFone would be able to raise the price of both VeriFone and Hypercom products because it would recapture some sales that would have been lost absent the acquisition as purchasers reacted to such price increases by switching between VeriFone and Hypercom products. The elimination of Hypercom as a competitor would also reduce the number of significant competitors from three to two in the POS terminals markets, resulting in a duopoly and heightening the potential for coordinated behavior. Coordination, whether tacit or explicit, is especially likely because the acquisition would enhance each company's ability to deter competitive behavior in one market by retaliating across a range of other product and geographic markets.¹⁵

¹⁴ *U.S. v. Verifone Systems Inc., et al.*, Complaint (May 12, 2011); available at <http://www.justice.gov/atr/cases/verifone.html> for case filings. Shortly after executing the merger agreement, Hypercom entered into a licensing agreement pursuant to which it would license its POS business to Ingenico, S.A., the only substantial provider of POS terminals. The Division also challenged this agreement, but dropped the challenge when the parties abandoned the proposed licensing deal. The Verifone/Hypercom transaction was also reviewed by Spain's National Competition Council (see <http://www.cncompetencia.es/Inicio/Noticias/tabid/105/Default.aspx?Contentid=441972&Pag=10>) and by the UK's Office of Fair Trading (see <http://www.offt.gov.uk/OFTwork/mergers/decisions/2011/hypercom>).

¹⁵ *U.S. v. Verifone Systems, Inc., and Hyperion Corporation*, Competitive Impact Statement at 7, available at <http://www.justice.gov/atr/cases/f273600/273617.pdf>.

The high barriers to entry in both markets made entry unlikely to alleviate any of the anticompetitive effects.

After the Division's complaint was filed, VeriFone and Hypercom entered into settlement negotiations with the Division to find an alternative buyer. The Division filed a proposed settlement on August 4, 2011. The settlement required Verifone to divest Hypercom's U.S. POS terminals business to an entity sponsored by Gores Group LLC ("Gores"), a private equity fund. This divestiture would include physical assets, personnel, intellectual property rights, transitional support, and all other assets necessary for Gores to become a viable competitor in the industry. The final judgment was issued by the district court on November 21, 2011.

2.3 *United States v. American Express Company*

In *U.S. v. American Express Company*,¹⁶ the Division challenged the so-called "anti-steering" rules that American Express, MasterCard, and Visa had in place that prevented merchants from offering, at the point of sale, consumer discounts, rewards, or information about card costs, or from expressing a preference for a card brand that is less expensive for the merchant ("merchant restraints"). According to the complaint, filed on October 4, 2010 ("Complaint"), these rules prohibited merchants from encouraging consumers to use lower-cost payment methods, resulting in an increase in the merchants' cost of doing business, and ultimately forcing consumers to pay more for their purchases. The challenged merchant restraints deterred or obstructed merchants from freely promoting inter-brand competition among networks by offering customers discounts, other benefits, or information to encourage them to use a less expensive General Purpose Card brand or other payment method.

The merchant restraints blocked merchants from taking steps to influence customers and foster competition among networks at the point of sale, such as: promoting a less expensive General Purpose Card brand more actively than any other brand; offering customers a discount or other benefit for using a particular General Purpose Card that costs the merchant less; posting a sign expressing a preference for another General Purpose Card brand; prompting customers at the point of sale to use another General Purpose Card brand in their wallets; posting the signs or logos of General Purpose Card brands that cost less to the merchant more prominently than signs or logos of more costly brands; or posting truthful information comparing the relative costs of different General Purpose Card brands.¹⁷

The Complaint alleged two distinct relevant product markets: the market for General Purpose Card network services to merchants, and within that broader market, a price discrimination market -- the market for General Purpose Card network services to travel and entertainment merchants ("T&E market"). In each case, the relevant geographic market was the United States. The Complaint alleged that each of the defendants possessed market power in both relevant product markets. Finally, significant barriers to entry and expansion protected defendants' market power, and contributed to their ability to maintain high prices for years without threat of price competition by new entry or expansion in the market. Barriers to entry and expansion included the prohibitive cost of establishing a physical network over which General Purpose Card transactions could run, developing a widely recognized brand, and establishing a base of merchants

¹⁶ See <http://www.justice.gov/atr/cases/americanexpress.html> for case filings.

¹⁷ Federal law mandates that networks permit merchants to offer discounts for cash transactions. Additionally, Dodd-Frank, by adding section 920 to the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.*, forbids networks from prohibiting merchants from offering a discount or in-kind incentive for payment by the use of cash, checks, debit cards, or another payment method. This would include, for example, offering a discount for the use of any debit card. All General Purpose Card networks operate under these laws, and the Complaint did not seek relief relating to these two types of discounting.

and a base of cardholders. Defendants, having achieved these necessities early in the history of the industry, held substantial early-mover advantages over prospective subsequent entrants. Successful entry would be difficult, time consuming, and expensive.

Because the merchant restraints resulted in higher merchant costs, and merchants passed these costs on to consumers, retail prices were higher generally for consumers. Moreover, a customer who paid with lower-cost methods of payment paid more than he or she would if the defendants had not prevented merchants from encouraging network competition at the point of sale. For example, because certain General Purpose Cards that are more expensive for the merchant tend to be held by more affluent buyers, less affluent purchasers using other General Purpose Cards, debit cards, cash, and checks effectively subsidized part of the cost of the benefits of the more expensive cards and the rewards enjoyed by those cardholders.

The Complaint also alleged that the merchant restraints had a number of other anticompetitive effects, including reducing output of lower-cost payment methods, stifling innovation in network services and card offerings, and denying information to customers about the relative costs of General Purpose Cards that would cause more customers to choose lower-cost payment methods. Defendants' merchant restraints also heightened the already high barriers to entry and expansion in the network services market. Merchants' inability to encourage their customers to use less costly General Purpose Card networks made it more difficult for existing or potential competitors to threaten Defendants' market power.

The Division filed a proposed settlement simultaneously with its complaint requiring MasterCard and Visa to allow their merchants to offer consumers a discount or incentive for using a particular card network, express a preference and promote the use of a particular card network, and communicate to consumers the cost incurred by the merchant when a consumer uses a particular card network. The court approved the settlement on July 20, 2011.¹⁸ Litigation with American Express is ongoing.

3. Update on private litigation in the United States

3.1 *Kendall v. Visa U.S.A., Inc.*

In *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008), a group of merchants sued Visa, MasterCard, and several banks, alleging that they violated Section 1 of the Sherman Act by conspiring to set the merchant discount and interchange fees charged to merchants for payment of credit card sales. The trial court dismissed the complaint, and was upheld on appeal. The Court of Appeals held that the merchants had failed to plead any evidentiary facts beyond parallel conduct with respect to the banks, and as indirect purchasers were barred from recovery against the credit card networks.

3.2 *Merchant class action litigation*

The 2006 submission in para. 28 described the class action antitrust complaint merchants and other industry participants brought against Visa and MasterCard in 2005.¹⁹ A putative class of approximately seven million U.S. merchants who accept Visa and MasterCard credit and debit cards sued the two networks and a group of card-issuing banks, including JPMorgan Chase, Bank of America, Citibank, Wells Fargo, Capital One, and others. The complaint alleged that Visa's and MasterCard's anti-steering rules (imposed on merchants) reduced competition and kept prices high. The complaint also alleged price-fixing in the setting of interchange fees. On July 13, 2012, the parties announced they had signed a memorandum of understanding to enter into a settlement agreement to resolve the claims. This proposed agreement

¹⁸ The final judgment is available at <http://www.justice.gov/atr/cases/f273100/273170.htm>.

¹⁹ *In re Payment Card Interchange Fee and Merchant Discount Litigation*, 05-MD-1720 (JG)(JO)(E.D. NY).

“include[s] a cash payment and significant reforms of Visa and MasterCard rules and business practices.”²⁰ The reforms of rules and business practices include modifications of network rules previously enforced by Visa and MasterCard relating to steering at the point-of-sale. The settlement agreement is currently before the court; several entities have expressed opposition to the settlement.²¹

4. Development of mobile payment systems

4.1 *Technical developments and possible antitrust issues*

The recent proliferation of smart phones and the development of technologies such as near field communications (“NFC”) provide opportunities for consumers to use their smart phones rather than their credit or debit cards. The plans of those developing this technology appear to allow the incumbent credit card networks to continue to play a role in the payment ecosystem, except that mobile devices rather than plastic cards would be used for payment. However, because some new technologies like NFC permit two-way communication between a consumer’s smart phone and a retailer’s terminal, mobile payment systems may offer greater functionality to consumers and merchants.

Successful implementation of mobile payment systems is challenging because (1) it requires coordination across several complement providers (smart phones, enabled terminals, merchants, consumer accounts), and (2) network externalities heighten the importance of scale. In the United States, two sets of competitors have formed mobile payment joint ventures: (1) Isis, a joint venture including most of the major American mobile phone network providers: Verizon Wireless, AT&T, and T-Mobile,²² and (2) Merchant Customer Exchange (“MCX”), a joint venture of many merchants that collectively represent approximately \$1 trillion in annual sales. Members of MCX include Wal-Mart, Target, CVS, Sears, Lowe’s, and Shell Oil. These joint ventures are not yet in operation.

Joint ventures that are collaborations between competitors may warrant antitrust scrutiny. The *Antitrust Guidelines for Collaborations Among Competitors* issued by the U.S. antitrust agencies in April 2000 describe the principles for evaluating agreements among competitors and the analytical framework for doing so.²³ Two broad categories of anticompetitive harm theories are (1) “exclusion” and (2) “overly inclusive joint venture.” For exclusion, harm may arise if a joint venture denies some key element to rival systems and thereby reduces competition.²⁴ Whether this is a viable theory would depend on factors such as the freedom that the joint venture’s members have to participate in multiple mobile payment systems

²⁰ See [http://www.rkmc.com/Merchants-Reach-Landmark-\\$7.25-Billion-Settlement-with-Visa-MasterCard-and-Major-U.S.-Banks-for-Alleged-Anticompetitive-Practices-and-Price-Fixing-In-Setting-Interchange-Fees.htm](http://www.rkmc.com/Merchants-Reach-Landmark-$7.25-Billion-Settlement-with-Visa-MasterCard-and-Major-U.S.-Banks-for-Alleged-Anticompetitive-Practices-and-Price-Fixing-In-Setting-Interchange-Fees.htm).

²¹ See, e.g., *Merchants Say Proposed Swipe Fee Settlement Entrenches Visa/MasterCard Price Fixing*, http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=1428; *Wal-Mart Balks at \$7 Billion Visa/MasterCard Settlement*, <http://www.forbes.com/sites/danielfisher/2012/07/24/wal-mart-balks-at-7-billion-visamastercard-settlement/>.

²² Sprint, the other large mobile phone network, has partnered with Google to deploy the Google Wallet solution on some Samsung smart phones that are available to Sprint subscribers. A March 21, 2012 Bloomberg.com report suggests that, due to slow adoption, Google may be considering sharing revenues with Verizon Wireless and AT&T in order to get these carriers to embrace the Google Wallet.

²³ U.S. Department of Justice & Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000), reprinted in 4 Trade Reg. Rep. (CCH) para. 13,161 (Apr. 12, 2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

²⁴ *Id.* at sec. 3.34 (Factors Relevant to the Ability and Incentive of the Participants and the Collaboration to Compete).

(“multi-home”), the extent to which the members, individually or collectively, have market power with respect to the denied element, and the availability of adequate substitutes for that element. For the “overly inclusive joint venture” theory, harm may arise if a joint venture’s membership is so expansive, or its rules sufficiently restrictive, as to prevent the emergence or viability of a rival mobile payment system that might otherwise threaten the joint venture’s market power. Factors relevant to this analysis include the joint venture’s exclusivity, membership scope, whether current members would help form competing systems but for the overly inclusive nature of the joint venture, and if so, the impact of such participation on the timeliness, likelihood, and sufficiency of such entry.²⁵

4.2 *FTC consumer protection activities*

Since 2000, the FTC’s Bureau of Consumer Protection has actively examined consumer issues in mobile payment services. Among other things, the Commission’s workshops have focused on the applications and implications of Radio Frequency Identification (“RFID”) technology,²⁶ the role of mobile technology in commerce,²⁷ the emergence of contactless payment systems,²⁸ and advertising and privacy disclosures in mobile environments.²⁹ Mobile payments frequently involve hardware manufacturers, operating system developers, application developers, data brokers, coupon and loyalty program administrators, payment card networks, advertising companies, brands, and end-merchants. The FTC has jurisdiction over all of these entities as well as telecommunications providers when they are not engaged in common carrier activities.³⁰

On April 26, 2012, the FTC’s Bureau of Consumer Protection convened a workshop on the development of mobile payments and their impact on consumers.³¹ The workshop looked at innovative products and services being developed and the potential changes coming for consumers and merchants. For consumers, mobile payments can be an easy and convenient way to pay for goods and services, get discounts through mobile coupons, and earn or use loyalty points. Mobile payments also may provide under-served communities with greater access to alternative payment systems. The workshop examined three primary areas where consumer concerns are likely to arise with the increasing use of mobile payments: dispute resolution, data security, and privacy. Given the potential concerns raised, the agency will continue to monitor mobile payment developments to ensure consumers are adequately protected.

²⁵ *Id.* at sec. 3.33 (Market Shares and Market Concentration), “The creation, increase, or facilitation of market power will likely increase the ability and incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.”; and sec. 3.35 (Entry).

²⁶ See FTC Workshop, *Radio Frequency Identification: Applications and Implications for Consumers* (June 21, 2004), available at <http://www.ftc.gov/bcp/workshops/rfid/index.shtml>; FTC Workshop, *Transatlantic RFID Workshop on Consumer Privacy and Data Security* (Sep. 23, 2008), available at <http://ftc.gov/bcp/workshops/transatlantic/index.shtml>.

²⁷ See FTC Workshop, *Protecting Consumers in the Next Tech-ade* (Nov. 6-7, 2006), available at <http://www.ftc.gov/bcp/workshops/techade/what.html>.

²⁸ See FTC Workshop, *Pay on the Go: Consumers & Contactless Payment* (July 24, 2008), available at <http://www.ftc.gov/bcp/workshops/payonthego/index.shtml>.

²⁹ See FTC Workshop, *In Short: Advertising and Privacy Disclosures in a Digital World* (May 30, 2012), available at <http://www.ftc.gov/bcp/workshops/inshort/index.shtml>.

³⁰ The FTC’s jurisdiction reaches any person, partnership or corporation that affects commerce, except for limited exclusions such as depository institutions. See 15 U.S.C. § 45(a)(2).

³¹ See FTC Workshop, *Paper, Plastic . . . or Mobile? An FTC Workshop on Mobile Payments* (April 26, 2012), available at <http://www.ftc.gov/bcp/workshops/mobilepayments/>. FTC staff is currently preparing a report based on the workshop’s findings.

In July 2012, the FTC's Bureau of Consumer Protection filed a comment with the Federal Communication Commission, stating that the "cramming" of unauthorized charges on wireless phone bills poses a serious problem for consumers and that wireless providers should be required to give customers the option to block all third-party charges from their bills.³² The FTC continues to monitor mobile payment systems for concerns about these types of unauthorized charges.

The FTC also leads the U.S. delegation to the OECD Committee on Consumer Policy, which is doing extensive work on emerging online and mobile payment systems.

5. Innovation in the industry

There has been innovation in payment systems over the last few years, much of it focused on mobile payment technology. A recent report by the Consumer Research Section of the Federal Reserve Board's Division of Consumer and Community Affairs found that adoption of mobile payments in the United States has been slower than in many other countries, and that the primary reason that consumers resist using mobile payments is uncertainty regarding security. To address these opportunities and challenges, firms may focus innovation on two areas: (1) developing solutions for underserved consumer and merchant segments, and (2) improving transaction security.

Square is an example of a firm focusing innovation on underserved consumer and merchant segments. It has developed a payment card reader that can be attached to a mobile phone or tablet computer and has enrolled many small merchants for whom investing in a traditional payment card terminal is not fiscally prudent. Visa, which has invested in Square, claims that Square does not compete with Visa products, but "helps to drive acceptance of payment cards in a segment that has been historically underserved."³³ The Starbucks Coffee Company recently formed a partnership with Square to employ its mobile technology in U.S. Starbucks stores.³⁴

In regard to innovation in the second category -- transaction security -- there are a number of existing innovations responding to consumers' concern, as well as new ideas under development. These include secure elements that are embedded in mobile phones, secure elements that reside on SIM cards, and solutions in which a virtual secure element is stored in the cloud. Absent a sufficient variety of "secure element" solutions, control of the secure element(s) may create market power and reduce competition in mobile payment technologies. For example, if the only viable technologies are secure elements that are controlled by the mobile network operator (MNO), then MNOs may seek to exercise market power by collecting substantial transaction fees on all mobile payments. This could reduce the benefits from mobile payment technology available to merchants and to consumers. However, if alternative security solutions exist that do not require access granted by the MNO, then the owner/controller of any given secure element may be unable to exercise market power in this manner. Greater numbers of merchants and consumers might then adopt mobile payment technology more rapidly. Benefits include increased convenience and better-targeted promotions for consumers, and potentially lower transaction fees and more effective promotions for retailers.

³² See FTC Reply Comment Before the federal Communications Commission Concerning Placement of Unauthorized Charges on Wireless Bills, Otherwise Known as "Cramming." CG Docket Nos. 11-116, 09-158 and 98-170 (July 2012), available at <http://www.ftc.gov/opa/2012/07/cramming.shtm>.

³³ Claire Caine Miller, "Visa Invests in Square for Mobile Payments," The New York Times, April 27, 2011, <http://bits.blogs.nytimes.com/2011/04/27/visa-invests-in-square-for-mobile-payments/>.

³⁴ Claire Caine Miller, "Starbucks and Square Team Up," The New York Times, August 8, 2012, http://www.nytimes.com/2012/08/08/technology/starbucks-and-square-to-team-up.html?_r=1.

Innovation is also occurring in products that facilitate the usage of debit and credit cards at merchants. Services such as Google Wallet and PayPal offer consumers and merchants an all-in-one payment processing solution. By accepting PayPal, a small merchant allows its customers to pay with any of the major credit card networks or alternately with a debit from a demand deposit bank account. For small merchants, this one-stop solution can be easier to implement than acceptance of each credit card brand. Such wallets also offer additional security and convenience to consumers for online transactions, by eliminating the need to enter one's credit card information on the merchant's website. In addition to its online solution, PayPal began to offer a point of sale payments service at the cash register for the U.S. and certain European markets in 2011. Buyers can access their PayPal accounts via a mobile phone number or a PayPal Access Card.

Entry barriers, however, remain significant in mobile payments. Recently, PayPal announced a partnership with Discover which will equip its more than 7 million merchants to accept PayPal as a payment method. By relying on the established merchant acceptance network of an incumbent general purpose card, PayPal was able to sidestep the formidable business and technical challenge of arranging acceptance directly at millions of brick and mortar establishments.

6. Conclusion

As predicted in the 2006 submission, the primary constant in the U.S. payment industry over the last several years has been change. While the advent of mobile payment technology offers the potential to significantly increase consumer choice even further, it is not yet clear how this technology will develop. While certain of the competition concerns articulated in the 2006 submission have disappeared, others remain, and yet others have arisen. We look forward to meeting the enforcement challenges posed by the continued evolution of this complex industry.

BIAC

1. Introduction

The Business and Industry Advisory Committee (“BIAC”) to the OECD welcomes the opportunity to comment on the matter of Competition and Payments Systems at the meeting of the OECD Competition Committee on 24 October 2012. This paper follows and complements BIAC’s comments submitted to the OECD in June 2006 as part of the OECD Competition Committee’s debate on competition and efficient usage of payment cards and primarily focuses on:

- the development of new payment instruments and increased competition in the payments sector in general;
- the key issues relating to the payments industry that have been challenged over the last few years (namely interchange fees, no-surcharge rules and honour-all-cards obligations);
- the costs and benefits of those features; and
- the impact of regulating the payments industry.

The payments industry has seen significant changes in recent years with the development of new technologies and new entrants. Combined with the steps taken at the European Union (“EU”) level to promote integration of the payments industry (including in particular the various SEPA¹ initiatives) this makes it an appropriate time to take stock and evaluate whether the industry is working effectively, the impact (or expected impact) of current regulation, and whether, and if so in what areas, policy measures could improve outcomes for consumers and market participants.

As BIAC submitted in 2006, experiences with deregulation confirm that competition should be stimulated and maximised except in cases of market failure or where other overriding public interest objectives give rise to a need for regulation. Consequently, BIAC continues to advocate the following:

- Competition authorities and sectoral regulators should exercise particular caution when considering intervention in this fast moving market with its changing consumer demand and supply patterns. Before authorities intervene it should be clear that the enforcement action is proportionate and necessary to protect consumers and that any remedy imposed will benefit consumers. This requires assessing alternatives to regulation as well as the loss of any advantages of the status quo if regulation is imposed.
- Competition authorities should proceed with particular care when considering whether to intervene in high-technology industries undergoing rapid transition. Intervening too quickly and too aggressively can inhibit innovation and future market growth. This is particularly relevant to

¹ SEPA (the Single Euro Payments Area) is the payments integration initiative of the EU for simplification and harmonization of bank transfers.

the payments industry which has seen significant technological advances in recent years, some areas of which, such as mobile payment, are currently at an early stage.

2. The evolving face of the payments industry

There is little doubt amongst stakeholders in the payments industry that innovation has become increasingly prevalent in the sector and that, as a result, the payments industry is changing rapidly. There are a range of new and emerging products and technologies, particularly in the field of electronic payment (e-payment) and mobile payment (m-payment); these are expected to lead to both new entry and new business models by new and existing providers, many of which work in parallel with payment card schemes.

For example, in the UK, competition among non-card based providers is still evolving. Large online players such as PayPal and Google have entered this space while UK based operators such as The Mobile Money Network have combined with merchants to offer mobile payment services to customers. The sector has also seen a number of collaborations in the UK in the growing area of payment facilities. Chief amongst these has been between banks and mobile network operators (MNOs), either trialled or announced for forthcoming launch but other initiatives are as prominent or have the potential to impact payment methods. In addition, MNOs cooperate to offer various m-commerce models or MNOs and card companies co-operate to bring traditional cards into the mobile business. Examples of new innovations in the payments industry are set out in the box below.

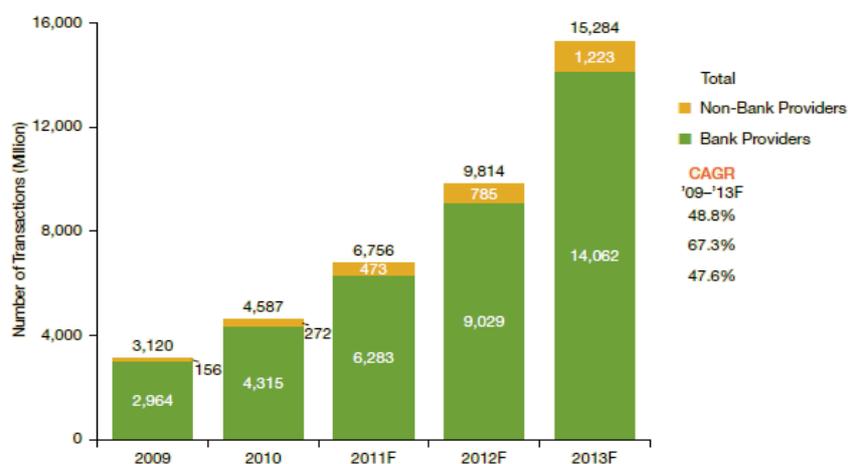
Competition in the payments industry has become more intense in recent years as a result of these innovations, with new technology attracting further new entrants in the digital/mobile arenas. This trend is expected to continue and accelerate as existing and new payment providers use a variety of new technologies to compete with (or replace) existing card based schemes and mechanisms. The two graphs below demonstrate significant increases in both e- and m-payments over the last few years and the expected growth in the near future.

Global E-payments: number of transactions (billions) 2009-2013F²



² Source: World Payments Report 2011.

Global M-payments: number of transactions (billions) 2009-2013F³



Box 1. Examples of recent payment innovations

Google wallet (available in the US and expected to launch in the UK shortly)

Google wallet is a virtual wallet that stores your payment cards and offers on your phone and online. When you check out at brick-and-mortar stores that accept Google Wallet, you can pay and redeem offers quickly just by tapping your phone at the point of sale (using NFC technology). You can also pay online where retailers accept Google wallet. Google won't charge users or merchants for access to Google wallet, and plans to make money by offering sponsored ads to their users.

Merchant Customer Exchange – in the US

A joint venture of retailers with a combined \$US 1 Trillion in annual sales (including Wal-Mart, Target, Sears, Shell, and Lowe's) will offer a new mobile payment application.

ISIS- in the US

A full function joint venture of Verizon, AT&T, T-Mobile, JPMorgan Chase, Barclays, and Capital One plans to offer a mobile wallet.

PayPal inStore – launched May 2012 in UK and the US

PayPal inStore is a new cashless, cardless way to pay in-store using your mobile phone. In the UK, after downloading the application, you simply press 'pay inStore' and a unique barcode is displayed on the phone screen. The retailer scans this barcode, and your PayPal account is charged and accepted discount offers will also be applied. The application does not require NFC or even a mobile/WIFI signal. No personal or financial details are stored on the phone. Currently 230 fashion stores in the UK accept PayPal inStore, but more retailers are expected to sign up. In the US, consumers with a PayPal account can pay with a PayPal payment card or by entering their mobile number and a PIN.

Simply Tap – in the UK

Simply Tap allows you to purchase goods online and in-store quickly and easily on your phone, and have them delivered to your home address. You register your home address and bank account details in the application and when you spot a product you want to purchase in a participating store you can either enter the special code displayed alongside it, scan a code using the phone camera, or even take a photo of the product itself which is matched against a database. The application charges your debit/credit card, and the product is delivered to your home address. The app does not require NFC, and can be used in an increasing number of shops in the UK

³ Source: World Payments Report 2011.

LevelUp - Currently available at businesses in certain cities in the US

A mobile phone application for that allows registered users to securely link their debit or credit card to a unique QR code displayed within the application. To pay with LevelUp, users scan the QR code on their phone at LevelUp terminals located at local businesses who accept LevelUp as a form of payment.

O2 Wallet – in the UK

Allows consumers to transfer money across any mobile phone network, make online purchases and conduct price comparisons by scanning product barcodes in shops. Users can also get daily discounts from retailers. Unlike Google Wallet, however, O2 Wallet does not currently allow users to make contactless payments using their mobile phone. The company said that the service will eventually evolve to incorporate near field communications (NFC) technology, but in the meantime users can apply for a physical O2 Money Visa Account Card that allows them to make purchases on the high street or withdraw cash from ATMs.

GoCardless – in the UK

GoCardless provides merchants with a flexible tool to charge customers directly from their bank account, with no card merchant fees or credit card fees. Merchants can charge one-off bills or take regular payments and can even let customers pre-authorise future variable payments.

Customers are sent a link to GoCardless where they register and input their bank account details. The customer is then charged (via a Direct Debit set up by GoCardless), and emailed a receipt. For future payments customers can use a username and password. GoCardless then transfers the money to the merchant's account. GoCardless has no set-up or monthly fees, charging merchants 1% per transaction up to a maximum of £2.00.

MasterCard/Everything Everywhere – in the UK

MasterCard recently announced a five-year deal with the UK's biggest mobile phone operator Everything Everywhere to develop contactless mobile phone payment systems for the networks 27m customers. The partnership will initially include a prepaid digital wallet, allowing customers to transfer money from a bank account to a mobile phone for use in micro payments at more than 100,000 eligible shops across the country. The partnership is also set to roll out a variety of other services, including person-to-person money transfers and loyalty rewards at shops where payments are made. Plans to help boost the capability of small retailers to accept contactless payments in the future are also on the cards.

Deutsche Telekom - "myWallet" – from H2 2012 onwards in Poland, Germany and other European countries

The digital wallet "myWallet" by Deutsche Telekom (DT) combines means of payment with such services such loyalty cards, vouchers, tickets or entry cards on a smartphone. The myWallet platform will allow for integration of different partners and service providers (banks, public transport, etc.) and support various technologies, including NFC. The myWallet portfolio will cover all customers' payment means (e.g. online and offline payments, micro- and macro payments, etc.) and will contain a DT-branded MasterCard, issued by DT's affiliate ClickandBuy. The myWallet initiative also supports roll-out of contactless infrastructure at the points of sale in the relevant markets.

M-commerce joint venture between Everything Everywhere, Vodafone and O2 – in the UK

The joint venture received competition clearance by the European Commission on 5 September 2012 and the company plans to launch its products, which include a wholesale m-payment platform, in the coming months. According to the commission the JV will act as a supplier on the wholesale m-wallet market (two-sided market). This market combines the attributes of the two following existing sets of services: contactless physical transactions services such as services already offered by banks through NFC-enabled debit and credit cards. Consumers will be able to register their bank cards and loyalty cards on their mobile and use their device to pay for products (via NFC or online) and to claim rewards. They will also be able to receive relevant offers via their mobile. The services will be free for consumers and the JV will attempt to attract all mobile operators in the UK as its customers so that as many people as possible are able to use its services.

Mobile Money for the Unbanked (GSMA) – developing countries

Mobile money is a sustainable, scalable approach to providing convenient and affordable financial services to the unbanked. More than one billion customers in developing markets have access to a mobile phone, but do not have a formal bank account. Through mobile money, customers can perform financial transactions where they buy airtime. How? Because typically, the largest MNO in a developing country has 100-500 times more airtime reseller outlets than banks have branches. Mobile money provides new channels for customers to access traditional retail financial services such as savings, remittances, credit and insurance. With mobile financial services, customers can leverage mobile money platforms to make payments, withdrawals, and cash transfers, among others.

The result of this high rate of innovation is expected to be a change to the increased competitive dynamic of the payments industry which will constrain the more traditional payment methods and schemes (such as cash, cheques and payment cards used in-store), thus delivering additional benefits to consumers and merchants.

In relation to such changes, a key factor is the industry's ability to adopt interoperability standards and other forms of standardisation. It is therefore important that competition authorities take on board that there currently exists a certain element of legal uncertainty surrounding the application of competition law to standardisation cooperation within industry. It is in the interests of the industry and consumers that this legal uncertainty be reduced given that any new payment solution needs to be designed to be accessible to the mass market in order to be commercially viable.

3. Key issues

This section outlines the key issues relating to the payments industry that have in recent years been challenged by payments market stakeholders (namely interchange fees, no-surcharge rules and honour-all-cards obligations) and summarises the respective arguments in each case. Views on the extent to which regulation is considered an appropriate response to these challenges are set out in section 0 below.

3.1 *The interchange fees debate*

BIAC's 2006 submission to the OCED outlined the role of interchange fees in payment card systems. However, a summary of the system is set out in the box below.

Box 2. Summary of interchange fees

An interchange fee is the fee charged by the bank which issued the credit card to the consumer (the issuing bank) and paid by the retailer's bank (the acquiring bank) for processing a payment card transaction. They are either set bilaterally between individual banks or multilaterally ("MIF"). A MIF is set by a decision binding all banks participating in a particular payment card scheme relating to a brand of payment card.

In the context of a payment card transaction, the acquiring bank charges the retailer a fixed fee (the merchant service charge ("MSC")) for processing the transaction. This is deducted from the price that the retailer receives for the transaction with the consumer (the retail price). The issuing bank pays the acquiring bank the retail price less the agreed MIF. The MSC is used by the acquiring bank to recoup the MIF from the retailer. The costs incurred by the retailer in accepting payment cards from consumers (the MSC) may be passed on in the retail price of goods or services.

Critics of interchange fees continue to predominantly comprise merchants who fund the interchange fee through MSCs. In summary, merchants' objections to interchange fees have included the following, which have led to a number of investigations by competition authorities:

- MIFs amount to a price floor, akin to price-fixing and therefore constitute a breach of competition law;
- Merchants have particularly objected to premium cards which charge them higher interchange fees and which they are compelled to accept under the honour-all-cards rule (discussed further below);
- The inclusion in the interchange fee of certain identifiable issuer costs that merchants assert cover items that do not benefit them particularly. The Visa II decision in 2002⁴ accepted that three

⁴ Commission Decision 2002/914/EC of 24 July 2002.

categories of issuer cost could be seen to benefit merchants: the costs of the “payment guarantee”, the cost of processing and the cost of free funding. However, some merchants have disputed the relevance of certain of these costs, in particular free funding, as well as for example costs relating to the provision of rewards programmes to cardholders, and argue that they end up paying for the benefits enjoyed by cardholders;

- Merchants have no control over (or can exert no constraint over) the level of the interchange fee, yet they have to pay it, and that is it therefore akin to a tax on transactions; and
- In the past, attention has also focused on the fact that acquirers were not permitted to disclose the actual interchange fees to merchants resulting in a certain lack of transparency. The Visa II decision required Visa to change its rules so as to permit acquirers to disclose interchange to merchants where requested. Subsequently Visa and MasterCard in Europe have published cross-border EU and domestic interchange rates on their websites.

In response to these concerns, the payment card schemes and participating banks have argued that MIFs are in fact of net benefit to merchants and consumers thus incentivising the use of card payments, which is reflected in year on year growth in card usage in recent years. The main points historically they have raised in this regard include the following:

- MIFs are essential for the operation of a four party scheme and operate to enhance the efficiency of a payment card scheme as a whole. As an example of a two-sided market, four party payment systems provide a joint product simultaneously to both cardholders and merchants and MIFs are set at a level that optimises benefits to both sides of the market. Put differently, the four party payment system generates positive network effects whereby the more merchants accept cards the more valuable they become to cardholders, and vice-versa. Specifically, MIFs enable recovery of certain costs incurred by issuing banks (such as guaranteed payment, processing costs and funding costs) which reflect benefits not only to cardholders but also to merchants. In the absence of interchange fees, issuers would be required to recover all of the costs they incur from cardholders, and would need to adjust their activities accordingly. In these circumstances it is highly unlikely that the usage of a card payment system would be at an optimal level;
- Interchange fees have had (and continue to have) a significant positive impact in the adoption of new technology and fraud prevention measures. The successful introduction and coverage of chip and PIN anti-fraud technology and recent introduction of contactless payment terminals at merchants’ point of sale are examples of how interchange fees are being used as an incentive to merchants to invest in new technology for the benefit of the customer;
- Both merchants and consumers (and therefore the economy as a whole) benefit from the near universal acceptance of payment cards and some argue that such universal acceptance could be threatened by any significant intervention in the way payment card schemes set MIF rates; and
- Interchange fees also pay for a number of consumer benefits many of which are often provided without any direct cost to cardholders for holding a card (in the US, Canada, the UK, and elsewhere). These include the convenience of making secure online purchases, interest free periods for credit cardholders who pay off their balance each month, free in-credit banking for many debit cardholders. In addition, in the US, Canada, the UK and elsewhere customers using credit cards enjoy strong insurance benefits covering the goods or services they purchase.⁵

⁵ Retailer and competition authorities tend to argue that the only benefits that could justify interchange are those that accrue to merchants. Their argument would be that cardholder benefits should be paid for by cardholders.

Some merchants have urged regulators to eliminate the interchange fee altogether, while others recommend capping it. In general, the favoured response of regulators in the EU has been the latter: in both Visa and MasterCard⁶ the European Commission accepted undertakings to reduce interchange fees and to increase transparency of interchange fees.

3.2 *No-discrimination/surcharging rule*

Under the no-discrimination rule (also sometimes referred to as the no-surcharging rule) merchants are prohibited from directing their customers towards the use of the payment instrument they prefer through surcharging, offering rebates or other forms of steering, though these rules vary by scheme. For example, Visa and MasterCard permit steering by discounting or rebating other payment means (for example, cash) and MasterCard also by surcharging of its products by merchants. Critics of the rule argue that this limits the ability of merchants to signal to consumers the relative costs of different forms of payment when deciding how to pay. Although the European Commission did not challenge Visa's no-surcharge rule in 2001 because it found that the policy had no appreciable effect on competition,⁷ it has more recently stated that, together with honour-all-cards rules (see below), this may act as a barrier to entry⁸ and lead to higher interchange fees, hence potentially increasing the cost of card payments and stifling competition.⁹ However, the European Commission has also noted that even where surcharging and discounting are allowed, the practices are not widespread.¹⁰

Payment card systems have defended these rules as output-enhancing practices that protect the goodwill associated with the entire system from opportunistic behaviour that merchant participants otherwise could undertake. Surcharging, particularly high levels of surcharging (prevalent among retailers that do not expect repeat business) impose a negative externality on a payment card system and its brand name and make the system less attractive to cardholders and to merchants that do not impose surcharges. Moreover, the payment card systems defend their no surcharge rules as consumer protection measures designed to protect cardholders who may be lured into a store by the promise of a low price only to be forced to pay a higher price at checkout.

3.3 *Honour-all-cards rule*

In general terms honour-all-cards rules require a merchant that agrees to accept one particular card on a system to accept all other cards issued on that system. More specifically, honour-all-cards rules can be seen as two separate rules: honour-all-issuers (for example, if a merchant accepts Visa cards issued by local banks it should also accept foreign cards); and, honour-all-products (for example, if a merchant accepts consumer credit cards it must also accept more expensive commercial cards).

⁶ MasterCard and a number of participating payment scheme banks subsequently appealed the European Commission's decision to the European General Court, which subsequently upheld the European Commission's decision (Case T-111/08, *MasterCard and others v Commission*, 24 May 2012). MasterCard is in the process of appealing to the European Court of Justice.

⁷ Commission Decision Case No COMP/29.373, *Visa International — Multilateral Interchange Fee*.

⁸ European Commission, Interim Report I Payment Cards: Sector Inquiry under Article 17 Regulation 1/2003 on retail banking, 12 April 2006, 124-25.

⁹ See section 4.2.3, European Commission Green Paper, "Towards an integrated European market for card, internet and mobile payments", 11 January 2012.

¹⁰ European Commission, Interim Report I Payment Cards: Sector Inquiry under Article 17 Regulation 1/2003 on retail banking, 12 April 2006, 124-25 and Commission Decision Case No COMP/34.579, *MasterCard*.

These honour-all-cards rules have been challenged by merchants in the past as a form of tying arrangement that limit merchant choice and are therefore incompatible with competition law. Merchants' concerns in this regard have been heightened by the increased use of "premium" credit cards¹¹ that typically charge higher interchange fees than standard credit cards issued by the same payment scheme. It is of note that the European Commission has stated that, in general, it does not have any concerns with the honour-all-issuers rule¹² but has some reservations regarding the competitive impact of the honour-all-products rule and has expressed concern that, in the absence of information as to the indirect costs associated with such usage, this is likely to lead to interchange fees rising as customers increasingly use premium cards to gain from their direct benefits.¹³

Advocates of honour-all-cards rules continue to assert that these rules offer substantial efficiency benefits that outweigh the concerns referred to above. These benefits primarily include the following, all of which help to foster further development of new card products/variants within a payment card scheme:

- customers have confidence that they will be able to use their card, regardless of type, in different geographical locations with a broad network of merchants; and
- preventing individual merchants from blocking the introduction of new cards that would increase the utility of the system as a whole to all merchants and all consumers.

4. To regulate or not to regulate ... and if so, how?

As explained in Section 0 above, competition in the payments industry has become more intense in recent years with new technology attracting new entrants in the digital/mobile arenas. However, it is important to note that these new payment systems have by no means replaced cash, cheques and in-store card payment use, nor it is expected that they will do so in the near future. This is partly because many consumers will always have a preference for cash or in-store card payment use and partly because much of the newer payment technology (such as contactless m-payments) is still evolving and not yet accepted by merchants. However, similar to the meteoric growth of online shopping over the last two decades, it is expected that these newer payment technologies will rapidly become more prevalent over time. In fact, newer innovative payment technologies will increase competition in the payment sector. It is therefore important that authorities proceed with particular care when considering whether and, if so, how to intervene. As BIAC submitted in 2006, intervening too quickly and too aggressively can inhibit innovation and future market growth. This consideration applies in particular to proposals to regulate more traditional payment card schemes only, given that many of the new electronic and mobile payment innovations work in conjunction with payment card schemes meaning that over regulation of the former may still stifle the latter.

In this regard, BIAC therefore continues to recommend that competition authorities and sectoral regulators should only intervene when it is absolutely clear that the enforcement action is proportionate and necessary to protect consumers and that any remedy imposed will produce net benefits for consumers. This requires assessing alternatives to regulation and assessing the loss of any advantages of the status quo that may be lost if regulation is imposed.

Outlined below are some of the regulatory intervention options considered recently by competition authorities, particularly in the context of payment card schemes.

¹¹ Premium cards in this regard are credit cards that offer additional customer benefits (usually for an annual fee) such as cash back, air miles and other forms of discounts or additional benefits.

¹² This was subject to negative clearance in Visa's 2001 decision.

¹³ See section 4.2.3, European Commission Green Paper, "Towards an integrated European market for card, internet and mobile payments", 11 January 2012.

4.1 *'Fee' regulation*

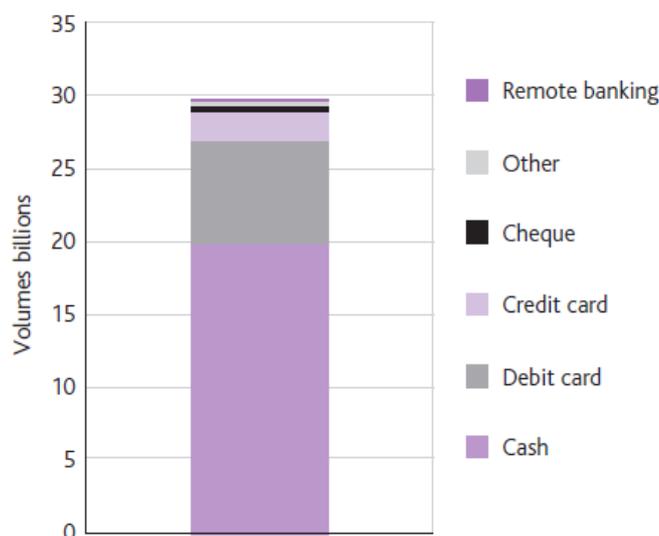
Various jurisdictions have intervened to set the level of interchange fees either under competition law (in the EU the remedies offered by Visa and MasterCard) or under legislation (such as in the US and Australia).

On one hand, regulation may to a certain extent help to alleviate certain merchant's concerns regarding the level of interchange fees and remove what was considered by some as an anti-competitive price-fixing element of the fee structure. On the other hand, there is a concern amongst stakeholders that regulation may not lead to clear and substantial benefits to customers. Regulatory intervention to lower interchange fees will not benefit customers if merchants do not pass the full benefits back to customers through lower prices and if card issuers have to raise fees to consumers, reduce benefits or introduce new fees to achieve an economic return. It is not yet clear from the evidence from the US and Australia, where some form of regulation have been introduced, that merchants do pass lower merchant fees to customers.

There is also a risk that regulation is likely to deter new entry from the likes of mobile phone providers, technology companies and to deter innovation by existing payment card schemes and providers to exploit the opportunities created by new technology. This would reduce competition amongst existing providers and risk consumer harm by preventing or slowing the adoption of new payment mechanisms and innovative charging models.

Regulation of this nature would also pose significant practical difficulties. First, it is difficult to determine what the correct/fair fee level should be, particularly given that the market is constantly innovating. Second, it is unclear whether regulation would operate at the cross-border or national level and it's equally unclear how regulation, if applied across the EU for example, would apply universally across all 27 EU member states. The scale of this challenge becomes clear when one considers that national systems within the EU are at different points in their development and this is reflected in different levels of product penetration and significantly different levels of fees. These differences mean there are very significant challenges in imposing a single regulatory regime. On the one hand these differences in payment scheme fee levels across the EU are could be viewed as a problem leading to internal market distortions or, on the other hand, a reflection of the different level of development of payment systems and other relevant conditions in various national territories.

The final point often raised in the context of regulation of payment systems is that of proportionality. Notwithstanding the dramatic growth of card, electronic and mobile payments in recent times, such payment methods still account for only a very small amount of total value of payments compared to cash and even cheque, as illustrated by the figures below regarding the UK payments market. Regulators should therefore consider the extent to which price regulation of payments systems are proportionate in a market when cash is still very much the key payment method.

UK personal spending payment volumes in 2011 (billions)¹⁴

4.2 *Increasing transparency: permitting surcharging*

The second feature of the payments market outlined above and which has been the focus of some concern in the recent past is the no-surcharging/no-discrimination rule incorporated into some payment card schemes. As a result, customers are largely unaware of the indirect cost of using different payment systems and this may reduce the effectiveness of competition. In this context regulatory intervention aimed at increasing consumer awareness of such costs at the point of transaction may be a potential alternative to the fee regulation method outlined above. Advocates of this approach suggest allowing merchants, through the use of surcharging and other methods, to indicate to consumers the costs of using different payment methods at the point of sale. This would bring the added benefit to the merchant of managing the costs associated with accepting different payment methods.

In this regard a number of EU member states, for example, have permitted surcharging.¹⁵ On the other hand, other EU member states have banned surcharges altogether.¹⁶ Regarding the stance of the two leading payment systems, BIAC understands that:

- In some jurisdictions, MasterCard's global rules prohibit merchants from surcharging cardholders for a card transaction. However, in other jurisdictions, such as in Europe, MasterCard's rules have, for a number of years, allowed merchants not to discount other means of payment (for example, cash), but also to surcharge its products.¹⁷ The merchant may even apply different surcharges for MasterCard consumer cards, MasterCard commercial cards and/or Maestro debit cards and

¹⁴ Source: UK Payments Markets 2012 Report, UK Payments Council.

¹⁵ In the European Union, as at mid-2011, national legislation of the following countries permits surcharging: Belgium, the Czech Republic, Denmark (with limitations), Estonia, Hungary (with limitations), Ireland, Malta, the Netherlands, Norway, Slovenia, Spain (with limitations) and the UK. In Germany and Poland the law is silent on whether contractual clauses prohibiting surcharging are permitted or not.

¹⁶ In the European Union, as at mid-2011, national legislation of the following countries prohibits surcharging: Austria, Bulgaria, Cyprus, France, Greece, Iceland, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovakia and Sweden.

¹⁷ Such surcharging is permitted subject to two requirements under MasterCard's European rules: (a) the surcharge must be clearly indicated to the cardholder at the time of purchase; and (b) must bear reasonable relationship to the merchant's cost of accepting cards.

- Visa's rules worldwide prohibit a merchant from surcharging unless expressly permitted by local law, but permit merchants to offer discounts for the use of non-Visa payment systems.

It is important to stress, however, that proponents of permitted surcharging have argued that in order to achieve the full benefits of such an approach, and to allow consumers to compare accurately the real costs of different payment methods, efforts at improving transparency should be directed at all providers in the payments industry and not just card schemes and issuers.

While greater transparency and surcharging may provide a solution to this problem, critics have argued that it can lead to other potential problems, as has been seen in the UK over excessive surcharging by merchants for the use of credit cards even in highly competitive markets such as budget airlines, prompting investigation by competition authorities.¹⁸ This has led to the UK Government implementing early the consumer protections in the Consumer Rights Directive that restrict the level of surcharges. The Reserve Bank of Australia has likewise expressed concern about excessive surcharging that has occurred since the RBA required payment schemes to permit surcharging and permitted card scheme rules to limit surcharges to the reasonable cost of card acceptance.¹⁹ In Canada, the Competition Bureau has challenged Visa and MasterCard's no surcharge rule under the Competition Act's price maintenance provision. A hearing before the Competition Tribunal was concluded in June and the Tribunal's decision is pending.

4.3 *Relaxing the honour-all-cards rule*

With respect to the concerns regarding honour-all-cards rules, the complexity of issues raised by potential regulatory intervention are reflected by the fact that different jurisdictions have taken very different approaches in this field. In the US, for example, both Visa and MasterCard have modified their honour-all-cards rules following a legal settlement with merchants in 2003, allowing merchants to decline acceptance of debit or credit cards, but maintaining other aspects of honour all products and the honour all issuers requirement.²⁰ However, even in this case the claimants agreed there were significant benefits to the honour-all-cards rule and did not challenge its necessity. Some honour-call-cards rules are also prohibited (in particular where debit cards are concerned) in a number of other jurisdictions such as Canada, South Africa and New Zealand, for example. In the EU the European Commission has recognized the value of the honour-all-cards rule, upholding the Visa honour-all-cards rule in 2001 and concluding that abolishing the rule would not increase competition substantially.²¹ In the MasterCard decision, however, it did not specifically oppose the rule but held that aspects of it may reinforce the alleged restrictive aspects of the interchange fee.²²

Regarding the stance of the two leading payment systems, BIAC understands that:

- MasterCard's global rules require that merchants honour all valid cards without discrimination when properly presented for payment. However, as with surcharging, there are variations to this rule in countries where the honour-all-cards rule is prohibited. In Europe, MasterCard has

¹⁸ See the UK's Office of Fair Trading's investigation into retailers' surcharges conducted in 2011 (www.of.gov.uk/OFTwork/markets-work/super-complaints/which-payment-surcharges).

¹⁹ See A Variation to the Surcharging Standards: Final Reforms and Regulation Impact Statement (June 2012) (<http://www.rba.gov.au/payments-system/reforms/cards/201206-var-surcharging-stnds-fin-ref-ris/index.html>).

²⁰ Visa Check/MasterMoney Antitrust Litig., No. 96-CV-5238 (JG), 2003 WL 1712568 (E.D.N.Y. Apr. 1, 2003) (Wal-Mart litigation).

²¹ Commission Decision Case No COMP/29.373, *Visa International*.

²² Commission Decision Case No COMP/34.579, *MasterCard*.

essentially separate honour-all-cards rules for the MasterCard brand, the Maestro brand and the Debit MasterCard brand. A merchant can therefore decide, for example, to accept Maestro but not MasterCard, or vice versa;

- Visa's general position is also that merchants must accept all cards properly presented for payment. However, there are variances of this rule in the US and Canada.²³

It is important to appreciate the impact any changes to scheme rules may have on the customer experience – especially the convenience factor of knowing that their card will be accepted, something that most consumers almost unconsciously assume when making a card payment. It is important to ensure that if changes are suggested, altering or removing any of the scheme rules will not damage the customer's purchasing experience.

5. Conclusions

The payments industry has seen significant changes in recent years with the development of new technologies and market entry which compete directly with the more traditional forms of payment such as cash, cheques and card payments. This has added to the already complex debate as to the relative costs and benefits of each payment system and how the payments industry operates and the extent to which it should be regulated.

Experiences with deregulation confirm that competition should be stimulated and maximised with limited intervention except in cases of market failure or where other overriding public interest objectives give rise to a need for regulation. Consequently, BIAC advocates that:

- Competition authorities and sectoral regulators should exercise caution when considering intervention. Existing or potential competition by new and innovative products should be encouraged. Before authorities intervene it should be clear that the enforcement action is proportionate and necessary to protect consumers and that any remedy imposed will result in net benefits for consumers. This requires assessing alternatives to regulation and assessing any advantages of the status quo that may be lost if regulation is imposed;
- Competition authorities proceed with particular care when considering whether to intervene in high-technology industries undergoing rapid transition. Intervening too quickly and too aggressively can inhibit innovation and future market growth. This is particularly relevant to the payments industry which has seen significant technological advances and recent years. What would help innovation in this industry, however, would be greater clarity on the application of competition law to the adoption of industry-agreed interoperability standards and other forms of standardisation; and

Where intervention is deemed appropriate, it is of note that some regulators have often favoured fee regulation, but it is often accompanied by material practical difficulties. Other alternatives approaches, such as increasing transparency to enable customers to make more informed choices about which payment methods to use, should therefore also be considered.

²³ The US variance permits merchants to opt for "limited acceptance" (for which they must register) but they are still obliged to accept Visa cards issued outside the US. The US limited acceptance allows merchants to choose to accept either Visa Credit and Business cards or Visa Debit cards. The Canada variance allows merchants to opt out of accepting Canadian-issued Visa Debit or Visa Credit but still requires merchants to accept all Visa cards issued outside Canada.

RETAIL PAYMENT SYSTEMS: COMPETITION, INNOVATION, AND IMPLICATIONS

By Wilko Bolt *

Abstract

Efficient payment services underpin the smooth operation of the economy. Competition and innovation are key drivers for payment market efficiency in both the short and long run. This short paper gives an overview and tries to assess the key determinants that affect pricing, competition, and the incentives to innovate in the payment market. While the payment landscape is changing rapidly, it is not yet clear what business model will survive. *Key Words:* Payments, pricing, competition, innovation. *JEL Classification Code:* L11, G21, C21

1. Introduction

Rapid advancements in computing and telecommunications have enabled us to interact with each other digitally.¹ We can purchase our vacation package online in the middle of the night. We show our electronic boarding pass on our cell phone to the airline attendant at the check-in desk. Prior to boarding, we quickly buy and download a book to our Kindle to read during the flight. Once arrived at our holiday destination, we immediately share our digital pictures taken with our iPad3 via gmail or post them directly on Facebook. And GoogleMaps/Streetview is used to exactly pinpoint the shortest route between our hotel and the nearest---best reviewed---restaurant. Yet despite the digital economy being upon us, we still rely on paper-based payment instruments such as cash, checks, and paper giros for a significant amount of face-to-face and remote bill payments in advanced economies. While we have not won the “war on cash”, we have made considerable progress to adopt electronic payment instruments, especially payment cards.

Payment cards are nowadays indispensable in most advanced economies. For Europe, Bolt and Humphrey (2007) report that the number of card payments increased by 140 percent across 11 European countries during the period 1987--2004. Amromin and Chakravorti (2009) find that greater usage of debit cards has resulted in lower demand for small-denomination banknotes and coins that are used to make change. Furthermore, without payment cards, internet sales growth would have been substantially slower. This has now paved the way as well for “competing” mobile phone payment services and other online banking solutions.

The ongoing shift from cash and paper-based towards electronic forms of payments potentially confers large economic benefits. Not only are electronic payments cheaper to “produce” than cash, but they may also offer benefits over cash in terms of greater security and access to credit lines. Nevertheless, card payments in particular have remained expensive for merchants. This has triggered a great deal of merchant dissatisfaction and led to some spectacular antitrust litigation not only in Europe but also in the

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¹ For a review of economic models on electronic payments, the reader is referred to Bolt and Chakravorti (2012a).

United States and Australia.² Strong adoption and usage externalities are at play in payment markets, causing possible divergence of social and private incentives. Thoughtful market intervention and regulation may restore competitive potential and raise total economic surplus but can also have unintended consequences. Furthermore, innovation is key for dynamic efficiency. But in the payments industry especially, there exists a fine line between cooperation and competition. Regulatory burden and uncertainty only frustrates the pace of innovation in the long run.

The structure of this paper is as follows. Section 2 deals with some key issues and questions. In Section 3 we describe how a typical payment network operates, while Section 4 discusses payment usage and pricing. Section 5 and 6 briefly analyze payment competition and innovation. Finally, concluding remarks are made in Section 7.

2. Key issues and questions

The provision of retail payment services is complex, as many participants are engaged in a series of interrelated bilateral transactions and subject to large economies of scale and scope along with strong adoption, usage and network externalities. This not only makes optimal payment pricing difficult but also sound public policy.³ We discuss the following key questions in this short paper:

- Is the payment market sufficiently transparent to generate the right price signals and incentives?
- Will competition among payment providers, networks, or instruments improve consumer and merchant welfare?
- How do you encourage innovation among the players in the payments industry?

Note that many payment markets exhibit a combination of market failures. First, there may be coordination problems among the large number of participants, preventing large capital expenditures or the setting of industry-wide standards, inhibiting long-run growth and development of modern and innovative payment solutions. Second, strong network effects exist in the provision of payment services because of the connectivity required between millions of payees, payers, financial institutions and payment network operators. Third, considerable economies of scale and scope in retail payment systems may lead to highly concentrated markets with few payment networks because of high barriers to entry for new payment networks, also raising potential concerns about significant pricing power. Fourth, “two-sided” network effects cause further interdependencies that affect the pricing structure of payment instruments, in particular the setting of interchange fees in payment card markets. Economic models of two-sided markets suggest that competition among network operators may not yield efficient market outcomes. Fifth, consumer and merchant incentives to keep vital payment information secure and investments into fraud mitigation systems by payment providers may not be aligned to achieve the socially desirable level of prudent behavior by market participants. This may require the central bank or another government agency to step in.

But before we proceed, we briefly turn to a general description of payment market structure.

3. Structure of payment markets

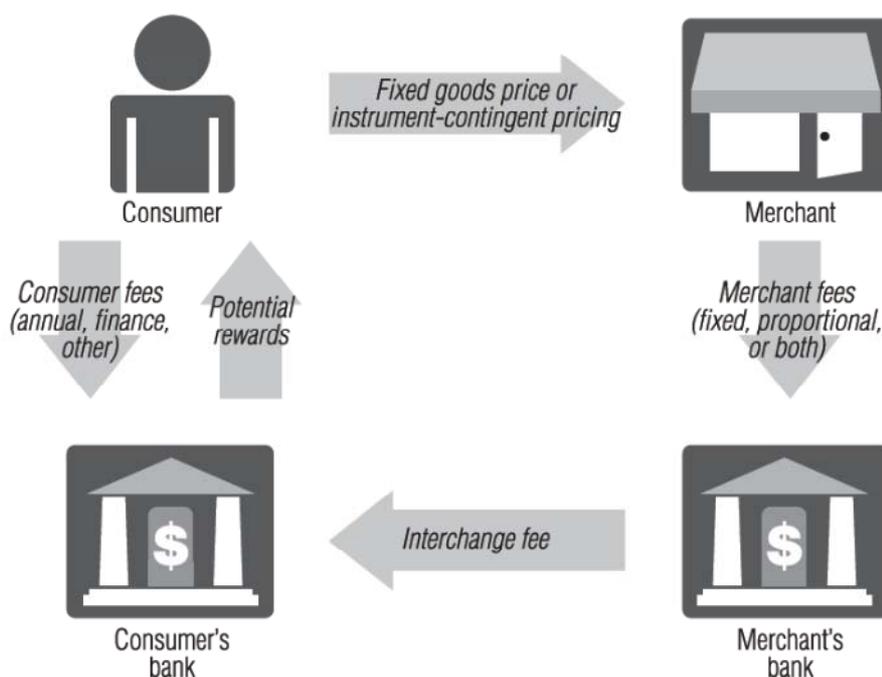
While our focus in this paper is more geared towards payment cards, in principle, other forms of electronic payments, such as credit transfers and direct debits, follow the same market structure. Most card

² For a summary of different antitrust cases in various countries and jurisdictions, see Bradford and Hayashi (2008).

³ See Bolt and Chakravorti (2012b) for a public policy perspective on the pricing of payment cards.

transactions occur in three- or four party networks. These networks comprise of consumers and their banks—known as issuers—as well as merchants and their banks—known as acquirers. Issuers and acquirers are a part of a network that sets the rules and procedures for clearing and settling payment card receipts among its members.

Figure 1: Payment flows and fees



Source: Bolt and Chakravorti, 2012b

In Figure 1, we diagram the four participants and their interactions with one another. First, a consumer establishes a relationship with an issuer and receives a payment card. Consumers often pay annual membership fees to their issuers. They generally do not pay per transaction payment card fees to their banks. On the contrary, some payment card issuers, usually more common for credit card issuers, give their customers per transaction rewards, such as cash back or other frequent use rewards. Second, a consumer makes a purchase from a merchant. Generally, the merchant charges the same price regardless of the type of payment instrument used to make the purchase. Often the merchant is restricted from charging more for purchases that are made with payment cards. These rules are called no-surcharge rules. Third, if a merchant has established a relationship with an acquirer, it is able to accept payment card transactions. The merchant either pays a fixed per transaction fee (more common for debit cards) or a proportion of the total purchase amount, known as the merchant discount fee (more common for credit cards), to its acquirer. For credit cards, the merchant discount can range from half a percent to five percent depending on the type of transaction, type of merchant, and type of card, if the merchant can swipe the physical card or not, and other factors. Fourth, the acquirer pays an interchange fee to the issuer.

4. Payment usage, externalities and pricing

The rapid digitization of payment instruments, especially payment cards, is a striking feature of most modern economies. Table 2 lists the annual per capita payment transactions for ten advanced economies in 1988 and 2008. In all cases, there was enormous growth, but countries differ significantly from one another and over time.

Table 2: Annual Per Capita Card Transactions 1988 and 2008

Country	1988	2008	Percent Change
Belgium	6.23	87.1	1298
Canada	28.34	187.8	563
France	15.00	102.0	580
Germany	0.76	27.3	3492
Italy	0.33	23.5	7021
Netherlands	0.34	113.7	33,341
Sweden	5.45	176.5	3139
Switzerland	2.34	62.8	2583
United Kingdom	10.47	123.7	1081
United States	36.67	191.1	421

Source: Bolt and Chakravorti, 2012a

Naturally, society will be best off when it relies on the most efficient payment system. However, strong adoption and usage externalities may hamper transparent payment pricing. To study the optimal structure of fees between consumers and merchants in payment markets, economists have developed the two-sided market or platform framework. Rochet and Tirole (2006) define a two-sided market as a market where end-users are unable to negotiate prices among themselves and the price structure affects the total volume of transactions. In payment markets, the price structure or balance is the share of the total price of the payment service that each type of end-user pays.

An important empirical observation of two-sided markets is that platforms tend to heavily skew the price structure to one side of the market to get both sides “on board”, using one side as a “profit center” and the other side as a “loss leader”, or at best financially neutral.⁴

4.1 Interchange fees

A key externality examined in the payment card literature is the ability of the network to convince both consumers and merchants to participate in a network. In a seminal paper, Baxter (1983) argues that the equilibrium quantity of payment card transactions occurs when the total transactional benefit for payment card services is equal to the total transactional cost, including both issuer and acquirer costs. Pricing each side of the market based on marginal cost—as would be suggested by “one-sided” economic logic—need not yield the socially optimal allocation. To arrive at the socially optimal equilibrium, an interchange fee may be required between the issuer and acquirer if there are asymmetries of demand between consumers and merchants, differences in costs to service consumers and merchants, or both. This result is critically dependent on merchants’ cost pass-through and the inability to price differentiate between card users and those who do not use cards or among different types of card users.

⁴ Bolt and Tieman (2008) analyze heavily skewed pricing in two-sided markets and offer an explanation for this phenomenon based on curvature of the demand functions.

Unlike Baxter, Rochet and Tirole (2002) consider strategic interactions of consumers and merchants. Also, in their model, issuers have market power, but acquirers operate in competitive markets. Thus, any increase in interchange fees is passed onto merchants completely. Rochet and Tirole find that the profit-maximizing interchange fee for the issuers may be more than or equal to the socially optimal interchange fee, depending on the issuers' margins and the cardholders' surplus. Moreover, merchants are willing to pay more than their net benefit if they can steal customers from their competitors or retain their customers by accepting cards.⁵

While most economists and antitrust authorities agree that an interchange fee may be necessary to balance the demands of consumers and merchants resulting in higher social welfare, the “right” level of the fee remains a subject of debate. Well-intended regulation may have unintended consequences. The recent US debit card regulation introduced by the Durbin Amendment of the Dodd-Frank Act in 2011 has already generated some unexpected distributional effects. While the regulation is intended to lower merchant card acceptance costs by capping the maximum interchange fee, some merchants find their fees instead risen because card networks subsequently charge the maximum cap amount on small ticket transactions that previously cost merchants much less (Wang, 2012).

4.2 *Ability to surcharge*

In many countries and/or jurisdictions, merchants are not allowed to add a surcharge for electronic payments because of legal or contractual restrictions. These restrictions are often called no-surcharge rules. There is general consensus in the payment literature that if merchants were able to recover their costs of accepting a given payment instrument directly from those consumers that use it—applying price differentiation—the impact of the interchange fee would be severely dampened. Under certain conditions, a strong neutrality results holds: the cost pass-through may be such that lower consumer card fees (due to higher interchange fees) are exactly offset by higher goods prices from merchants (Gans and King, 2003). An interchange fee is neutral when changing the level of the fee has no impact on card adoption or usage. Naturally, if the interchange fee was neutral, regulating it would not matter at all for payment card usage.

Even if price differentiation based on the payment instrument used is not common, the possibility to do so may increase the merchants' bargaining power in negotiating their fees. This may lead to various types of price discrimination schemes that are observed in different countries.⁶ Merchants can exert downward pressure on fees by having the possibility to set instrument-contingent pricing. Payment networks may prefer non-instrument-contingent pricing because some consumers may not choose payment cards if they had to explicitly pay for using them at the point of sale.

The Netherlands offers an interesting case. A significant number of Dutch merchants were surcharging debit transactions vis-à-vis cash. Debit card surcharges were widely applied for purchases below 10 euro. Moreover, those surcharges were up, on average, four times the debit card merchant fee. Once these surcharges were removed, consumers started using their debit cards for smaller payments, suggesting that merchant price incentives do affect consumer payment choice. Interestingly, in an effort to promote a more efficient payment system, the Dutch central bank has supported a public campaign to encourage retailers to stop surcharging to encourage consumers to use their debit cards for small transactions. This strategy turned out to be successful. In 2009, debit card payments below ten euro

⁵ Shy and Wang (2011) suggest that proportional fees may not only be more profitable for card networks but also socially efficient when card networks and merchants enjoy some market power.

⁶ Ho and Xu (2011) empirically show that debit card merchant fees differ across Chinese industries depending on credit risk and gross margin.

accounted for more than 50 percent of the total annual growth of almost 11 percent in debit card volume (Bolt, Jonker, Van Renselaar, 2010).⁷

The ability for merchants to charge different prices is a powerful incentive to convince consumers to use a certain payment instrument. Moreover, acceptance becomes virtually costless for merchants when payment fees can be passed directly onto consumers. In reality, few merchants surcharge or discount card transactions depending on expected benefits and their underlying cost structures. The question rises to what extent fees can be passed on. Merchants also benefit from accepting electronic payments, in terms of security or consumers' ease to access to credit, and should therefore absorb some of these payment cost. Competition between merchants may curb excessive pass-through. If there is no full cost pass-through, fee neutrality does not hold and two-sidedness will still affect the payment price structure. Hence, the ability to surcharge, mixed with “two-sidedness”, merchant competition, and incomplete pass-through, leads to a complex issue of optimality.⁸

In some instances, surcharges may result in less efficient payment use—as evidenced by the Dutch example—suggesting a potential adverse problem whereby merchants impose higher surcharges than their costs. Yet, it remains somewhat of an economic puzzle as to why most merchants do not set instrument-contingent pricing when they are allowed to do so to (partially) offset fees that they pay to their payment providers.

5. Payment competition

The effects of competition in two-sided markets are difficult to analyze. In payment markets, both payment networks need to get both sides—consumers and merchants—on board to sell their services. Different types of price strategies may achieve this. The additional complexity lies in the ability of end-users to participate in different networks at the same time—many consumers carry debit and credit cards in their wallet, while many merchants accept debit and credit cards in their store (Rochet and Tirole, 2003). This two-sided multiplicity is difficult to rationalize in theory. Moreover, there are many different layers of competition in payment markets: between merchants, between banks, between networks, and between payment instruments.⁹

5.1 *Competition between merchants, banks, and networks*

When asking merchants why they accept certain types of electronic payment instruments, like payment cards, if they are too costly, they answer that they would lose business to their competitors. Rochet and Tirole (2002) were the first to consider business stealing as a motivation for merchants to accept payment cards. They show that the interchange fee that maximizes profit for the issuers may be greater than or equal to the socially optimal interchange fee. An interchange fee set too high may lead to overprovision of payment card services. Due to weak “merchant resistance”, payment networks may exploit each merchant's eagerness to obtain a competitive edge over other merchants. Remarkably, this rent extraction has also some economic benefits since, on the consumer side, it offsets the underprovision of payment cards by issuers with market power.

⁷ Shampine (2012) analyzes the price effects of RBA's market intervention in Australia where interchange fees were capped and no-surcharge rules were banned in 2003. He found a total credit card fee decrease of \$0.67 per average purchase of \$131.55 in 2008.

⁸ See Brigrlevics and Shy (2012) for an analysis of steering consumer payment choice. He concludes that credit card surcharges may be the only profitable action for steering purposes by merchants, not so much providing price discounts to consumers who pay by debit card or cash.

⁹ Competition is hard to measure in the financial sector. Standard measures such as HHI, Lerner Index, or Panzar-Rosse H-statistic seem to be uncorrelated across banks and over time. Bolt and Humphrey (2012) propose a frontier based methodology to assess relative competition among banks.

Economic theory suggests that competition among suppliers of goods and services generally reduces prices, increases output, and improves welfare. However, two-sided competition may yield an inefficient price structure. A key aspect of two-sided competition is the ability of end-users to participate in more than one payment network. When end-users participate in more than one network, they are said to be “multi-homing”. If they connect only to one network, they are said to be “single-homing”. As a general finding, competing networks try to attract end-users who tend to single-home, since attracting them determines which network has the greater volume of business (Guthrie and Wright, 2007). In particular, payment competition may result in low or negative consumer fees if payment providers (or issuers) compete too vigorously on the consumer side, tilting pricing against merchants. Using data from Visa, Rysman (2007) demonstrates that even though consumers carry multiple payment cards in their wallet, they tend to use the same card for most of their purchases.

5.2 Competition between payment instruments

If consumers carry multiple types of payment instruments, merchants may be able to steer them away from more costly payment instruments. Rochet and Tirole (2011) argue that merchants at the point of sale may choose to decline payment cards even when they signed an acquiring contract to accept them. This observation forms the basis for the so-called “Tourist Test”. It defines the interchange fee level that leaves a merchant indifferent between different means of payment, say between a payment card and cash, when an incidental customer (the “tourist”) enters the store and pays at the counter. That is, the avoided cost of rejecting one payment instrument is equal to the actual incurred cost of accepting another instrument at the point of sale. This test provides a general basis for interchange fee regulation (European Commission, 2010). However, a “perverse” by-effect may come to front, especially in countries like the Netherlands, where (debit) card volumes are still strongly increasing at the expense of the number of cash payments. Due to large scale effects, the average cost of a (debit) card transaction continues to decrease while the average cost of a cash payment is increasing. Applying the tourist test methodology would then predict higher (future) interchange fees for payment cards as to maintain the indifference level.¹⁰

Merchants may steer consumers through price incentives, if allowed to do so. Bolt and Chakravorti (2008) study the ability of banks and merchants to influence the consumers' choice of payment instrument when they have access to three payment forms—cash, debit card, and credit card. Unlike most two-sided market models, where benefits are exogenous, they explicitly consider how consumers' utility and merchants' profits increase from additional sales resulting from greater security and access to credit. They show that bank profit is higher when merchants are unable to pass on payment costs to consumers because the bank is better able to extract merchant surplus. Also, in their model, the relative cost of providing debit and credit cards determines whether the bank will provide both or only one type of payment card.

In a similar model of payment card competition, Bolt and Schmiedel (2011) show that market segmentation where debit and credit cards serve different merchant segments yields a preferred “payment mix”. However, when markets are segmented, payment card fees do not necessarily reach their socially efficient levels. Hence, thoughtful regulatory intervention regarding merchant fees may still be necessary to raise total economic surplus.

6. Payment innovation

Over the past decade, many innovations in retail payments have emerged. Contactless payments, mobile payments, P2P payments are currently mentioned as the future payment media of a “cashless society”. These innovations will certainly affect the retail payment market in terms of user preferences (regarding the choice of payment instruments) and by reshaping payment processes. Innovations are potentially cost reducing and may increase economic surplus. However, they also raise policy issues, as

¹⁰ See Jonker and Plooij (2012) for an empirical analysis of the tourist test in the Netherlands.

they have implications for the soundness, safety, and efficiency of the retail payment system. Some key drivers for payment innovation are technological change, end-user preferences, and regulatory frameworks. Other endogenous factors are cooperation and standardization. Owing to the network effects inherent in the retail payment market, common standards may help to achieve a necessary critical mass and lower entry barriers. (BIS Report, 2012).

As already mentioned, payment innovation requires cooperation between competing players. This might lead to adverse incentives and lock-in effects. An important question concerns who captures the rents from innovation. This will largely depend on the competitiveness of the payment industry. Pure cost-based approaches to payment pricing may limit incentives to innovate, and payment providers may require years to recoup investments in new payment products. In the end, they may not introduce new products but just upgrade existing rails.

A network good can provide large benefits to providers and users, but network economies can also make efforts to replace old technology difficult. Adoption is often slow. An innovation will be preferred to the existing technology only if sufficient numbers of providers and users adopt it. In such cases, there may be a role for regulation or market intervention to facilitate a transition. However, imposing regulations mandating the use of new technology may impose high costs on some market participants, but alternatively, if the intervention has too light a touch the transition may be delayed or even postponed indefinitely, foregoing its benefits. Where possible, providing for interoperability of the old and new technologies can ease the transition by lowering the cost of adoption. Agents with the largest net benefits adopt first, and as more agents adopt, more network economies move to the new technology, increasing incentives for non-adopters to switch, accelerating adoption (Bauer and Gerdes, 2012).

An important question rises what business model is most apt to encourage innovation among competing market players. As a result of regulatory interventions, drastic reductions of interchange fees may invert the traditional business model for the payments industry from a “merchant-pays” model to a “consumer-pays” model. Evans (2011) argues that moving away from a merchant-pays model is likely to reduce the overall level of innovation in the industry, divert innovation away from the role of payments in transactions and towards improvements for which consumers can be charged non-transaction related fees, and discourage the entry of new payment systems. Naturally, entrepreneurs will always adapt to a new regime and adjust the types of payments innovation they develop accordingly. Nevertheless, the amount of innovation and investment in payments could decline for the simple reason that the amount of profits that payment networks and banks can obtain from the consumer side is less than what it can obtain from the merchant side. In a recent paper, Bourreau and Verdier (2012) qualify this argument by claiming that high interchange fees are only necessary for providing the right incentives to innovate if merchants do not exert strong externalities on consumer adoption.

Not much payment research has yet considered the relationship between payment pricing, competition, and the level and type of innovation. Yet getting innovation right is likely to be far more important than getting prices right. Innovation generates new products that provide considerable improvements in social welfare while changing prices and upgrades for existing products typically leads to marginal improvements in social welfare (Evans, 2011).¹¹

7. Concluding remarks

Payment pricing and competitive efficiency have recently attracted a lot controversy. To date, there is little consensus—neither among policymakers nor economic theorists—on what constitutes an efficient fee

¹¹ In an influential paper, Aghion et. al. (2005) investigate the relationship between competition and innovation. By developing a model where competition discourages laggard firms from innovating but encourages neck-and-neck firms to innovate, they predict an inverted-U relationship. Using panel data, they find strong evidence for this phenomenon.

structure for electronic payments, card-based payments in particular. Appropriate pricing arrangements for payment instruments are a complex matter, since payment networks are subject to large economies of scale and give rise to strong usage and network externalities. These factors have likely resulted in significant concentration in the retail payments industry. Although payment competition may significantly reduce the total price paid by consumers and merchants, it need not improve economic efficiency. Ultimately, the central issue concerns whether the specific circumstances of payment markets are such that public policy or market intervention can be expected to improve economic welfare.

Most policymakers and economists agree that the digitization of payments confers economic benefits. Technological advances in contactless and mobile phone technology have the potential to replace many remaining paper-based transactions. How rapidly payment innovations are introduced and adopted is critically dependent on the long-term profitability of the retail payment system as a whole. However, the rate at which these shifts will occur hinges on the underlying benefits and costs to payment system participants. The regulatory framework is key here. We argue that intervention into payment markets should concentrate on the removal of entry barriers in payment markets and providing greater incentives to adopt efficient payment instruments without stifling private sector investment in more efficient payment technologies over the long term. Moreover, public authorities should encourage the removal of merchant pricing restrictions to improve market transparency.

The payments literature continues to grow. However, there are a few areas in payment economics that deserve more attention. First, what business model is most apt to generate sufficient incentives for future innovation? Second, should governments and central banks step in and start providing payment services and, if so, at what price? Third, who—and to what extent—should pay for fraud containment and distribute the losses when fraud materializes?

Finally, empirical studies about payment system pricing using data from payment networks and providers are still scarce. Such analysis would be helpful in understanding how effective market interventions and regulation were in terms of stated objectives and studying any potential unintended consequences. We hope that recent regulatory changes and regime shifts in different parts of the world will generate rich sets of new data that can be exploited by economists to test how well the theories fit the data.

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1. Call for Contributions

The October 2012 discussion will be based on the proceedings of the 2006 OECD roundtable on Competition and efficient usage of payment cards (DAF/COMP(2006)32), on the 2012 EU Green paper “*Towards an integrated European market for card, internet and mobile payments*” and country written submissions which reflect the authorities’ experience in this area.

The set of questions below is by no means restrictive or comprehensive. Delegations are encouraged to raise and address other issues as well, based on their own experience in this area. Answers to these questions should be provided in an integrated manner rather than question by question. Delegates are invited to focus more particularly on competition issues related to the introduction of new payment technologies.

Structural conditions

Social costs and benefits of different payment systems

Often discussions of the “high” cost of cards assume that cash and check payments are costless, when in fact the social costs of these alternative methods are non-trivial. If card costs are lower than cash, for example, then the impact of policies that deter consumers from using cards may lead to higher social costs for the same transactions. Have any domestic estimates been produced of the relative costs of different payment instruments? Such estimates might take into account the fact that check processing is costly and that making cash available through automated teller machines, for example, requires the building, installation and maintenance of machines, the printing of cash, the distribution of cash to the machines and may give a seignorage benefit to the state.

Exit/entry

To what extent has entry (or exit) occurred in the retail payment systems area in your country? If there has been entry (or exit), has competition from this entry benefited consumers, retailers or others? If entry has not occurred, are there any explicit or implicit barriers to entry?

New technologies

Nascent technologies exist for the Internet and mobile phones, for example, that may permit consumers to make payments without a card platform. New technologies might require or benefit from: ability to check on funds in a consumer’s bank account, ability to withdraw funds from a consumer’s bank account, technological compatibility with merchant terminals and acceptance by merchants. Would it be possible for non-depository institutions to achieve these requirements? Would any changes in regulation be necessary in order to give cost-reducing technologies a chance of success or to promote new technologies with an ownership structure that yielded different incentives from the major bank-led networks?

Fees and charges

Merchant charges

Merchant charges are the charges paid by a merchant for accepting and receiving funds from a consumer's card. Merchant charges are often different for different sizes of transactions and types of merchants. Some observers have suggested that as card usage has expanded, merchant charges have increased rather than fallen; some observers would further argue that this is evidence of market power. Have merchant charges shown any trends over time? For example, as consumer use of cards has increased, have merchant charges fallen? Have the charges increased? Is there any evidence that merchants feel unable to refuse cards?

Interchange fees

Card associations often require that the merchant acquirers pay a fee to the card-issuing institution, a fee that can account for a non-trivial portion of the merchant charge. What is your view as to the value of such fees? What would happen were such fees constrained or limited to 0?

Regulation of fees

To what extent are the fees involved in card transactions regulated? Was the overall system for setting the fees approved by any part of government or based on consultation with government? Is it possible that banks have promoted cards to a large extent because of perceived inadequacies in the fee system for checks and cash? Are debit fees to consumers and merchants regulated? If so, what are the fees? If not, what part of government (if any) would have the authority to institute such regulation?

No-surcharge and no-discount rule

Have "no-surcharge" rules existed in your country, in which a merchant cannot charge a customer using a card more than a customer using cash? Have "no-discount" rules existed in your country in which a merchant cannot charge a customer using cash a discount below the card price? If so, do such rules still exist? What has been your view of such rules?

Cost-based fees

Some governments are seeking the introduction of more cost-based fees and charges. Card companies claim that costs are very difficult to identify in a two-sided market where the platform must attract both consumers and merchants. What is your view of cost-based fees and charges? What would be the impacts of a closer relationship between fees and costs, or even a complete elimination of interchange fees, for example?

Tying

Honour-all-cards rule

Certain payment platforms may later introduce competing payment technologies and platforms but issue them on the same card. If this occurs, they can seek to require that merchants honour all cards issued by the competitor, and may even seek to place their products as higher priority products than those of competitors (e.g., on a card that provides access to multiple transaction platforms.) Has this type of behaviour occurred in your jurisdiction? If so, what are your views of such behaviour?

Distributional effects of merchant fees on non-cardholders

One impact of having constant prices for a good whether it is paid for with cash or card is that the cash users will likely cross-subsidise card users, as the merchant fees will lead merchants to set higher

prices for their goods than otherwise. In your view, does the existence of merchant fees without a surcharge imply that non-cardusers will pay more for their goods, on average, than they otherwise would? Given that the non-cardusers would typically be lower income, does this not imply a subsidy by the lower income to typically higher income cardusers? Do you consider such distributional effects problematic? If so, how might they be addressed?

Information limits

Not only do issuers limit the incentives that merchants can provide to consumers for use of less costly means of payment, they may also limit the extent to which information about card transaction costs can be provided to consumers and others through confidentiality clauses. Do such information limits serve a legitimate business purpose? Do they have the result that consumers, merchants and governments have difficulty assessing and comparing the impact of one payment platform to other payment platforms, particularly across countries?

Membership in joint ventures: Exclusivity and duality

Exclusivity

Card platform joint ventures have, at times, sought to exclude members who issued certain competing cards. This exclusivity has prompted lawsuits alleging antitrust violations by issuers of competing cards. Platforms not based on joint ventures, however, are typically permitted to enter into exclusivity arrangements. Do exclusivity arrangements exist in your country and, if so, how have they developed?

Duality

The boards of two large payment platforms (VISA and MasterCard) historically have had members from card-issuing banks. Because of dual issuing banks (who would issue both VISA and MasterCard products) a large share of banking membership was common between the two organizations. In terms of governance, there was a large convergence of interests. Does this duality of governance exist in your jurisdiction? If so, what is your view towards such duality? Do the interchange fees of the two platforms differ?

Competition law

Competition law application

Many OECD jurisdictions have had competition law cases related to cards. Has your jurisdiction had any such cases? If so, what have been the key issues and what is the current status of the case(s)? How has your jurisdiction treated the issue of two-sided markets in such cases? What have been the areas of focus and the ultimate findings of the finder of facts?

Joint activity by merchants

One of the primary barriers to the development of new payment instruments is the difficulty of ensuring broad merchant acceptance of a new payment system, including appropriate terminal sets. One method of helping to ensure broad merchant participation might be to permit merchants to form a joint venture for the development of a new retail payment instrument. Would such a joint venture be viewed as necessarily a competition law problem, from your perspective? If not, how might such a venture be structured to avoid competition law concerns? Would any activities by such a joint venture raise competition law concerns?

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DAF/COMP(2012)24

SUMMARY OF DISCUSSION

By the Secretariat

The Chair, Frederic Jenny, opened the roundtable on card payments by noting that the discussion and contributions would be organised around four main topics. It would start with a discussion of the developments since the last roundtable on payment systems, followed by a dialogue regarding the implementation of the payment service directive in European countries. Third, they would look at issues related to market structures and barriers to entry, and the way competition works in some countries. Finally, they would discuss innovation, regulation and enforcement issues in a number of countries.

The Chair also noted that this roundtable on competition and payment systems attracted a lot of interest, 25 contributions. He introduced the two experts: Mr Wilko Bolt from the Nederlandsche Bank, and Professor David Evans from Global Economics who both participated into the 2006 discussion on payment systems.

1. Introduction and developments since the 2006 roundtable

The Chair invited Mr Bolt to remind everyone of the background from the first roundtable and also to look at some issues, particularly innovations having arisen since then.

Mr Bolt started by introducing the topic of payment systems that he characterised as being very complex due to the many externalities and interactions between the different players in the system. There has been an ongoing shift in recent times in most Western countries from cash and paper towards electronic payments and this is potentially very beneficial from a social welfare point of view. Since electronic payments, especially card payments, have remained expensive for merchants, there might be a divergence between social and private incentives and there could be a need for regulation. However, regulation may have unintended consequences and competition in payment systems may or may not increase efficiency. Finally, competition in this market is very hard to measure empirically.

Mr Bolt identified several key questions that should be addressed when discussing competition in payment systems.

First, there is the price in question: is the payment market sufficiently transparent? Do end users get the right incentives and do they receive the right price signals? Second, one has to discuss how to encourage innovation. Then, will competition among payment providers, networks, payment instruments really improve efficiency? Finally, if there is a need for regulation, what guidelines can theory offer?

Regarding the pricing question, it is probably well known that society would be better off under the most efficient system. The theory of two-sided markets has shown that side payments, also called interchange fees may be necessary to balance demands on both sides of the market, the demand of the consumers and the merchants. What we have witnessed also is that this may evolve into price differentiation between instruments, when so-called 'no surcharge' rules are abolished it might also lead to price discrimination across merchants. For example, in the Netherlands, the situation was that merchants were surcharging debit cards, which are very cheap in some sense, over cash, while cash is quite expensive. Possibility of surcharging actually made people move back to cash, which is probably not what

is desired. So, one has to be very careful how to surcharge. Now, with regulatory actions, one may have unintended by-effects, which is visible in the US. After the Durbin amendment, included in the Dodd-Frank Act, there were signals that small merchants were worse off instead of being better off. The idea that, by allowing surcharging everything would be fine as these two-sided tensions would be neutralised and the interchange fee would not play a big role anymore, is not necessarily true. If you allow surcharging it may make payment card acceptance almost costless for the merchant because it can pass on immediately the fee to the consumer; but in countries where this was allowed only a few merchants do that actually. The incidence of surcharging is not high even if it is allowed, and there is the real question of why do merchants not surcharge more when they are allowed to do so. It is a complex issue because merchants also benefit from accepting electronic payments in cards and so they absorb part of these costs. This makes the pass-on incomplete and the two-sided tension a real threat again. Competition between merchants may of course try to discipline the pass-through but it will be a very complex mix in the market, a very complex issue of optimality. Allan Shampine (2012) has an interesting paper about an Australian case, where the RBA reduced interchange fees and banned 'no surcharge' rules in 2003 and that has changed the payment structure and the total payment fee on credit cards.

Regarding payment system competition, with competition between merchants, cards networks can exploit the eagerness of merchants to get an edge over their competitors by charging higher interchange fees. This is sometimes called "weak merchants resistance to high fees". Another point from the two-sided theory is that network competition does not necessarily improve the price structure between consumers and merchants and that might not lead to the best outcome. Sometimes competition can lead to very low or even negative prices for consumers if issuers compete too vigorously on their side. Then you get skewed pricing tilt against the merchants and that might not be the best outcome. So, competition might have some unexpected effects in a two-sided market with externalities.

Also, measuring competition especially in the financial sector is very difficult. The data is quite limited and moreover main measures of competition such as HHI, the Herfindahl-Hirschman concentration index, the Lerner index, Panzar-Rosse H-Statistics, seem quite uncorrelated across banks and over time.

Together with Dave Humphrey, Mr Bolt tried to implement a frontier-based method, an old econometric approach to determine relative competition in bank-provided payment services and they found for the US that small banks are among the most but also the least competitive. The very large banks are somewhere in the middle and this points to some location issues and some market segmentation. So, competition authorities should keep in mind that these standard measures sometimes do not really measure competition the way they can in other markets.

Regarding credit, if there is a preference for credit in the market then card networks can try to exploit this. It is another source of income for payment providers but one should ask who pays for it. High finance charges may affect the willingness to pay for consumers, leading to high merchant fees in the market place. So, one has to look very carefully into that as there may be a trade-off between extending the credit to poorer people in the economy and the relation with the merchant fees. A recent report by Scott Schuh from the Boston Fed showed that looking into who is actually paying for the payment system in the US, it tends to be the poorer people who use their credit card in their credit facility, not the wealthier who only use their credit card as a charge card. This is something to keep in mind. Now, when debit and credit cards compete, banks may have an incentive to push credit cards because of their high margins. Probably one would want a segmented market where the high-end merchants accept debit and credit, the middle merchants only accept debit and on the low end, smaller merchants only accept cash. In this way, one could get payment-mix, which is most preferred but might come at a loss.

Finally, co-operation is needed for payment innovation but this co-operation is between competing players. How do you structure that? Who captures the rent? There is a tension between rent and

competition and too much regulation may frustrate innovation and dynamic efficiency in the long run. A cost-based approach may limit incentives to innovate because, if there is too little profitability, bank network issuers may require years to recoup investments and they may not introduce new products but only upgrade the existing rails, which could not be efficient in the long run. Interchange fees may be needed to provide the right incentives to innovate, but this might also depend on the adoption of externalities.¹

Mr Bolt concluded that payment economics is very complex and there is not much consensus yet among economists and policy makers on what constitute the efficient fee structure for electronic payments.

Payment competition may not lead to the most efficient outcome as one may end up with an inefficient price structure due to heavy tilting. Speaking strictly for himself, Mr Bolt said that regulation should be geared towards removing entry barriers in payment markets and banning pricing restrictions across merchants or for merchants. Also, one finds that there is no 'one size fits all' solution and that theory is not enough as one has to look at the facts, in order to corroborate them with elegant theories.

With Professor David Evans concurring with Mr. Bolt about the complexity of payment economics, the Chair gave the floor to the delegate from Portugal who asked which market he believed to be the most relevant when assessing competition issues in a payment card system.

Mr Bolt pointed to a recent case in the Netherlands where he considered that the relevant market for card-based payments did not include remote payment like direct debit and credit transactions. In terms of instruments he would investigate debit versus credit and cash on a domestic market. He concluded that specifying the relevant market is very complex and all kinds of other issues play a role but in his view the demand for cash debit and credit should be considered as well as the suppliers on a national market.

Professor David Evans considered there were two parts to this question. The first is whether one is taking a multi-sided market approach and the second is what other substitutes for cards you might want to consider. Regarding the first part to the question, he noted that, ultimately, in competition policy analysis we are interested in evaluating the impact of whatever it is we are looking at on welfare and the only way to do that in payment cards is to take into account what is happening on all sides of the business, the connection between merchants on the one side and consumers on the other side. So, in terms of market analysis and market definition, one has to focus on the platforms, that is, both the consumer side of that and the merchant side of the market. Whether this is done through the market definition piece of the analysis or through some other aspect, ultimately one needs to make a consumer welfare judgment that takes into account both sides of the platform.

Therefore, regarding point number one, we should be talking about two-sided platforms here and that needs to be the focus of the market definition.

Then comes the question of what competes with payment cards or whatever payment instrument one is looking at. That is an empirical question and the answer is likely to vary by jurisdiction. There is no particular reason to think that that is going to be the same in Portugal, Russia or the United States. However, he thinks that there is a tendency to assume that payment cards do not have any competition from other forms of payments and he always thought that was odd because everyone in the payment card industry thinks they are competing with cash and checks and everyone in the cash business thinks they are competing with cards so it is a little surprising to see a market definition analysis that assumes that there are no competitive constraints whatsoever on cards but ultimately that is an empirical question.

¹ See the recent 2012 paper by Marc Bourreau and Marianne Verdier.

The delegate from Portugal commented that he finds it difficult to reconcile the literature that comes from competition authorities with payment economics. Regarding the recent MasterCard case, he noted that the relevant market was defined by splitting off the merchants, the acquirers, the issuers and the cardholders. He considered, in contrast, that the payment system is an ecosystem and one has to see how card payments interact with the other means of payments and in particular with cash. Regarding the MasterCard decision, when defining the relevant market as the acquirers' domestic market, the conclusion to be reached is that the interchange fee should be zero. But, with the interchange fee set at zero, the system will not develop. As a result one realises that Europe is not the leading payment system in the world and that the innovation occurs in the Middle East, Far East, America but not in Europe.

The Chair thanked the delegate from Portugal and noted that he raised several questions that are going to be touched upon in the course of the discussion. He then gave the floor to the German delegate that wanted to reply to this last comment.

The delegate from Germany pointed out that in the German market, retailers and non-banking service providers developed an innovative card-based payment system with significantly lower costs than bank based products. It was developed to satisfy specific customer needs.

The Chair steered back the conversation to recent developments in addressing competition problems with payment systems. According to their submission, New Zealand brought proceedings against Visa and MasterCard and looked at not only the interchange fee but also the rules that go with it such as the 'no surcharge' rule or the 'no discrimination' rule, and the 'honour all cards' rule. The Chair asked the New Zealand delegate to explain how they analysed those rules, and, in particular, why they did not alter the 'honour all cards' rule and why they had decided that there was no particular issue there.

The delegate from New Zealand responded by outlining the key issues addressed by their investigation into Visa and MasterCard. They focused on the fact that the schemes in the card issuing banks had fixed the interchange fee, which effectively set a floor for the merchants service fee and that the schemes' rules such as 'no surcharge' and 'no discrimination' were anticompetitive because they eliminated the opportunity for merchants to create incentives for issuers to lower the interchange fees. The combined effect of these rules was that scheme banks could collectively set high interchange fees, without fear that consumers would switch to other payment options and merchants could not charge consumers for credit card usage and had to accept the cards. As a result, the high interchange rate would flow through to higher prices for consumers. They also addressed some of the access rules to these schemes and in particular the ones that meant that you had to be an issuer or an acquirer to participate in the scheme.

After initiating proceedings in 2006, in 2009 New Zealand resolved those proceedings through a settlement agreement. It was the delegate's opinion that they were the first to agree to a wide-ranging settlement covering the fees and the scheme rules. The settlement agreement stated that issuers would individually set the interchange fee subject to a maximum set by the schemes but they would also have to publish this on their websites. The intention was to try to increase transparency. The 'no surcharge' and 'no discrimination' rules were not to be applied, the intention being that merchants then could decide whether or not they pass through the interchange fee but they had to disclose this and the cost of the pass had to bear a reasonable relation to the cost. As part of this settlement agreement, there were also some changes to the access rules to enable entry so one did not have to be an issuer and acquirer to participate. As a result of this agreement merchants would be offered unbundled service fees so that merchants would be able to see the elements of the fees, another way of increasing transparency. As part of the settlement agreement, the New Zealand authority undertook to monitor the impact of these changes and so they have been collecting data to try and assess what has been happening in the short, medium and long term. They will be surveying over 3000 merchants to find out how this settlement agreement has impacted on them and they expect the results of this to be available in 2015/2016.

During their investigation they did consider that the ‘honour all cards’ rule was potentially anticompetitive in their statement of claim. However, when taking a holistic approach, they concluded that, by removing the ‘no surcharge’ and the ‘no discrimination’ rules, these would cumulatively remedy most of the competition concerns they had identified. With removal of the ‘no discrimination’ rules, merchants would, for example, be able to steer customers to different cards. Therefore, they hope that the results of settlement agreement will show that this was the right approach to take.

The Chair then turned to Canada where, in 2010, Canada filed a civil application with the Competition Tribunal to strike down ‘no surcharge’ and ‘honour all cards’ rules. The Chair asked about their reaction to the report from New Zealand, how was the situation different and what was the outcome.

The delegate from Canada noted that this particular matter involved ongoing litigation, and so they have been legally advised to stick to their prepared notes and would not be able to engage in the debate with their colleague from New Zealand but would still be able to explain Canada’s position in this particular matter.

Visa and MasterCard are Canada’s two largest credit card networks. Both have an ‘honour all cards’ rule embedded in the rules and operating regulations. The Visa rules state that merchants may not refuse to accept the Visa product that is properly presented for payment and similarly MasterCard rules require merchants to honour all valid MasterCard cards without discrimination when properly presented for payment. Essentially, the ‘honour all cards’ rules require merchants that accept Visa and MasterCard cards as a method of payment to accept all cards within a given brand. It is an all or nothing approach that denies merchants an ability to refuse to accept certain types of credit cards, such as higher-cost premium credit cards. For example because of the ‘honour all cards’ rules, if a merchant accepts a MasterCard core credit card with an acceptance fee of 2%, the merchant does not have the option of refusing the MasterCard super premium World Elite card with an acceptance fee of 4%. Therefore, in Canada, the ‘honour all cards’ rules in combination with the ‘no surcharge’ and ‘no discrimination’ rules have effectively eliminated competition between the two credit cards networks for merchants’ acceptance of their credit cards.

Collectively these anticompetitive rules prohibit merchants from encouraging consumers to consider other low cost methods of payments and result in higher prices for consumers as merchants tend to pass along some or all the high costs that they are forced to pay as a result of these rules. Concern over the anticompetitive effects of these rules prompted the Competition Bureau to file an application with Canada’s Competition Tribunal in December of 2010. The Bureau’s application was filed under the price maintenance provision of the Competition Act. It asserts that the ‘no surcharge’ and ‘honour all cards’ rules were combined to eliminate competition between Visa and MasterCard networks for merchants’ acceptance of their credit cards and resulted in increased costs to businesses and ultimately to consumers.

The Bureau’s application, which seeks an order to prohibiting Visa and MasterCard from implementing and enforcing their anticompetitive rules, was heard by the Tribunal in May of 2012. During the course of the hearing the Bureau argued that eliminating the ‘honour all cards’ rule would enable merchants to make separate acceptance decisions with respect to different types of cards and permit them to selectively refuse premium and super premium cards that carry very high fees. The Bureau believes that the evidence introduced before the Tribunal clearly demonstrates that Visa’s and MasterCard’s ‘honour all cards’ rules in combination with their ‘no surcharge’ and ‘no discrimination’ rules substantially reduce or eliminate the incentive for Visa and MasterCard to lower their card acceptance fees. They also distort price signals provided to customers when they choose to use specific methods of payment at a point of sale and suppress competition between Visa and MasterCard more generally. Although a ruling from the Tribunal is pending, the delegate is hopeful they will issue an order prohibiting each of these rules, thereby restoring competitive forces that have been lacking in the Canadian market.

Professor David Evans thought that it would be useful to get something off the table that would be helpful in calculating the welfare effect of these various interventions. He pointed out that, as the delegate from Canada had stated, it is assumed that the costs of card usage are passed on to merchants. In other cases and regulatory actions the same inference is made, like when the Reserve Bank of Australia insists that all the benefits of the lower interchange fees are passed on to consumers. However, he finds no empirical evidence for that in any of the cases or regulatory interventions he has seen. So, he finds no evidence to support the notion that if you give cross savings to a merchant they will pass on all of those savings to consumers, in terms of payment cards. From the numerous studies by economists, it appears that, on average, merchants will pass on about 50% of cost savings to consumers and that this will depend upon the circumstances. This point is very important to understand what the consumer welfare implications are of these various interventions because, on the one hand, if one reduces the cost to the merchants, there is going to be a benefit to consumers, some type of pass-on effect, but when talking about interchange fees there is also going to be a revenue consequence for the banks since they shall also pass-on that cost to consumers. To know the impact on consumers, one has to take both of those effects into account. As a general comment, therefore, if banks have higher pass-through rate than merchants, in the end consumers are going to lose. So, the ultimate welfare effect depends upon those two numbers and one simply can't assert that merchants are going to pass-through a 100% of the savings because they are not. There is no evidence to support that.

Mr Bolt followed up on what Professor David Evans said by pointing out that, in the Dutch case where surcharges were used to surcharge debit cards, the surcharges were sometimes four times higher than the fee. This shows that retailers also consider how to increase their own margins when they are allowed to surcharge.

The Chair turned to Estonia on a different issue. In 2008, there was a study that was undertaken by the Estonian Competition Authority on multilateral interchange fees. According to their submission, the six main Estonian banks ultimately abandoned the multilateral interchange fee and reverted to a bilateral interchange fee. Is there a causal relationship between the study and the change in practice, were they afraid of what the Estonian Competition Authority was going to say or did the Authority suggest that they should give up and if so why?

The delegate from Estonia confirmed that the Estonian Competition Authority had carried out a study on interchange fees for debit and credit card domestic transactions. In the past, until June 2008, a multilaterally agreed interchange fee of 1% was in force. After the investigation, the fee was cancelled and banks turned to a bilaterally agreed interchange fees practice. The level of interchange fee became a subject of bilateral negotiations between two particular banks, on individual basis. During the proceedings, the banks reduced fees on numerous occasions, from the jointly agreed 1% on average to 0,5% by the end of the study, in 2011. Some banks even agreed on an additional reduction of interchange fees in the future with the increase of card payments in volume. Given that the banks have reduced the fees substantially and made the system more open to competition (since the bilaterally agreed fees are dependent now by each bank's business strategy) the Estonian Competition Authority decided to terminate the proceedings. Their analysis shows that the cost of the existing interchange fees has been carried bilaterally over to the merchants' fees and hopefully over to consumers as well.

The Chair turned to Chinese Taipei, which suggested in its submission that first of all there is no particular limitation on the multilaterally agreed interchange fee but also that if there were bilateral fees then the payment system would not develop as efficiently as it does when it has a possibly high interchange fee. This appeared to contrast with the point of view just presented.

The delegate from Chinese Taipei stated that presently they don't have any restrictions on the interchange fees. The reason for this is the dynamism of their credit card system where they have

36 financial institutes issuing credit cards in Taiwan at this moment and there are more than 33 million cards issued, an average of 3,8 cards per household. The card issuing market is quite competitive, with the top five banks having about 60% of the credit card market and the top bank with a market share of about 18%. The study conducted by the Chinese Taipei FTC a few years ago shows that if the card issuing banks and the acquiring banks were allowed to negotiate freely the interchange fees, the result would be less efficient and not competitive, as this would limit the credit card transactions to a smaller scale with less liquidity. Also, the study found that the establishment of interchange fee was helpful in stabilising the credit card system and the circulation of the credit cards. So, based on a rule of reason, the determination of a uniformed interchange fees was considered as reasonable and necessary. Therefore, at this moment, the interchange fee in Chinese Taipei is negotiated between national credit card centres and the financial information service corporation, both monitored by the financial supervisory commission, and is fixed at 1,5%.

The Chair asked the delegate from Chinese Taipei if there was an explanation for the divergent conclusions from the intervention from Estonia and invited him to comment on this later.

The Chair asked experts if they had any comments on the question of whether bilateral fees are better or worse than multilaterally agreed interchange fees.

Mr Wilko Bolt replied that depending on the number of players, bilaterally agreed fees could be more efficient than multilaterally agreed ones. However, when more issuers are in the market, the transaction costs may make it unfeasible and so multilaterally agreed fees would be preferable.

The delegate from Portugal, referring to the previous presentation by New Zealand, asked about the incidence of surcharge among merchants and the maximum cap on which the interchange fee was based. Was it based on the tourist test or some other indifference arguments? The point being that, in the Netherlands, a recent study found that the tourist test would actually predict the interchange fee to go up in order to maintain the indifference level, since card volumes are increasing significantly and scale effects lead to lower average costs.

The delegate from New Zealand replied that according to early indication, surcharging is certainly happening in New Zealand, and the schemes and merchants are presently negotiating lower merchants' service fees. Regarding the second question, since the investigation report was never made public, one would need to exercise caution when talking about it.

The delegate from Portugal also made the point that, in a small country with three, four or five banks, one can engage in bilateral arrangements, but in Europe with 5000 banks this is no longer possible, as the costs of bilateral arrangements would be too high. This would also create problems for a bank wanting to enter the system, as it would need to make bilateral arrangements with the 5000 existing banks in the system. Therefore, the definition of the relevant market has to be carefully considered, and the ideas that the acquirers' part of the business is a relevant market and that bilateral arrangements in an electronic system are good for the system should be critically questioned.

The Chair turned to another issue, which interested particularly two countries that have opposite views. In Lithuania there was apparently a debate about whether banks legitimately claim to lose money on the issuing of cards and where they argue that the interchange fee is absolutely necessary and presumably should be higher than it is. They also claim that the absence of an interchange fee could lead to higher prices and less investments in new technologies.

The delegate from Lithuania first clarified that the competition authority has not actually performed any studies in the field of retail payment systems. The allegedly co-ordinated behaviours of certain banks

which are currently being investigated, and the payment systems, have only been assessed to the extent it was necessary for the aims of the investigation. Therefore, Lithuania's intervention would rely on the analysis of different payment platforms prepared by the Lithuanian central bank. The Lithuanian issuing market is quite a tight oligopoly as two banks have issued around 80% of all payment cards. Payment by cards has been increasing steadily and, last year, the value of card payments rose by 16%. However, many Lithuanian residents still use their payment cards primarily to withdraw cash from the ATM instead of paying for their purchases. So, in the last year the value of ATM transactions was three times higher than the value of point-of-sale transactions. In general, the cashless payment system in Lithuania can be considered less developed than in many EU countries. It is, therefore, expected that the level of development of the system actually correlates with the level of interchange fees in Lithuania. For instance, in Estonia banks argued that when payment by cards increase in the future they may be able to reduce the interchange fees. The analysis prepared by the Lithuanian central bank actually showed that debit and credit card revenues covered only 75% of cost incurred by banks and 99% of credit cards cost incurred by banks, respectively. A bank also noted that it had considered issuing payment cards but had come to the conclusion that it would be too costly. So, banks in Lithuania claimed that if interchange fees were to be reduced it would not be profitable for banks to issue cards and they would reduce investment in new technologies. The Lithuanian Competition Authority found no reason to question these arguments given the analysis from their central bank.

Mr Bolt asked them about the degree of merchants' acceptance of cards.

The delegate from Lithuania replied that the coverage was very wide in Lithuania and that only some very small shops didn't have the possibility to accept cards.

The Chair then moved to Latvia, where according to its contribution, the Latvian Competition Commission has found that banks had sufficient incentives to promote the issuing of cards without additional stimulations such as interchange fees.

The delegate from Latvia responded that, during the investigation regarding the multilateral agreement between all Latvian banks about the MIF (the multilateral interchange fee for domestic card payments) they repeatedly asked the banks to provide evidence that the benefits of the agreement could outweigh the restrictions to competition but could not obtain any information from the banks. At the end of their investigation, they found that the agreement was in place for very long time and during all this time (since 2004) the level of interchange fees did not change. The Latvian competition Council set a fine for a total of 7 800 000 Euros to all banks. The banks' own view was that card usage is so widespread that they need to issue cards in order to remain competitive. They see the issuing of cards as an instrument for attracting consumers. If MIF were set to zero, banks would like to increase cards' annual fees, but these should be kept in check by competition between banks. It is also plausible that banks would cross-subsidise card issuing as they do for other services, since it is an important tool for competition. At this stage, some of the banks appealed their decision in court and some of the banks already paid the fine because they are in a bankruptcy procedure and the bankruptcy administrators just paid the fine. The next hearing in court was set for the beginning of October of 2012 but since the Competition Council is at the stage of discussions about administrative agreement with some banks, this has been postponed for a few months.

2. The implementation of the Payment Services Directive in Europe

The Chair then turned to the implementation of the Payment Service Directive in Europe and some of its consequences in EC countries. He asked the EC to make an initial presentation on the payment service directive.

The delegate from the European Union stated that they would be looking at both the regulatory and enforcement aspects. To begin, payments are considered as an important activity for banks because they represent about 1% of GDP, EUR 130 billion in the EU and constitute 25% of bank revenue. In the EU in addition to the national dimension of payments, there is also the cross-border dimension to make the internal market function, and it is known that one of the big obstacles for the development of online commerce are payment systems. It is a complicated issue because it requires co-operation between competitors and it is a two-sided or multisided market that bears risks of anticompetitive agreements of various sorts.

Regarding the regulatory and enforcement practice, since the last roundtable in 2006, the Commission conducted a sector inquiry into retail banking, including payments, in 2007. This was followed by a number of individual cases (the “Carte Bancaire Decision”, which dealt with the entry of new card issuers, the Visa/Morgan Stanley Decision, where Visa was excluding Morgan Stanley from the acquiring markets and the MasterCard Decision that found that the MIF for cross-border consumer transactions restricted competition by raising the level of merchants’ service charges). This was followed by unilateral undertakings by MasterCard setting the MIFs for debit and credit at 0.2-0.3 respectively and through an individual action undertaken against Visa. Visa has committed to 0.2 for the debit MIFs and the Commission is currently issuing a supplementary statement of objection. The Commission also opened a case against the European Payments Council, a body that brings together various banks with the intention of working on electronic payments inside Europe but was at the risk of excluding other payment service providers.

On the regulatory side, the 2007 Payment Services Directive allowed for the notion of a payment institution (i.e. not necessarily banks) to provide payment services but also set down rules on rebates and surcharging, basically allowing merchants to offer rebates and leaving it to the Member States whether to prohibit surcharging or not. With regards to cross-border payments, there was a first regulation in 2009 that capped the MIFs for direct debits. This was followed by the SEPA (Single Euro Payment Area) regulation in the European payment area. This regulation provided for the replacement of national credit transfer and direct debit with EU-wide schemes as of 2014 and also prohibited MIFs for direct debits (to note that 21 Member States already have direct debit schemes without MIFs).

Regarding enforcement and focusing on the MasterCard case, there was a ruling by the General Court of the EU in May 2012 on the MasterCard case that fully supported the assessment of the Commission. According to the ruling, first, (i) MIFs are considered a decision of an association of undertakings even though the legal structure, the legal form of MasterCard has changed in the meanwhile; secondly (ii) MIFs are not objectively necessary for the operation of a four party scheme, and indeed there are examples of four party schemes that are operating without a MIF and a payment system could operate if necessary with a less restrictive fee and there were cases such as in Australia where significant reduction of the MIF levels did not lead to a decrease in card use. So, issuing banks can have lower costs, receive additional revenue and would not stop issuing cards if MIFs did not exist. The Court also found that MIFs are both a restriction by object and by effect, although the Court did not exclude that MIFs can be exempted under Article 101(3), which gives them the burden of proof that there is an efficiency gain involved in setting MIFs and that the benefits are passed on to consumers. An important role in reaching the commitments that the Commission has with Visa and the undertakings from MasterCard were based on what Wilko Bolt called the ‘tourist test’ or the ‘merchant indifference test’, which says that the cost of the merchants of card acceptance should not exceed the cost of cash acceptance. This is of course an empirical question and so the rates offered in the unilateral undertakings by MasterCard were based on studies by central banks including the Dutch central bank and subsequent calculations made by the consultants of MasterCard. There is a theoretical argument that the application of the merchant indifference test (MIT) can lead to an efficient outcome but, as Wilko Bolt was saying, when the use of cards is very widespread the application

of MIT may actually drive up the MIF, which is not an efficient and desirable outcome. Ultimately, the application of MIT should lead to higher card acceptance.

Therefore, a MIF is not necessarily needed if merchants can steer a customer to cards and this also has implications for issues like surcharging and the ‘honour all cards’ rule.

In terms of policy initiatives, the Commission has launched a green paper on cards, mobile and Internet payments and launched a consultation. This has proved to be not just a regulatory exercise but also very technical as it has involved many services within the Commission. The Commission has taken a holistic approach to this issue with the ultimate objective that there should be no distinction between cross-border and domestic payments. This green paper has proposed a multifaceted action that could consist not only of regulation but also of setting standards and the crucial issue of access to bank account information for third parties, i.e. payment services, providers that are not banks. The EC delegate was of the opinion that there are secure ways of ensuring that other payment service providers can get access to bank account information in order to process payments, in particular in electronic form.

Finally, regarding the next steps, the Commission will look at the harmonisation of surcharging and the rules on surcharging. It will also propose modifications to the Payment Services Directive and the regulation of MIFs, by doing an impact assessment. In that context, its ongoing survey on the merchant indifference test in the context of the undertakings with MasterCard and Visa might play a role in the analysis.

The Chair thanked the Commission for the presentation and gave the floor to Mr Bolt.

Mr Bolt asked if the harmonisation of surcharging was meant across countries or across instruments. He also raised the question of whether the Commission is not afraid that excess of surcharging may occur and that consumers will be inefficiently steered back to cash, since cash is never surcharged and that there would be a risk of a “war on cash”. He also wanted to comment on the difference between discounts or surcharges. There is a fundamental difference between discounting or rebates and surcharging and referred to a paper by Oz Shy and Tamas Briglevics (2012) from the Boston Fed on this difference between discounting and surcharging and the ability to steer consumers to an instrument.

The Chair invited Professor David Evans to comment on these points. He noted that payment is a very important part of the micro-economy and macro-economy, and regulating payments is an important thing for society to get right. He questioned whether Article 101 was the right intellectual framework for coming up with the right prices in this area and the right balance between cash and payment cards. He did not think that anyone reading the MasterCard decision from the European General Court and the analysis would come to the conclusion that that was the right way to think about how to actually regulate such an important thing in society. He did not think that Article 101 is capable of coming up with the right answer. He thought that this raised a general discussion of whether competition authorities are the right entities to be regulating payments in society.

The second point he wanted to make was that economists know that the interchange fee implicit in the merchants’ indifference test is too low. The originators of the merchants’ indifference test were Rochet and Tirole and there is an interesting paper by Jean Tirole from 2011, where he explains why the MIT is merely a lower bound approximation for what the right answer might be. Therefore, he thought that using the merchants’ indifference test as the regulatory framework seems like a surprising way to want to do this.

The delegate from the European Union replied that, when he talked about harmonisation of surcharging, he meant setting the rules because currently this is left to the Member States. The harmonisation of surcharging could be done, for instance, by differentiating between different cards and

setting a number of rules for that. He agreed with the point about the risk of return to cash but that was not primarily the intention there. He thought that one of the reasons why merchants have not been using the surcharging had to do with psychological effects. He agreed that rebates and surcharges, although they may have the same impact on relative prices, in practice may not operate equally and therefore should be looked at separately.

As regards to the comments from David Evans, he thought the word ‘regulate’ should be understood properly. The point being, regulation is the result of a regulatory or legislative proposal, which is a normative type of way of potentially setting MIFs, whereas the use of 101(3) is done case by case and it is left to the banks or payment services providers and should not be called regulation. Therefore, if there is no regulation to set MIFs, then according to what the Court has said it is up to banks to come up with justifications for setting MIFs and that is what 101(3) is doing. If we regulated it by setting a cap that would be different so the outcome of the process goes in the direction proposed by Professor David Evans, namely that it is too important to leave it to banks and give it to the legislator. Regarding the use of the MIT, the Commission was trying to import a concept designed by economists but they would be prepared to take another look at it if it is not the right measure. Finally, they were already aware of the potential weaknesses of relying on the MIT and their study into the matter is continuing and will look at the limitations of the merchants’ indifference test when coming to up with a regulatory proposal.

The Chair then turned to the topic of surcharging and introduced Romania that had decided to forbid surcharging for payment cards based on the fact that this prohibition would enhance competition but also lead to a more efficient use of payment instruments. The Chair asked them how they had come to the conclusion that preventing surcharging would in fact lead to a more efficient use of payment systems.

The delegate from Romania noted that, as part of a sector inquiry opened by the Romanian Competition Council in February 2011, a survey was carried out targeted at bank members of Visa and MasterCard, which issue and accept payment cards in Romania, 22 merchants operating in different fields and also the international organisations, Visa and MasterCard. The Authority found that one of the reasons why the merchants preferred not to apply price differentials is that merchants have to recalculate the price according to the payment media and this makes the execution of the payments longer. Another reason for refraining from surcharging for the main merchants is the risk of moving to cash (as mentioned by Mr Bolt): it is a high risk in Romania even if card acceptance is quite widespread today. Last but not least, the merchants surveyed argued that surcharging might be limited to certain business segments such as ticket agencies for online events, e-commerce, travel agencies and the airline industry where the risk of fraud is higher. As a general preliminary conclusion, the Authority found that a ‘no surcharge’ rule may prohibit merchants from establishing prices that are different depending on the method of payment but at the same time the answers from the merchants show very clearly that the decision to ban or to allow surcharging involves a complex trade-off between considerations in the field of efficiency, consumer protection, transparency and competition that would receive careful examination by the Romanian Competition Council.

The Chair pointed out that a different solution was chosen by Denmark which has a complex system called “the split system” where there are different surcharging rules for debit and credit cards, and physical and Internet transactions. He asked why this solution was chosen by Denmark.

The delegate from Denmark noticed at the outset that Denmark is one of the countries where credit card payments are more widely used. This is largely due to the fact that, in 1984, a national debit card, the Dankort, was introduced by way of agreement between the banks. This was done also with political involvement since for more than 15 years the merchants’ service charge relating to this particular card has been regulated. That particular national card is by far the most widely used and it is possible to combine it with an international card. This means that international cards are not that important in the Danish payment

card market. A survey conducted by the national bank showed that the Dankort is by far the most cost-efficient payment instrument (also compared to cash) due to the large number of payments done in this system. The payment system and the setting of fees are regulated by the Directive but also by the national implementation in the Danish Payment Service Act. The Act regulates merchants' service charges so that merchants as a whole can only pay half of the cost of the system. The Act also regulates merchants' payments to be related to how many transactions they have. They were currently conducting an investigation as to the setting of merchant service charges regarding Dankort in non-physical trade, in order to evaluate whether these fees were in accordance with the general fee clause in the Payment Service Act.

Regarding the question raised by the Chair, in Denmark the split model was recently introduced: the regulation of both physical and non-physical trade is split as well as debit cards as opposed to credit cards. The reason was that the former regulation was in violation of the Directive. They had no uniform rules for domestic and foreign issued payment cards. The split between physical and non-physical trade was driven by a political wish of avoiding surcharges in the physical trade, due to anticipated problems, while allowing for surcharges in the non-physical trade. The rules were such that one could not put surcharges on the use of debit cards but merchants were allowed to surcharge the use of credit cards and that gave them an incentive to direct customers towards the most cost-efficient cards. Another change was that there is now the general rule that implies that the surcharges cannot exceed the fees that merchants actually pay themselves, so that they don't overcharge consumers, as opposed to the price caps on domestic international payment cards that existed before. Given that this was a recent regulation, they have not yet made a full evaluation but they found that the new regulation gave more incentives to direct consumers towards more cost-efficient payment cards and they will closely monitor the implications of this new regulation and will continue to evaluate the development of merchants' service charges.

In response to a question from Mr. Bolt regarding the nature of the fee for the merchants' service charge for Dankort in the physical trade, the delegate from Denmark confirmed that it is an annual fee but that for non-physical trade, they have a positive per transaction fee, which is flat but gets a little bit higher with the value of payment.

Mr Bolt then expressed surprised to find that credit cards are much more expensive in terms of social cost and wanted to know what makes a credit card so much more expensive inherently than a debit card.

The delegate from Denmark noted that these results came from a study conducted by the national bank. The very low cost of the Dankort should be due to the fact that all adults in Denmark have a Dankort, i.e. its widespread use. Therefore, the correct comparison should be between international debit and credit cards.

Professor David Evans responded by pointing out that the European central bank had a study that also concluded that the social cost of credit cards was slightly higher than the social cost of the debit cards. He did not know why this was so but suspected it could be allocation of fraud cost.

The Chair then turned to Norway, which has a different system where the card schemes are prohibited from denying the possibility of surcharge. He found that Norway raised an interesting question since it seemed that the surcharge was not so prevalent except in the Internet payment system. He wanted to know whether there was an explanation as to why it is that, when the surcharge is possible, retailers don't use this possibility and whether this could mean that the whole issue on the prohibition of surcharges should go away as it does not have much importance in real life.

The delegate from Norway gave a short overview of the Norwegian payment card system. In Norway, there is a widely used national card payment system since the 1980s called BankAxept. 82% of the number of transactions is done using this card. The Norwegian national bank conducted a survey in 2008 that

showed that the social cost of these cards is significantly lower than the cost of international cards. The Norwegian government implemented the Payment Service Directive and harmonised it with Norwegian law and opted to prohibit the 'no surcharge' rule. As a result, card schemes operating in Norway could no longer prevent the merchants to pass on the merchants' card fees to card holders. The prohibition was implemented into Norwegian law through the Norwegian Finance Agreement Act and came into effect on 1 November 2009. To analyse the effect of the new legislation, the Norwegian Competition Authority prepared a report to the Finance Department in 2012. Based on answers of acquirers surveyed for the report, it was noted that there is a very low penetration of surcharging among the merchants in Norway.

There are several reasons for this low incidence of surcharging. First of all, the BankAxept scheme in Norway has been operating with high card usage, without MIFs and with very low costs both for cardholders and merchants. As a result, surcharging has not been widely used historically in Norway. Second, the providers of EFTPOS terminals in Norway have been very slow in developing and implementing surcharging options in the software to the terminals. Third, although the largest terminal provider in Norway, NETS, had informed the NCA that they now have this option, one would still need to make specific configurations into each terminal to make this software option available for the merchants. Fourth, the report also revealed that merchants still find it costly to implement and arrange an efficient pricing system for price differentiation. Finally, due to competition among the merchants, there seems to be a first-mover disadvantage. For instance, when SAS, the largest airline in Norway that is co-owned by the Scandinavian States, announced earlier this year that they would introduce surcharging, it caused a lot of negative publicity and they now have withdrawn this plan. Also, the largest grocery company in Norway, Norges Gruppen signalled that they would like to introduce surcharging if the usage of international cards reached some critical level. This was mainly due to their plans to introduce a communication system to their terminals.

The delegate from Portugal referring back to the difference between debit and credit interchange fees thought the reason was the risk premium, given that default rights in credit cards are higher, while in the debit cards there are no default rights in principle. He also questioned if there should be some difference between normal and differed debit cards, given that the latter can also have some risks. Finally, he questioned why the Commission set the interchange fees at 0.2 for debit and 0.3 for credit cards, where the difference would not be enough to account for the risk premium in a credit reserve.

Mr Bolt replied that it was not completely true that debit cards did not carry a default risk. There was, in some countries like the US and the Netherlands, the possibility of overdrafting with your debit card, which would lead to some default risk, although smaller, than for credit cards.

Regarding the presentation from Norway, he pointed out that, given their payments statistics for the last 20 years, it would be a great place to be a researcher. Regarding surcharging, he always understood that in Denmark and Norway, consumers are already priced by the banks themselves because, when they go to an ATM outside opening hours or if they use a machine from a different bank they have to pay a fee, while in many countries ATMs are almost always for free. He wondered if that system was still working and whether this meant that, with surcharging, the consumer actually pays two prices, one for the merchant and another to the bank.

The delegate from Norway replied that this was still the case: several - not all - banks charge a fee for using your card in the ATM after hours or in another bank's ATM. He pointed out, however, that the largest amount of cash withdrawals is made over-the-counter in ordinary stores with cash-back and that comes without any fees.

The Chair thanked everybody for their interventions and steered the discussion toward the consequences of the European Commission's Visa and MasterCard decisions at the level of European

countries. This was an issue raised by the contribution from Hungary, which suggests that one of the consequences of the Commission's decision of 2010 against Visa was that Visa had to introduce a limit to the weighted average of its domestic debit interchange fees in countries like Hungary where it was setting these fees. The contribution argued that this had created an uneven playing field and that there had been some competition problems resulting from this, basically because MasterCard was not subject to the same constraint. He wanted to know how Hungary had dealt with this issue.

The delegate from Hungary started by introducing the situation in their country. The Hungarian banks first decided to abandon their interbank agreement on domestic interchange fees after the Hungarian Competition Authority started proceedings against them. In 2009, MasterCard and Visa decided to introduce domestic Hungarian interchange fees for the market. The European Commission had separate proceedings against MasterCard and Visa and in the MasterCard case the result was a cap on cross-border MIFs that did not affect their domestic interchange fees. In the case of Visa debit cards, the Commission decided to accept Visa's commitments and a cap was introduced for both Visa's cross-border MIFs and Visa's domestic debit card MIFs. As a result, in Hungary there was a weighted average of debit interchange fees in the Visa system of around 0.2%, compared to the weighted average of MasterCard domestic interchange fees of 0.8%. This significant difference was due to the fact that Visa had a cap on its domestic interchange fees while MasterCard did not face such a cap. Now, as interchange fees are the main source of revenues in the payment card system, Hungarian banks were interested in having a higher interchange fee. As a result, they started migrating their portfolios from Visa to MasterCard. Visa was arguing that it could not compete with MasterCard in the Hungarian market because of the lack of level playing field. Given MasterCard's share of more than 75% of the Hungarian market, the Hungarian competition authority decided to initiate proceedings against MasterCard in order to investigate whether MasterCard used its dominant position in the Hungarian market to abusively foreclose the market through its interchange fees.

This is an on-going case, proceedings were initiated in June 2012, and so the delegate could not reveal many details about the case apart from the fact that it was being looked at from an abuse of dominant position perspective.

The Chair gave the floor to Poland where there was an attempt by the National Bank of Poland to broker an agreement on interchange fees in October 2011. However, MasterCard decided to abandon this discussion for fear of the European Commission's reaction to any multilateral discussion on the interchange fee. As a result, the agreement that the national bank was trying to procure did not come to fruition. The Chair asked Poland to give more background on this situation. What was the National Bank trying to achieve, why did MasterCard decide to leave the agreement and what were the consequences?

The delegate from Poland summarised the long story that started in 2002 with a complaint from a merchants' organisation, which led to an investigation that reached a decision in 2006. The multilateral interchange fees were found to be in breach of the Polish competition law. The decision led to a long debate in Court. The Court decided to suspend proceedings awaiting the final judgment in the EC MasterCard case. In light of this uncertainty, the National Bank of Poland decided to broker an agreement because the issue of high interchange fees was growing more and more problematic. The National Bank of Poland gathered all stakeholders at one table: the representatives of merchants, issuing banks, both major card schemes, as well as consumers' organisations and acquirers, with the goal of lowering interchange fees in order to expand network acceptance. MasterCard expressed strong reservations regarding this working group because they were mindful that such contacts among competitors might be construed as in breach of competition law. They were not afraid of the European Commission but they were afraid of the Polish Competition Authority. The delegate thought it was difficult to say to what extent this was a strategic move or not. As a result, after having gone through all that negotiation and discussion on the level of interchange fees, there was a proposal from the National Bank of Poland to lower the MIF, with some

ancillary conditions, like making the market more transparent and promoting cashless payments. However, because of MasterCard's intransigence, no agreement was reached. Politicians started intervening and there were several drafts of legislative proposals in the Parliament attempting to cap either the interchange fees or the merchants' service charges.

3. Market structure, barriers to entry and competition

The Chair Frederic Jenny moved the discussion to the different structure of payment systems and their specific competition issues.

He gave the floor to Israel, where there is a highly concentrated system, with a joint venture between the main banks operating the only credit exchange system in the country, which of course raised some specific competition concerns.

The delegate from Israel explained that the banking sector in Israel is highly concentrated: the five largest banking groups control over 90% of the retail banking market and the three credit card companies that issue and acquire credit cards are controlled by the four largest banks. Isracard is controlled by Bank Hapoalim, Leumi-Card by Bank Leumi, CAL by the Discount Bank and the International Bank, jointly. They substantially reduced the interchange fees in Israel from 1.38% in 1998 to 0.7% by 2014 and they don't allow a 'no surcharge' prohibition. A joint venture among the five largest banks, Shva, was established in 1979 and it controls the only credit card switch and the only ATM switch and it also owns ATMs with a substantial share of the cash withdrawals. This raised three main issues. First, what to do with the monopoly switch of credit cards and ATMs. Second, what to do about the fact that these switches are controlled by the banks, who in turn own the credit card companies, which raises issues about vertical integration that could inhibit entry into the credit cards market and the banking market. Third, does Shva's control of ATMs soften competition among the ATM outlets in Israel as the owners of Shva also operate their own ATMs. The Israeli Competition Authority received various complaints regarding the connection fees that Shva charged entities to connect to the credit card switch. According to the conditions set by the antitrust authority in its exemption of 2008, Shva was to grant open access. It was allowed to charge connection fees and, in case of disagreement, the dispute would go to an arbitrator. But since 2008 various companies have tried to connect to Shva with no success. For example, an international bank wanted to enter the Israeli credit card market but Shva wanted to charge this international bank its historical cost of establishing the system and eventually the bank decided not to enter the Israeli credit card market. Also, there were complaints about long delays in connecting to Shva's system. This raised suspicions of blocking entry and protecting the incumbent credit card companies that own Shva.

In renewing the exemption granted to Shva in 2008, the Israeli Competition Authority found that there was no justification for charging new entrants Shva's historical costs of establishing the system since these costs had been recouped by Shva a long time ago. So, the Competition Authority granted Shva a temporary exemption for a further six months but decided to re-examine the above competition issues. In particular, they decided to examine whether they could create competition among credit card switches in Israel and whether the switch currently owned by Shva should be owned by the banks, given the vertical integration issues this raises. They also demanded that Shva give up its ATM machines to an independent entity, because they found that the fact that Shva owned these ATMs while competing with the banks' independent ATMs could substantially soften competition between the ATM outlets.

The Chair then turned to Germany where there is a widely used national debit card scheme, Girocard, and an electronic direct debit system, ELV, which was mainly developed outside the banking community. Recently, in 2011, The Bundeskartellamt opened proceedings against the main banking association in Germany, which offers electronic cash services and there were issues about the viability of ELV. So, he

wanted to know something about the structure of the German market, and the competitive issue related with ELV.

The delegate from Germany started by pointing out that, although credit cards are used in Germany, they have a smaller market share of about 25% of all payments because customers consider them to be too expensive compared to the other systems. There are two other systems. First, there is the Girocard (electronic cash) system that has been the leading card payment system in Germany after its introduction around 1990 by the four main German banking associations. It allows consumers to pay with a debit card at a point of sale by using their PIN number. The merchant who is accepting the Girocard pays a fee to the issuing bank; the petrol sector got a special rate because they opposed the system at a certain moment. There is a 'no surcharge' obligation [ended 1st of January 2013] for the merchant and the 'honour all banks' rule is also in place. As part of the co-badging scheme, Girocard also carries the debit logo of one of the international card organisations which enables its use abroad. For payments made in Germany there is the rule of precedence in favour of the use of the debit card system, the Girocard. The rule of precedence reduces competition between methods of payments. Relatively new is the possibility to use the Girocard directly within the EAPS, the Euro Alliance of Payment Systems, a network of national debit card schemes in Europe.

The second scheme is the ELV direct debit authorisation system. It was mainly developed by providers of technical processing services and not by banks. This system also uses the debit cards but the customer authorises the retailer to withdraw a specific amount from his account with his signature. The debit card is only used to extract the necessary data on bank account and bank identification code. The system offers more choice and the possibility to save cost for the card accepters as the providers of this system have developed tailored product modifications to cater for specific needs of specific cardholders and accepters, like the preliminary examination of possible default risks and payment guaranties. Presently, the market share of Girocard in Germany was around 50%, whereas the ELV system had around 25%. Germany was mainly concerned that the Single Euro Payment Area should be flexible enough to allow the clearing and settlement of the ELV transactions and when setting such European formats they would like to make sure that the use of products like the ELV system was not hindered by inappropriate formulation of data record requirements. Germany's key point was that with the unification processes in the European Union, there should be enough flexibility for those competitive forces that were already in place.

Mr Bolt asked if the direct debit scheme was for point of sale payments because in the Netherlands direct debits are used for remote payments, like recurring payment to your health care insurance or gas and electricity payments but they do not use direct debit to pay at the counter? Also, what is the fee structure for the ELV system? Is there an interchange fee there on the direct debit or is it operated without a side payment?

Germany confirmed that ELV is used for point of sale payments. Therefore, a customer in a shop would normally not realise which payment system he is paying with. He would just notice that sometimes he is asked for his PIN and sometimes for his signature. The signature based ELV-system is the direct debit scheme. Both, Girocard and ELV do not have the four-party-architecture of international payment systems like MasterCard and Visa, and accordingly, they do not have an interchange fee. When a transaction is routed to Girocard, the merchant has to pay an ad valorem fee to the issuing bank. This merchant fee is *collectively* set by the banking associations which operate the Girocard system. In ELV, the merchants *individually* negotiate the fee they have to pay to their service providers for payment authorisation and guarantee. This fee is significantly lower than the merchant fee in the Girocard system. It can also be observed that in some cases banking associations agreed to lower the fee in the Girocard system due to competitive pressure from ELV.

Germany confirmed that although technical providers developed the ELV system, retailers also were also an important driving force for its creation.

The Chair then asked Switzerland to report on an interesting case they had concerning MasterCard in 2011, when MasterCard decided to introduce an interchange fee on its debit cards, Maestro and debit MasterCard. He was interested in the analysis of the Competition Commission and in the argument presented in favour of creating this interchange fee on a system that did not have one previously.

The delegate from Switzerland started by clarifying that they do not have a MIF for Maestro, the largest debit card network in their country. In 2004, for the first time, the Swiss issuers and acquirers of Maestro asked the Swiss Competition Commission to introduce a MIF. At that time, the Competition Commission explained that if a MIF were introduced they would immediately launch an investigation for that reason, the issuers and acquirers did not introduce a MIF.

In 2009, Visa asked to have a MIF for its debit card V-PAY. The Competition Commission found that since it was a new product that would be able to compete against the major player in the market, the Maestro card, they would not launch an investigation into the interchange fees for the introduction phase of the new card of three years as long as V-PAY did not exceed 15% market share and did not have a MIF above 2%. Following that decision, MasterCard in 2011 asked for the introduction of a MIF not just for Maestro but also for a new debit card, still unknown in Switzerland, the debit MasterCard. The Competition Commission ran a different analysis for Maestro and for the debit MasterCard. They found that given that the Maestro system was by far the largest debit card system in Switzerland and it faced no real competition in the market, there was no economic justification to introduce a MIF for Maestro and thus it would lead to an investigation by the CC. Regarding debit MasterCard, the CC concluded that, as with the case of V-PAY, this was about the entry of a new debit card in the market and decided not to launch an investigation in the introduction phase of three years as long as the card did not exceed 15% market share and did not have a MIF above 2%. An added requirement was that MasterCard could not invite its issuers and acquirers to adopt the new card in place of the old Maestro card. As a result, Switzerland currently does not have a MIF for Maestro, the largest debit system but has tolerated a MIF for the new cards V-PAY and debit MasterCard under certain conditions.

The Chair then asked if Switzerland was not concerned that its decisions could lead to anti-competitive behaviour by the new entrants to try and remain under 15% market share in order to keep their MIF.

The delegate from Switzerland replied that the 15% market share was not a threshold after which their MIF would automatically be considered illegal but it was a point at which the CC could decide to open an investigation into the impact of the MIF in the market.

Mr Bolt had a question for Switzerland regarding why, no national debit card scheme had been developed in Switzerland, unlike many other European countries such as Sweden, Denmark, Norway, Holland and Belgium. Could this be explained by Switzerland having the Maestro debit card?

Switzerland replied that, historically that was the case. They had a domestic system for the national transactions and Maestro was used for international transactions. From 2005, MasterCard united everything into a single system, Maestro.

4. Innovation, regulation and other enforcement issues

The Chair introduced the last part of the discussion on innovation, regulation and other enforcement issues, giving the floor to Professor David Evans.

Professor David Evans began by discussing the role of the consumer in the competition analysis because he thought that, to some extent, the consumer tends to be forgotten in this analysis. With that in mind, he said he wanted to make four brief points. The first one was connected to a point previously made during the day: when the interchange fee is reduced to the merchant, the revenue that the bank is getting will be reduced and this will have consequences for the consumer in two ways: first, when faced with a one euro reduction in the MIF, the merchants will keep a part of that and they are going to pass-on another part to the consumer in the form of lower prices; second, the bank will take a profit hit by losing a euro of interchange fees, and will recover some of that loss from the consumers. Therefore, in order to know the impact on consumers one needs to take both of those sides into account. If the pass-through rates are the same then the consumers get on one side what they lose on the other side. However, if the bank's pass-through rate is higher than the merchant's then the consumer loses more on the bank side than they gain on the merchant side and vice-versa. So that really needs to be investigated for all these cases if one wants to know what actually happens to consumers' welfare and what one knows regarding pass-through rates.

Looking at the studies done by economists, one finds that they estimate merchant's pass-through rates that are all over the place but that the average is around 50%. The studies on the bank side have found that pass-through rates range from something like 70-80% to more than a 100%, with a medium of around 80%. So, if you believe those numbers, the merchants are passing through 50%, the banks are passing on 80%, thus the banks are taking a partial hit to profits, the merchants are gaining and the loss to the consumer is the difference between 80 and 50%. One could debate those numbers but that is basically the analysis that needs to be done and the basic conclusion from those studies is that you cannot assume that merchants pass through 100% nor can you assume that banks take a full hit in profit.

Looking at the US situation, they have debit card interchange fee regulations because merchants went to Congress and lobbied for it, not as a result of a competition authority intervention. So, one could argue about whether there is a market failure on the card system side. One should also worry about whether there is, in effect, merchants' lobbying in order to lower the interchange fees for themselves thus resulting in a potentially a monopsonistic pricing. By concentrating too much on merchants' side of the story, we could be forgetting about the consumer. He also thinks that consumers tend to be forgotten when discussing the rules that card systems adopt and impose upon the merchants. Therefore, if merchants can impose surcharges, they may start doing it in a discriminatory way and there is evidence that, when they can, merchants actually engage in price discrimination and charge more than the cost, something that a sensible card system may prefer not to have.

The final point regarding the consumer was the tendency to focus on the cost of payments. He argued that, while everyone prepares studies about the costs of payments to the society or to merchants, like the recent study from the European Central Bank, the only way to understand what the efficient solution is for payments - whether we should be having more electronic payments, more cash payments, more checks payments, more debit, more credit - from a social welfare standpoint, is to be both looking at the cost and the benefit side, and looking at both the merchant side and looking at the consumer side. So, although cash may be really cheap for merchants, for consumers, on the other hand, in Norway, or in Boston in February, it may be found to be costly to get cash from ATMs. He argued that the studies fail to calculate the benefit that consumers get from different payment instruments and the value that they give to paying with debit or credit cards. Those benefits need to be incorporated into the calculation.

He found it disappointing to observe that all parties - banks, card associations or competition authorities - have these theoretical discussions about two-sided markets with very little empirical work that can educate this discussion and provide something that is close to the right answer. He argued that we do not have good studies that look into both costs and benefits for payments and as a result of that when we start talking about whether we should be having more debit cards or credit cards or whether interchange fees should be reduced, we don't know the consequences of that because we don't know the social welfare

calculation for the different payment instruments. He finished by saying that he thought the consumer needed to be explicitly introduced into these discussions and their interests needed to be balanced against the interest of merchants in order to come up with the right answer.

Mr Bolt agreed with a lot of what Professor David Evans said in particular about how it is not only costs but also benefits that drive payment behaviour. He deferred to Professor David Evans on the topic of regulatory capture and whether merchants really engage in getting competition authorities on their side as he was not so sure about that happening.

The European Commission delegate disagreed slightly on some of the points regarding the issue of pass-through. They have done a sector inquiry into retail banking and had a focus on payments and have found that the pass-through from banks was actually very small, 20% at maximum. They also found that competition between merchants is much fiercer than competition between banks. Their concern for the consumer comes from the fact that a MIF is a hidden fee and that the consumer does not know that these fees exist and does not know how high it is. Moreover, even if he does know that it exists he cannot do anything about it. So, would it not be better actually to do away with the MIF to give the right price signals to let the consumer decide for himself which payment means he wants to use and whether he wants to stay with that particular bank who is imposing high fees. He was, therefore, doubtful about Professor Evans' calculation on pass-through as he thought it was not in line with reality.

The United States delegate thought there was a logical question regarding the pass-through argument because, if, for example, a merchant has a 50% pass-through and the bank has a 100%, then the implication would be that you want a higher interchange fee - why not 10% - because then the price of the merchant only goes up five and yet you get 10% back from the bank, so one can benefit the consumer at the expense of the merchant and that did not seem very logical. She also thought that even if you believe that the bank competes away 100% of the interchange fee, they tend, at least in the United States, to compete through things like points, benefits and airport lounges, and these are just not efficient to compare with a lower price at the merchant. In addition, there would be the cross subsidisation problem: as prices are raised at the merchant, the people who are not using the credit card are paying that higher price. She thought, therefore, there were a number of problems with the pass-through argument.

Professor David Evans replied to the US point first. He said that if one is interested in doing a welfare analysis of interchange fees, it is simply not possible to do that without looking at pass-through rates, because that would give the marginal change and benefit of the change in policy. Regarding the EU's point, he agreed that the EU was looking at the right thing but he thought that its studies were inconsistent with dozens of economic studies so there could be some dispute about the numbers. Although he could not speak for the European countries, he did not think that in the US or Australian experience, the banks had shown a pass-through rate of 20% where the results of decreasing interchange fees had been fairly dramatic on the consumer side. His last point was about the price signal. First of all, there was no evidence to suggest that the socially optimal interchange fee, although lower than the privately set interchange fee, would be that different. Therefore, if the privately optimal interchange fee was 2%, there was no basis to conclude that the socially optimal interchange fee would be 20 cents or zero. Secondly, and this connected to the issue of surcharges, there was no proper price signal, because most merchants would not impose different prices for different payment instruments. The ones that do use different prices do it in a bad way and, by and large, merchants don't provide consumers with adequate price signals.

Mr Bolt added that cash payers subsidising credit card payers should not be a problem. He believed that, if a card payment is socially more beneficial than a cash payment then the cash payer will exert negative externality on the cardholder. Therefore, the fact that cash is cross-subsidising cards is a good thing because, in the end, card payments will have a higher social value than cash payments.

The Chair thanked everybody for this exchange and steered the discussion back to the contributions of the countries. He then asked the United Kingdom delegate to talk about some of the innovations in payment systems that have happened recently in his country.

The UK delegate announced that he would describe the new technology employed in the UK payment systems. He would then discuss three potential implications of this new technology and three challenges it might raise. First, this innovation is built around contactless card payments, a technology that has been around for a while and that allows small value transactions to be conducted without the need for a PIN, which speeds up transactions considerably for the retailer. There is a lot of potential for this in the field of communication technology as these chips are starting to be put on phones and they can potentially be linked up with other sources of non-payment services like transport systems or loyalty schemes and could start generating consumer benefit. The key challenge is around take-up, because, although contactless payments have been around for some time, usage is still very low. This is a classic problem of payment schemes. There is a potential benefit for retailers but they need to make investments in the system for handling these card payments at the point of sale and they have limited incentives to do so if card holding and customer usage is very low. At the same time, the cards will not be very attractive to consumers if only a few retailers accept them. So, this scheme is still very much in the early stages in the UK but the possible implications could mean a further decline in the use of cash because they focus on small payments and the idea would be that you would not need to have your wallet with you. You could just carry your mobile phone with you.

The second implication regards innovation. Traditionally, the concerns about the pace of innovation in payment systems were mainly due to the fact that payment systems were owned and controlled by the banks. These new technologies could stimulate competition between banks as they could encourage banks to introduce them more quickly than their rivals. More importantly, they could open the door for the involvement of non-banks, like mobile phone companies, in providing these services, and this might generate more impetus for innovation.

Third, there is the question of whether this provides the possibility of greater competition between payment systems. Although the system for linking up the two bank accounts would still be needed, it could be possible for new technologies to choose different ways of linking the bank accounts. Some might choose to do it through LINK to your debit card, some might choose to do it more directly and use things like faster payments to transfer the funds.

Regarding the challenges, the first would be for regulation to adapt to the new products and the new providers by making sure that there are adequate protections for fraud and financial stability but also that markets are not regulated in a way that excludes new providers. The second challenge for competition authorities would be that as this new technology has the potential for a significant change in the market, the competition authorities should try to understand how much change is going on and to establish whether any competition problems are arising and to tackle such problems quickly before the market tips to a particular system. Finally, the last challenge would be around social policy. There is a real question whether these technologies will increase financial exclusion because that would be like replacing cash and that could be harder for some segments of the community to deal with. Also, some sections of society may not have access to the same kind of mobile phones and technology.

The Chair then turned to BIAC, which in its contribution also talked about new developments in electronic payments and mobile payments. The Chair asked them to give their perspective on those innovations and on how they were going to change the business models of the actors who use the payment systems.

BIAC stated that they would be touching on some of the points that were discussed during the day. They started by recalling that a lot happened since the last roundtable in 2006: there was a financial crisis,

the MasterCard judgment came out, the European Commission has increased transparency with the publication of the green paper, Visa and MasterCard have published on their website their interchange fees and a lot of innovation has happened since then. This includes Google wallet, O2 wallet, the cardless payment system in the UK as well as the mobile joint venture between Vodafone and O2 in the UK.

A lot of what happens is happening outside Europe, because in Europe things have been moving more slowly mainly because there is uncertainty about the future of the European regulatory regime. Competition has been changing as banks now consider mobile operators, at least in the UK, as their competitors. But, for competition to be effective, there will have to be open access to payment systems. The issue of security is also very important as this is a sector where frauds are a serious issue. The balance between ensuring security and opening access is delicate and can be done very differently across states, which can cause problems to a bank or a payment scheme operating across Europe. The point made by Professor David Evans that there are always two sides to a story was also important. The concepts of fee capping, surcharges, relaxing the 'honour all cards' rule and transparency, all have two sides. For instance, as was already discussed, fee capping can alleviate the concerns of merchants, but they might not pass on all the benefits to consumers and the banks will end up recovering their costs from running these schemes somewhere, maybe by charging an annual fee to the customer as it happens in many jurisdictions.

Surcharging, on the other hand, may also lead to unintended consequences as was the case in the UK where the OFT had to change legislation since Ryanair would charge customers something like 6 or 7 pounds for using their credit cards, which was clearly not comparable with the cost of using a credit card. Regarding the topic of relaxing the 'honour all cards' rule, different jurisdictions have taken different approaches and one should not forget that for a consumer there is a benefit in going across the world and having cards accepted in the largest number of shops. Regarding transparency, everyone would agree that increasing transparency in this sector to allow customers to make more informed choices should be encouraged. BIAC's recommendation was that competition authorities should only intervene when it is absolutely clear that the enforcement action is proportionate and necessary to protect consumers, and that any remedy imposed will produce net benefit for consumer. This would require assessing alternatives to regulation and assessing the loss and the advantages to the status quo if regulations were to be imposed.

The Chair then turned to the US, because their contribution also talked about innovations, both in mobile technology and in products to facilitate the usage of debit and credit cards. He suggested that the US may also want to comment on some of the points that were made.

The delegate from the United States started by talking about the importance of the security aspect of mobile payment transactions. She explained that the bank account and personal information reside on something called the secure element, which can be built into a phone, or can be an external hardware to the phone, or could be software or it could be stored in the cloud. These different choices for how to handle the secure element would make a difference to competition because there could be a bottleneck. If, for example, the secure element could only be built into the hardware then the mobile telecom operator would have market power because it would be controlling access to the phone and therefore access to that consumer. If, for example, the secure information was accessed through an application that was presented on the phone but the information was in the cloud, then potentially one would be closer to something that would look like free entry because various people could promote apps. Therefore, technology will be an issue that determines the role of carriers, the mobile phone provider and entry barriers.

Another antitrust issue of merit is the fact that these are - at least - two-sided market problems, with merchants, banks, hardware providers, consumers, and they all have to be organised to use a platform to pay for their goods and services. In such setting, it is very difficult for one agent to move consumers to a new platform and it is likely that a joint venture where multiple parties – some of them competitors – can work together, may be needed to overcome adoption.

This would immediately become a topic of interest to antitrust enforcement agencies. There could be two types of antitrust problems with a joint venture (JV): the JV could be so broad that there is no competition among platforms or the JV could be so narrow that important market players are kept out of that JV and for some reason they cannot form a competing JV, foreclosing therefore competition. Her final comment was that we are seeing new and efficient inexpensive systems arising, where new technology is being used to go directly into bank accounts and allow consumers to pay in some relatively cheap way. This could be a competition issue in a general sense because the incumbents will be going to work hard to make sure that this does not happen.

The United States delegate then approached the topic of innovation and the tension between innovation in card services and reduction of interchange fees. He started by making the point that, although the issues raised today are very complex, they are not so complex that competition policy could not do something useful. He then proceeded to describe the kinds of actions that the US Department of Justice had undertaken in these markets to increase the freedom of banks to issue cards on rivals' networks, generating more competition in cards, and the freedom of merchants to drive consumers to lower-cost payment methods. He noted that the increase in transparency for consumers on the costs of their payment method is considered important, because, although costs may be difficult to perceive, this could help consumers make more informed choices about what kind of cards they choose to purchase. He noted that Professor David Evans had pointed out that the static welfare benefits of reductions in the fees that merchants pay might be counterproductive. He noted that Evans had claimed that if it is true that merchants do not pass those lower fees through to consumers and that banks will pass all of the increased fees through to consumers, consumers could be potentially harmed from reduced interexchange fees. However, he was not convinced that was the case, much like the delegate from the EU. He saw no reason why the rate decrease experienced by merchants – effectively a reduction in marginal costs - would not be passed through more fully to the consumer as competition develops. He preferred that effect to the rather opaque forms of pass-through on the card issuer side. He concluded by saying that these were more questions that needed to be answered but that the kinds of actions that the US has taken like freeing merchants to drive consumers' choice to lower-cost options and the freedom of banks to issue cards on rivals' networks, may allow competition on at least two sides of this market to lead to outcomes where consumers are getting what they want and the potential side-effects of regulation are attenuated.

Professor David Evans agreed that consumer welfare effect needed to be investigated and that one should look carefully at how merchants and banks may also change their service quality with a rate decrease.

The Chair then asked France to talk about a competition case which came into light when an innovation was taking place in the treatment of checks and their interbank commissions.

The delegate from France confirmed that they had taken a series of decisions in the past few years on interbank commissions. In particular, there was a decision on interbank commissions that were introduced when banks moved into a system of electronic compensation of checks in 2000, when banks stopped physically exchanging checks in a compensation chamber. At that moment, the banks introduced both an operational commission of 4,3 eurocents by check and exceptional commissions concerning operations that were cancelled by mistake. The Competition Authority considered that jointly fixing those commissions was a restriction of competition.

The authority took into consideration the economic benefits obtained from the electronic compensation of checks but not the arguments from the banks that the operational commission would incentivise banks that would find it costly to adhere to the new system. The Competition Authority found that banks would also reap benefits from the modernisation by lowering their administrative costs and increasing the speed of compensation so that no bank would lose by participating in the new system. For this reason, the authority found that the operational commission was not necessary and so could not be exempted on the basis of Article 101(3) TFEU. Regarding the exceptional commissions, the Authority only

found one of the commissions for which the level was not proportional to the service. He pointed out that the decision has been overturned by the "Cour d'Appel de Paris" in 2011 and that it is being appealed at the "Cour de Cassation".

The authority has also dealt with two other cases recently regarding interbank commissions both in the payment cards system, where the parties committed to reducing their commission by more than 35% and the non-cash means of payment system where the parties committed to remove the interbank commission from 1 September 2013.

The Chair then gave the floor to Turkey.

The delegate from Turkey summarised the experience in Turkey by pointing out that the share of credit card transactions has significantly increased in Turkey and that they have a very innovative market. The focus of the Turkish Competition Authority (TCA), however, has been BKM, the interbank card centre: a joint stock company founded by banks in Turkey that carries out clearing transactions between banks within the card payment systems in Turkey. In 2005, after receiving a complaint, the TCA initiated an investigation against BKM in order to determine whether there was an infringement of competition through fixing clearing commission rates by the banks under BKM. During the investigation process, BKM requested an exemption for its practices of fixing the clearing commission rates and argued that this practice was not contrary to the Competition Act and that each of the items constituting the fixed clearing commission rate was an element of cost for the issuing banks. Moreover, the payment guarantee provided by the issuing bank included fraud risk and so needed to be priced, and the payment delay resulting from the difference between transaction date and payment date were creating another cost figure for the issuing banks, the so-called funding costs. After the investigation, the TCA noted that the clearing commission fixes a part of the costs and the income of issuing and acquiring banks and that determining a common clearing commission rate among banks prevented competition at issuing and acquiring levels so that issuing banks could not follow an individual pricing policy for the services they provided for acquiring banks. In this context, it was concluded that BKM's practice of fixing clearing commission rates was contrary to the Competition Act. In the assessment of the exemption, it was noted that fixing the clearing commission rates through mutual agreements between all the banks included in the system required a lot of agreements and was not efficient. Therefore, it was concluded that the practice of fixing rates could be granted exemption provided that a cost-based approach for the calculation of the fee was adopted and secondly that the overnight interest rate determined by the Central Bank of Turkey was taken as a basis in the formula applied by BKM for the calculation of funding cost. The exemption period was decided to be of two years.

After this period of time, BKM again applied for the renewal of the exemption and in its assessment the TCA asked for the opinions of related regulatory authorities like the Central Bank of Turkey and the Banking Regulation and Supervision Agency. The board concluded that setting joint interchange commissions might be granted an unusual exemption until April 2009 provided that the total rate resulting from the formula is published on the website of BKM in order to increase transparency.

Finally, after the second exemption period was over in 2009, BKM requested another and final indefinite exemption request. At that time, they also requested the authorisation for using the Central Bank of Turkey overnight lending interest rates for the calculation of clearing commissions, which the TCA refused, since this would have increased the funding costs by 140 million TL or 90 million US dollars in the entire exchange cost for the year 2008. The Competition Board of the TCA decided that the daily interest rates established at the Istanbul stock exchange repo-reverse repo market would be suitable for use in the calculation of the funding costs. As a result, it was decided that an individual exemption could be granted for setting joint interchange commissions rates for five years provided that interest rates in the Istanbul stock exchange repo-reverse market were used for the calculations and also that BKM should reorganise independent auditing procedures to ensure data reliability and to standardise calculations between those banks that hold 80% of the market.

The delegate pointed out that this case illustrates the approach of the TCA to credit cards and two-sided markets. On the one hand, the TCA searches for a clearing commission which makes all parties get a fair benefit from the system and bear the cost, and, on the other hand, it takes steps to create an audit mechanism of the market by other government agencies and initiates the termination of legal barriers to entry in a competitive market structure.

The Chair thanked Turkey for their presentation and apologised to Iceland who contributed to this roundtable for not being able to hear their contribution, given the limited time available. He then gave the floor to Portugal for a short intervention.

The delegate from Portugal congratulated the Competition Committee of the OECD for bringing about this useful discussion in one of the areas where the gap between what competition authorities do and what economic theory tells us is probably too big yet. He noted that interoperability, innovation, and increased choice in payment services had been delayed due to deadlock and uncertainties regarding the commitment to such an important initiative for the European economy as a whole. He argued that what lacked was an understanding of how the market functions, of two-sided markets and a better understanding of market failures that require regulation. He concluded by saying that regulation is the least bad solution, with all the difficulties that had been explained in this meeting.

The Chair thanked the delegate from Portugal for pushing the case for regulation. He pointed out that during the day they had explored what they did not know and what they should know. He noted that they did not know much about pass-through and he found it to be a crucial point since in a multi-sided set of markets one should understand that when doing something on one side one might have repercussions to analyse on the other side. He noted that they did not know a lot about the relative cost of different payment systems, either. He thought they got some very useful methodological indications and also probably acquired some humility about what to do when changing interchange fees or the ancillary restraints that go with it.

He noted that the US had opened a direction by suggesting that there are some 'no regret' moves that competition authorities may engage in, even given the fact that they don't have all the facts, like allowing banks maximum freedom to start a payment system. On the back of that, he asked Mr Bolt to explain what were the 'no regret' moves that competition authorities can engage in, even though they have imperfect information; in other words the moves that are surely beneficial to society, keeping in mind that if there are none, one should get back to regulation as the delegate from Portugal was suggesting.

Mr Bolt commented that this was a difficult question for a short answer. He started by agreeing with the colleague from Portugal that this is an interesting market where market failures probably cannot be corrected by themselves given the co-ordination problems, the economies of scale, the externalities, the two-sided and/or pure network effects. There is also the issue of who pays for fraud containment and security. Can the private sector handle that alone?

These issues would probably warrant that authorities or regulators look into the payment system landscape. Although regulation should always be cautious because there can be unintended consequences, he thought that authorities should look at trying to abolish restrictions on market participants behaviour, like 'no surcharge' or 'honour all cards' rules because even if merchants don't use these benefits, the threat alone can already be enough. He also believed that trying to remove say, barriers to entry or exit, may be difficult given the existing network economies but it would still be the best way forward.

The Chair noted that this had been a very interactive session between delegates and experts and he thanked MM. Evans and Bolt for having challenged them.

SYNTHÈSE

Par le Secrétariat

Au vu des contributions écrites et de la discussion orale, plusieurs points clés se dégagent :

- (1) *L'application du droit de la concurrence vise notamment à identifier et à faire cesser les accords et les comportements anticoncurrentiels des participants au marché et à les dissuader de conclure de tels accords ou de se livrer à ce type de comportements, notamment lorsqu'ils ont un impact direct sur le bien-être des consommateurs. Dans le secteur des systèmes de paiement, dans lequel de nombreux marchés opèrent au moyen de plates-formes multifaces, des accords ou des comportements anticoncurrentiels peuvent avoir un impact sur ceux qui y participent, qu'il s'agisse des consommateurs, des commerçants ou des banques.*

En règle générale, les autorités de la concurrence s'efforcent dans un premier temps de définir correctement les marchés pertinents affectés par un accord ou un comportement. Nombre de marchés pertinents du secteur des systèmes de paiement font appel à des plateformes multifaces. Il convient de tenir compte de cette caractéristique du secteur comme il convient de le faire des caractéristiques de tout autre secteur pertinent afin de comprendre comment fonctionne un marché donné ; l'analyse de la concurrence est toujours un processus qui s'inspire d'éléments factuels. Plusieurs des marchés faisant appel à des plateformes multifaces peuvent être concernés par une restriction de la concurrence, mais l'analyse de la concurrence s'en tiendra normalement au marché pertinent sur lequel la restriction a été constatée. Dans la décision de l'UE concernant les commissions multilatérales d'interchange (CMI) appliquées par MasterCard, le marché pertinent ayant fait l'objet d'une analyse d'impact sur la concurrence était ainsi celui de l'acquisition, même si le marché de l'émission et le marché inter-système plus large avaient également été définis. Dans la décision de l'UE relative à l'affaire Visa/Morgan Stanley, le marché pertinent avait aussi été défini comme celui de l'acquisition, alors que dans l'affaire de l'UE contre le Groupement des cartes bancaires, il s'agissait du marché de l'émission.

- (2) *Les restrictions de la concurrence sur les marchés des paiements peuvent avoir divers impacts sur différents groupes de consommateurs du fait que des plateformes multifaces opèrent sur nombre d'entre eux.*

Au moment d'évaluer l'impact d'un comportement potentiellement anticoncurrentiel comme la fixation ou la modification des commissions d'interchange, il convient de prendre en considération le fait que cet impact peut affecter de différentes façons divers groupes de consommateurs. Premièrement, lorsqu'ils bénéficient d'une réduction de la commission d'interchange, les commerçants peuvent conserver une partie de cette réduction et en répercuter une autre sur les titulaires de carte et sur leurs autres clients en baissant leurs prix. Deuxièmement, la banque peut observer une augmentation des paiements par carte par rapport aux paiements en espèces (lorsque les commerçants encouragent les paiements par carte à frais réduits), mais elle peut également tenter d'accroître les prix qu'elle facture aux titulaires de carte et à ses autres clients pour compenser la baisse des revenus générés par les commissions d'interchange. En pareil cas, cependant, les titulaires de comptes envisageront sans doute de changer de banque et, le cas échéant, toute mesure collective prise par les banques risque de se

heurter à une action des autorités de la concurrence. Cet exemple illustre en quoi l'évaluation de l'impact des restrictions sur divers groupes de consommateurs peut s'avérer compliquée, dès lors que l'on prend en compte les retombées sur différents marchés. Il importe de reconnaître qu'un groupe de consommateurs (par exemple les commerçants) peut être désavantagé, même si les autres sont susceptibles de tirer avantage de la situation. De plus, il est essentiel de rappeler que la politique de la concurrence vise à protéger le processus de la concurrence et non à garantir un résultat donné.

Un participant à la discussion a fait valoir qu'il est impossible de déterminer l'impact global sur les titulaires de carte à moins de connaître les taux de répercussion pratiqués par les banques et les commerçants. Cependant, les travaux de recherche consacrés à ce sujet sont loin d'aboutir aux mêmes conclusions et il est possible que différentes conditions de marché donnent lieu à différents taux de répercussion selon les pays ou les régions du monde. Il se peut également que la répercussion pratiquée par les banques ou les commerçants ne porte pas uniquement sur les prix, mais qu'elle concerne aussi la qualité et le niveau de service. Les banques peuvent également répercuter les avantages sur les titulaires de carte sous la forme de points de fidélité ou d'autres types d'avantages. En raison de toutes ces différences, il est très difficile d'estimer et de comparer correctement les taux de répercussion, et il convient donc de faire preuve de prudence lorsque l'on tente d'en calculer empiriquement l'impact global sur les titulaires de carte. En tout état de cause, cette question n'est pas essentielle au regard de l'application du droit de la concurrence dans la mesure où plusieurs autres groupes de consommateurs (comme les commerçants, les personnes qui ne sont pas titulaires d'une carte, etc.) sont également affectés par les accords ou les comportements anticoncurrentiels. Il importe par ailleurs que l'analyse de la concurrence soit exploitable ; l'examen attentif d'effets possibles qui n'ont qu'un lien de plus en plus ténu avec le comportement en cause (voir les effets d'une entente sur le prix des achats d'intrants par ses membres) risque souvent de s'avérer inutile.

- (3) *On admet généralement que les autorités de la concurrence et les instances de réglementation devraient s'efforcer de réduire au minimum les obstacles à l'entrée ou à la sortie des systèmes de paiement et d'abolir les restrictions pesant sur le comportement des participants au marché, comme la règle interdisant aux commerçants d'appliquer un supplément (« no-surcharge rule ») ou celle leur imposant d'accepter toutes les cartes d'un même réseau (« honor-all-cards rule »). Cette mesure pourrait cependant avoir des conséquences imprévues et il n'est par ailleurs pas nécessaire d'adopter une même approche pour tous les systèmes.*

Lorsque les commerçants acceptent une carte, ils sont souvent tenus par les règles que leur impose le réseau de cartes relatives aux modalités selon lesquelles ils doivent se comporter en cas de paiements par carte. Certaines règles ont en particulier pour effet de limiter la capacité des commerçants à influencer sur le choix du mode de paiement utilisé par les clients. Elles peuvent rendre les commerçants moins sensibles aux frais qui leur sont imputés, dans la mesure où leur demande de services de carte est de ce fait rendue plus inélastique. Elles limitent en outre la capacité des commerçants à négocier des taux réduits. Ces règles peuvent donc avoir une incidence négative sur la concurrence entre les systèmes de paiement.

Les pouvoirs publics interviennent fréquemment lorsqu'ils estiment que ces règles sont incompatibles avec les objectifs d'action publique visés. De ce point de vue, l'une des règles soulevant le plus de préoccupations est celle imposant aux commerçants d'accepter toutes les cartes de paiement émises par un même réseau.

Selon cette règle, lorsqu'un commerçant accepte une carte d'un réseau donné, il doit aussi accepter toutes les cartes émises par celui-ci. Cette règle est contestée par certaines autorités de la

concurrence, dans la mesure où elle lie un produit que les commerçants se sont sentis tenus d'accepter (la carte principale) à un produit qu'ils ne souhaitaient pas accepter (comme une nouvelle carte ou une carte plus chère).

Certains pays contestent cette règle, estimant que cette approche « du tout ou rien » prive les commerçants de la capacité de détourner les clients des cartes pour lesquelles les frais qu'ils (les commerçants) encourent sont nettement plus élevés (comme les cartes de prestige) ; d'autres estiment au contraire qu'il est inutile de la remettre en cause en raison de l'effet cumulé de l'abrogation d'autres règles, par exemple de l'interdiction d'appliquer un supplément ou de l'interdiction d'orienter le client vers un système de paiement particulier (« no-steering rule »).

Font partie des autres règles suscitant des préoccupations l'interdiction d'appliquer un supplément et l'interdiction d'orienter le client vers un système de paiement particulier qui empêchent les commerçants de moduler leurs prix selon le mode de paiement utilisé. La capacité des commerçants à appliquer un supplément ou à orienter le client peut modifier les termes de la négociation avec un acquéreur ou un réseau de cartes concernant les commissions qui leur sont imposées même lorsqu'ils décident en fin de compte de ne pas appliquer de supplément à leurs clients.

Plusieurs pays se sont attaqués à l'interdiction d'appliquer un supplément sans tous parvenir à la même solution. Le Danemark et la Norvège ont ainsi décidé de proscrire cette règle, du moins dans certains cas. Le Danemark, en particulier, a instauré la possibilité pour les commerçants d'imposer un supplément en cas d'utilisation d'une carte de crédit sans pour autant les y autoriser en cas de paiement par carte de débit. Cette possibilité a été considérée comme susceptible d'inciter les commerçants à orienter les clients vers le système national de carte de débit, réputé le plus efficace en termes de coût, sans désavantager les cartes de débit d'autres pays.

De son côté, après avoir aboli l'interdiction d'appliquer un supplément, la Norvège a noté que les commerçants du pays facturant un supplément restaient très minoritaires. Cet état de fait est dû, semble-t-il, à la lenteur de la mise au point de la technologie nécessaire pour cela et au fait que les commerçants jugent cette pratique encore coûteuse, notamment pour les transactions en face à face (par opposition aux transactions en ligne).

De même, une enquête menée en Roumanie auprès des acteurs du marché a permis d'établir que les commerçants roumains préfèrent de loin ne pas appliquer de différences de prix. Malgré tout, l'autorité de la concurrence roumaine a indiqué qu'en raison des arbitrages complexes entre efficacité, protection des consommateurs, transparence et concurrence, l'interdiction d'appliquer un supplément ferait l'objet d'un examen approfondi.

- (4) *Un débat est actuellement en cours sur l'importance et le rôle de la commission multilatérale d'interchange (CMI) appliquée par le système de paiement. On peut se demander si la CMI est nécessaire au fonctionnement du système et si on peut la remplacer par des commissions bilatérales d'interchange.*

Dans plusieurs pays de l'OCDE, les autorités de la concurrence ont estimé que les commissions multilatérales d'interchange appliquées par les systèmes de paiement quadripartites constituent une infraction au droit de la concurrence. D'autres pays de l'OCDE ont préféré réglementer les CMI. La raison en est que ces commissions ont pour objet ou pour effet de fixer un plancher aux frais que les commerçants doivent acquitter pour l'acceptation des cartes de paiement (Merchant Service Charges ou « MSC ») sans être toujours indispensables au fonctionnement du système de paiement.

La Commission européenne a en particulier conclu dans sa décision sur MasterCard – confirmée en 2012 par le Tribunal de l'Union européenne et faisant actuellement l'objet d'un recours devant la Cour de justice de l'UE – que les CMI constituent une décision prise par une association d'entreprises et ne sont pas objectivement indispensables au fonctionnement d'un dispositif quadripartite. Pour parvenir à cette conclusion, elle s'est fondée sur plusieurs facteurs dont : (a) l'existence, dans certains pays, de systèmes de cartes de paiement fonctionnant sans CMI, (b) les avantages que les émetteurs retirent des cartes (à savoir les économies de coûts s'agissant des cartes de débit et le produit d'intérêts s'agissant des cartes de crédit) même sans CMI et (c) l'expérience des pays où le niveau des CMI a sensiblement baissé sans que cela n'entraîne de perturbation sérieuse du marché de l'émission.

Ce raisonnement ne fait pas l'unanimité. Dans certains cas, les décideurs ont conclu que les CMI sont importantes pour le fonctionnement d'un système de cartes. Dans d'autres pays, ils sont parvenus à la conclusion contraire, à savoir que les banques sont suffisamment incitées à émettre des cartes pour ne pas avoir besoin de la motivation supplémentaire que constitue la commission d'interchange.

Il est généralement admis que les CMI sont probablement davantage nécessaires pour lancer une nouvelle carte ou un nouveau système de cartes de paiement quand l'obstacle principal à l'entrée est lié à ces deux aspects. En revanche, s'il s'agit d'une carte dont l'utilisation ou la demande est généralisée ou d'un système bien établi, il ne sera probablement pas indispensable d'y recourir.

Une affaire intéressante survenue en Hongrie concerne la décision de l'UE d'accepter les engagements pris par Visa de plafonner, pour ses cartes de débit, ses commissions d'interchange dans ce pays, même si MasterCard n'a pas encore souscrit d'engagements analogues. Auparavant, l'autorité hongroise de la concurrence avait empêché les banques hongroises de fixer leurs propres taux de CMI. De ce fait, plusieurs de ces établissements ont récemment renoncé à émettre des cartes de débit Visa au profit de cartes de débit MasterCard, en dépit des risques d'amende et d'actions en dommages et intérêts que cette mesure leur a fait encourir. Cette situation donne à penser qu'une réglementation peut être souhaitable pour aider les systèmes de cartes et les banques à se conformer aux règles et aux objectifs de la concurrence.

- (5) *L'innovation dans le domaine des systèmes de paiement pourrait se renforcer et ouvrir à certains acteurs de nouvelles possibilités de prendre pied dans le secteur des paiements tout en posant de nouveaux défis aux autorités de la concurrence et aux instances de réglementation.*

Les nouvelles technologies offrent aux entreprises de nouveaux moyens de prendre pied dans le secteur des paiements. L'une des technologies qui évoluent le plus rapidement provient du secteur des télécommunications, avec la mise au point de solutions de paiement par téléphone portable. Il est ainsi possible d'introduire une puce spéciale dans ces téléphones qui, à l'avenir, pourraient constituer une composante du service de paiement. Reste à savoir si ces nouvelles technologies compléteront les systèmes de cartes existants ou s'y substitueront. En ce qui concerne les paiements en ligne, on assiste à un développement rapide dans certains pays (comme les Pays-Bas) du recours aux virements avec accusé de réception immédiat du paiement. Concernant les paiements en face à face, certains pays (comme l'Allemagne) ont recours aux débits directs – avec extraction sur la carte des informations élémentaires – se substituant aux nombreux systèmes classiques de paiement par carte.

Cette évolution implique de manière générale que, pour la première fois, ce ne sont pas les banques ou les réseaux, mais d'autres acteurs, qui sont à l'origine de l'innovation des technologies de systèmes de paiement. Cet état de fait pourrait contraindre les banques ou les

réseaux à innover ou encore permettre l'entrée sur certains marchés de systèmes de paiement d'acteurs non bancaires, comme les opérateurs de téléphonie mobile notamment. Une telle évolution pourrait donner une nouvelle impulsion à l'innovation et à la croissance sur un marché s'agissant duquel le rythme de l'innovation a suscité des inquiétudes dans le passé, puisque ce sont des établissements bancaires qui possèdent ou contrôlent les systèmes de paiement. On peut cependant se demander comment la situation va évoluer. Les nouveaux entrants pourraient avoir davantage de possibilités d'investir ce marché en proposant des produits et services complémentaires qu'en remplaçant les opérateurs historiques de systèmes de paiement. Il importera alors de veiller à ce que la concurrence exercée par ces nouveaux acteurs ne fasse pas l'objet de restrictions injustifiables.

Du point de vue de la réglementation, ces évolutions posent plusieurs autres défis. Premièrement, les autorités doivent veiller à ce que les opérateurs historiques – autrement dit les banques – permettent aux nouveaux systèmes de se développer et de déterminer, sur le marché, s'ils sont plus efficaces et moins onéreux et s'ils répondent mieux aux vœux des consommateurs. Deuxièmement, il faudrait adapter la réglementation aux nouveaux produits et aux nouveaux prestataires en veillant à mettre en place les protections adéquates contre la fraude et garantissant la stabilité financière, tout en s'assurant que cette réglementation des marchés ne ferme pas la porte aux nouveaux entrants. Parmi les défis qui les attendent, les instances de réglementation et les autorités de la concurrence européennes devront s'assurer que l'Espace unique de paiement en euros est suffisamment souple pour s'adapter à ces nouveaux systèmes et technologies.

Troisièmement, les autorités de la concurrence devraient s'efforcer de comprendre l'ampleur de la mutation due aux nouvelles technologies et recenser, puis résoudre rapidement, les problèmes de concurrence qui pourraient apparaître, avant que le marché ne bascule en faveur de tel ou tel système. Elles devraient également s'assurer que les problèmes de concurrence posés par les instruments de paiement existants (CMI excessives ou règles restrictives comme l'obligation d'acceptation de toutes les cartes d'un même réseau ou l'interdiction d'orienter les clients vers un système particulier ou de leur appliquer un supplément, par exemple) ne gagnent pas les nouvelles technologies. Ceci vaut particulièrement, par exemple, pour ce qui est du choix entre plusieurs nouvelles technologies en matière de sécurisation des transactions. Il faudrait veiller à ne pas créer inutilement de problèmes de concurrence et de goulots d'étranglement dus à la manière dont les opérateurs historiques mettent en œuvre ou adoptent les nouvelles technologies.

Enfin, le dernier défi concerne la politique sociale. Il faut en effet impérativement se demander si les nouvelles technologies sont de nature à renforcer l'exclusion financière, en substituant aux paiements en espèces des technologies que certaines catégories sociales pourraient avoir plus de mal à maîtriser. De même, certaines franges de la population pourraient tout simplement ne pas avoir accès au téléphone portable, à Internet et aux autres technologies requises.

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COMPTE RENDU DE LA DISCUSSION

Par le Secrétariat

Le président, M. Frédéric Jenny, ouvre la table ronde sur les paiements par carte en indiquant que les discussions et les contributions s'articuleront autour de quatre sujets principaux. Elles commenceront par un examen de l'évolution de la situation depuis la dernière table ronde consacrée aux systèmes de paiement, puis revêtiront la forme d'un dialogue sur la mise en œuvre de la Directive sur les services de paiement dans les pays européens. Elles couvriront ensuite certaines questions relatives aux structures et aux obstacles présents sur le marché, ainsi que la manière dont la concurrence fonctionne dans certains pays. Enfin, la table ronde abordera des questions touchant aux questions liées à l'innovation, à la réglementation et à la mise en œuvre dans certains pays.

Le **président** note également que cette table ronde sur la concurrence et les systèmes de paiement a suscité beaucoup d'intérêt, puisque 25 contributions ont été soumises. Il présente les experts – M. Wilko Bolt de la Nederlandsche Bank et M. David Evans de Global Economics – qui ont tous deux participé à la discussion de 2006 consacrée aux systèmes de paiement.

1. Introduction et évolution depuis la table ronde de 2006

Le président invite **M. Bolt** à faire le point pour les participants sur l'évolution de la situation depuis la première table ronde et aussi à se pencher sur certaines questions telles que les innovations apparues au cours de cette période.

M. Bolt commence par présenter le sujet des systèmes de paiement qu'il qualifie de très complexe en raison des nombreuses externalités et interactions entre les différents acteurs du système. On observe depuis quelques années une tendance, dans la plupart des pays occidentaux, à délaissé les opérations en espèces ou sur support papier au profit des paiements électroniques : une évolution très bénéfique du point de vue du bien-être social. Dans la mesure où les paiements électroniques – et plus particulièrement les paiements par carte – demeurent onéreux pour les commerçants, des divergences risquent d'apparaître entre incitations sociales et privées d'où l'intérêt d'une réglementation dans certains cas. Cependant, la réglementation peut avoir des conséquences inattendues et la concurrence entre systèmes de paiement ne se traduit pas toujours par un accroissement de l'efficacité. Enfin, la concurrence sur ce marché est très difficile à mesurer de manière empirique.

M. Bolt recense plusieurs questions-clés qu'il conviendrait d'aborder dans le cadre des discussions consacrées à la concurrence dans le domaine des systèmes de paiement.

Premièrement, il convient de se poser la question du prix : le marché des paiements est-il suffisamment transparent ? L'utilisateur final reçoit-il les signaux de prix et les incitations appropriés. Deuxièmement, il convient de se demander comment encourager l'innovation, puis si la concurrence entre les prestataires de paiement, les réseaux, et les instruments de paiement améliorent réellement l'efficacité. Enfin, à supposer qu'une réglementation apparaisse nécessaire, on peut se demander quelles orientations la théorie permet de proposer.

En outre, en ce qui concerne la question du prix, nul n'ignore probablement que la collectivité aurait avantage à disposer du système le plus efficace. La théorie des marchés bifaces révèle que les paiements secondaires, également dénommés commissions d'interchange, peuvent s'avérer nécessaires pour équilibrer la demande des deux côtés du marché, à savoir la demande des consommateurs et celle des commerçants. Nous avons également pu observer que cette situation peut évoluer en une modulation des prix en fonction des modes de paiements utilisés ; en outre, l'abolition de la règle interdisant l'application d'un supplément peut également conduire à une discrimination par les prix d'un commerçant à l'autre. Ainsi, aux Pays-Bas, les commerçants appliquaient un supplément en cas de paiement par carte de débit, par ailleurs très bon marché par rapport aux espèces (qui sont relativement chères). La possibilité donnée aux commerçants d'appliquer un supplément a en fait incité les gens à revenir aux espèces, ce qui n'était probablement pas l'effet recherché. Il convient donc de redoubler de prudence au moment d'imposer une telle commission. En ce qui concerne la réglementation, celle-ci peut avoir des effets secondaires imprévus comme on a pu le constater aux États-Unis. Après l'adoption de l'amendement Durbin modifiant la Loi Dodd-Frank, on a observé des signes de détérioration – et non d'amélioration – de la situation des petits commerçants. L'idée selon laquelle le fait d'autoriser la pratique du supplément serait bénéfique, dans la mesure où les tensions de ce type de part et d'autre de la plateforme se neutraliseraient et où la commission d'interchange verrait son rôle diminuer, n'est pas nécessairement fondée. Autoriser les suppléments peut quasiment faire disparaître le coût de l'acceptation d'une carte pour le commerçant, dans la mesure où celui-ci peut répercuter immédiatement ce coût sur le consommateur ; pourtant, dans les pays où cette pratique est autorisée, rares sont les commerçants à y avoir recours. L'incidence de cette pratique n'est donc pas importante, même lorsqu'elle est permise, et la vraie question est de savoir pourquoi les commerçants n'y recourent pas davantage lorsqu'ils y sont autorisés. Il s'agit d'une question compliquée dans la mesure où les intéressés bénéficient également de l'acceptation des paiements électroniques par carte, ce qui permet d'absorber une partie des coûts que ces paiements induisent. Cet état de fait limite l'ampleur de la répercussion et fait ressurgir les tensions de part et d'autre de la plateforme. La concurrence entre commerçants peut, bien entendu, réguler la répercussion, mais cela suppose toute une panoplie de mesures complexes sur le marché, ce qui pose un problème très compliqué d'optimalité. Allan Shampine (2012) présente une note très intéressante sur une affaire survenue en Australie dans le cadre de laquelle la RBA a réduit les commissions d'interchange et aboli l'interdiction d'appliquer un supplément en 2003, ce qui a provoqué une modification de la structure des paiements et des frais totaux liés aux paiements par cartes de crédit.

En ce qui concerne la concurrence entre les systèmes de paiement, dès lors que les commerçants sont en concurrence, les réseaux de cartes peuvent exploiter leur empressement à acquérir un avantage sur leurs concurrents en leur imposant des commissions d'interchange plus élevées. C'est ce que l'on appelle parfois la faible capacité de résistance des commerçants face aux commissions élevées. Un autre argument de la théorie des marchés bifaces est que la concurrence entre réseaux n'améliore pas nécessairement la structure des prix entre consommateurs et commerçants et ne débouche pas toujours sur le meilleur résultat. La concurrence peut parfois mener à des prix très bas, voire négatifs, pour les consommateurs si les émetteurs se livrent une concurrence excessive entre eux : une situation qui aboutit à une orientation des prix biaisée au détriment des commerçants, ce qui n'est pas forcément la meilleure solution. Par conséquent, la concurrence peut avoir des effets imprévus sur un marché biface comportant des externalités.

De même, mesurer la concurrence, surtout dans le secteur financier, s'avère une tâche extrêmement ardue. Les données sont très limitées et, en outre, les principaux indicateurs – tels que l'indice de concentration Herfindahl-Hirschman (ou HHI), l'indice Lerner ou les statistiques Panzar-Rosse H-Statistics – semblent non corrélés d'une banque à l'autre et dans le temps.

En collaboration avec M. Dave Humphrey, M. Bolt a tenté d'appliquer la méthode des frontières stochastiques – inspirée elle-même d'une ancienne approche économétrique – pour déterminer la concurrence relative dans les services de paiement fournis par les banques, méthode qui l'a conduit à

conclure qu'aux États-Unis, de petites banques se retrouvent à la fois parmi les banques les plus compétitives et celles qui le sont le moins. Les très grandes banques se situent quelque part au milieu et on peut en déduire que l'emplacement et la segmentation du marché jouent un certain rôle. Les autorités de la concurrence devraient donc ne pas perdre de vue que ces indicateurs standard ne permettent pas toujours de mesurer la concurrence dans ce secteur comme ils peuvent le faire pour d'autres marchés.

En ce qui concerne le crédit et à supposer que celui-ci ait la préférence sur le marché, les réseaux de cartes peuvent tenter d'exploiter cette tendance. Il s'agit là d'une autre source de revenus pour les prestataires de paiement, mais il convient de se demander qui la finance. Les frais financiers élevés peuvent affecter la disposition des consommateurs à payer et déboucher sur des frais importants pour les commerçants sur le marché. Il convient donc de peser très soigneusement la question, dans la mesure où un compromis s'impose parfois entre l'extension du crédit aux populations les plus pauvres de l'économie et les retombées que cela peut avoir sur les frais imposés aux commerçants. Un rapport – récemment rédigé par M. Scott Schuh de la Boston Fed et consacré à la question de savoir qui finance réellement le système de paiement en place aux États-Unis – révèle qu'il s'agit plutôt des pauvres (qui utilisent leur carte de crédit pour disposer d'une facilité de crédit) et non des riches (qui utilisent leur carte de crédit comme carte de paiement). Il convient de garder cette considération à l'esprit. En cas de concurrence entre cartes de débit et cartes de crédit, les banques peuvent être incitées à promouvoir les cartes de crédit en raison des fortes marges que cet instrument génère. Il est probable que d'aucuns souhaiteraient une segmentation du marché grâce à la quelle les magasins haut de gamme accepteraient les cartes de débit et de crédit, les magasins milieu de gamme uniquement les cartes de débit et les magasins bas de gamme uniquement les paiements en espèces. Une telle évolution donnerait lieu à une combinaison des modes de paiement, ce qui serait la solution préférée, mais qui pourrait s'avérer peu rentable.

Enfin, si la coopération s'impose en matière d'innovation dans les systèmes de paiement, elle doit être le fait d'acteurs qui se livrent concurrence. Comment la structurer ? Qui s'approprie la rente ? Il existe une tension entre rente et concurrence et une réglementation excessive pourrait porter atteinte à l'innovation et à l'efficacité dynamique à long terme. Une approche basée sur les coûts peut limiter les incitations à innover dans la mesure où, lorsque la rentabilité est trop faible, les émetteurs du réseau bancaire peuvent mettre des années à récupérer leurs investissements et donc ne pas lancer de nouveaux produits, se contentant de mettre les systèmes existants à jour, ce qui risque de s'avérer inefficace à long terme. L'application de commissions d'interchange peut alors s'avérer nécessaire afin de générer des incitations appropriées à innover, mais peut également dépendre de l'adoption d'externalités.¹

M. Bolt conclut que l'économie des paiements est très complexe et que les économistes et les décideurs politiques ont encore du mal à se mettre d'accord sur ce qui constitue une structure de commissions efficace pour les paiements électroniques.

La concurrence dans le domaine des paiements ne génère pas toujours le résultat le plus efficace, car elle peut aboutir à une structure inefficace des prix en raison d'un déséquilibre prononcé. S'exprimant strictement à titre personnel, M. Bolt déclare que la réglementation devrait viser à supprimer les obstacles à l'entrée sur le marché des paiements et à interdire à cet égard toute restriction pour les commerçants, quels qu'ils soient. Il s'avère également qu'il n'existe pas de panacée universelle et que la théorie ne suffit pas, et qu'il est indispensable de tenir compte des faits pour corroborer les théories, aussi élégantes soient elles.

M. David Evans se déclare d'accord avec M. Bolt concernant la complexité de l'économie des paiements. Le président donne la parole au délégué du **Portugal** qui demande à M. Bolt quel est, selon lui, le marché le plus pertinent pour analyser les questions de concurrence au sein d'un système de cartes de paiement.

¹ Voir le document publié récemment (2012) par M. Marc Bourreau et Mme Marianne Verdier.

M. Bolt évoque une affaire récente survenue aux Pays-Bas dans laquelle il estime que le marché pertinent des paiements par carte n'incluait pas les télépaiements comme les opérations de débit et de crédit sans intermédiaire. S'agissant des instruments, il préconise d'étudier les paiements par carte de débit par rapport aux paiements par carte de crédit et aux paiements en espèces sur un marché national donné. Il conclut que l'identification du marché pertinent est une tâche très compliquée et que beaucoup d'autres facteurs jouent un rôle important, mais qu'à son avis la demande de règlements en espèce, par carte de débit ou par carte de crédit doit être prise en compte, de même que les prestataires opérant sur un marché national.

M. David Evans considère que cette question comporte deux volets. Le premier consiste à savoir si l'on adopte une approche tenant compte des divers côtés du marché et le second à savoir quels autres instruments de paiement on pourrait envisager comme substituts aux cartes. Concernant le premier volet de la question, il note qu'en fin de compte, toute analyse de la politique de la concurrence vise à évaluer l'impact des éléments étudiés, quels qu'ils soient, sur le bien-être et que le seul moyen d'y parvenir s'agissant des cartes de paiement consiste à prendre en considération ce qui se passe de chaque côté de l'activité commerciale, à savoir le lien entre les commerçants d'un côté et les consommateurs de l'autre. Ainsi, selon l'analyse et la définition du marché, il convient de se concentrer sur les plateformes, c'est-à-dire à la fois sur la partie du marché constituée par les consommateurs et sur celle constituée par les commerçants. Que cette prise en considération ait lieu dans le cadre de la partie de l'analyse consacrée à la définition du marché ou bien dans le cadre d'une autre partie, il s'agit en définitive de se forger une opinion sur le bien-être du consommateur tenant compte des deux côtés de la plateforme.

Par conséquent, concernant le point numéro un, il convient de parler ici des plateformes bifaces qui devraient être au centre de la définition du marché.

Vient ensuite la question de savoir quels acteurs se livrent concurrence sur le marché des cartes de paiement ou des instruments de paiement, quels qu'ils soient, faisant l'objet de l'analyse. Il s'agit là d'une question empirique à laquelle la réponse risque de varier selon les pays. Il n'existe pas de raison particulière de penser que cette réponse sera identique au Portugal, en Russie ou aux États-Unis. Cependant, M. Bolt estime que l'on a de plus en plus tendance à supposer que les cartes de paiement ne sont concurrencées par aucun autre mode de paiement, ce qu'il trouve bizarre puisque tous les acteurs du secteur des cartes de paiement pensent être concurrencés par les espèces et les chèques alors que tous les acteurs du secteur des espèces pensent être concurrencés par les cartes ; il n'est donc guère surprenant de constater que l'analyse de la définition du marché part du postulat qu'aucune contrainte concurrentielle ne s'exerce sur les cartes, même si il s'agit là en définitive d'une question empirique.

Le délégué du **Portugal** fait remarquer qu'il paraît difficile de faire concorder les travaux publiés par les autorités de la concurrence et l'économie des paiements. En ce qui concerne la récente affaire MasterCard, il relève que le marché pertinent a été défini en dissociant les commerçants, les acquéreurs, les émetteurs et les titulaires de carte. Il considère, en revanche, que le système de paiement est un écosystème et qu'il convient d'analyser les modes d'interaction entre les paiements par carte et les autres moyens de paiement, notamment les espèces. En ce qui concerne la décision rendue dans l'affaire MasterCard, dès lors que l'on définit le marché pertinent comme le marché intérieur des acquéreurs, la conclusion qui s'impose est que la commission d'interchange devrait être nulle. Or, si cette commission est nulle, le système ne pourra pas se développer. On prend conscience, par conséquent, que l'Europe n'est pas le système de paiement dominant dans le monde et que des innovations se font jour au Moyen-Orient, en Extrême-Orient et en Amérique, mais pas sur le continent européen.

Le président remercie le délégué du Portugal et note que celui-ci a soulevé plusieurs questions qui seront évoquées au cours des discussions. Il cède ensuite la parole au délégué de l'Allemagne qui désire commenter la dernière remarque.

Le délégué de l'**Allemagne** signale que, sur le marché allemand, les détaillants et les prestataires de services non bancaires ont élaboré un système de paiement par carte innovant, dont le coût est nettement inférieur aux produits proposés par les banques. Ce système a été élaboré afin de satisfaire les besoins spécifiques des clients.

Le président ramène la conversation sur l'évolution récente de la situation concernant la manière d'aborder les problèmes de concurrence liés aux systèmes de paiement. Selon sa contribution, la Nouvelle-Zélande a engagé des procédures à l'encontre de Visa et MasterCard et s'est intéressée non seulement à la commission d'interchange, mais également aux règles dont elle est assortie, comme l'interdiction d'appliquer un supplément, la règle de non discrimination ou l'obligation d'accepter toutes les cartes d'un même réseau. Le président prie le délégué de la Nouvelle-Zélande d'expliquer comment il analyse ces règles et, notamment, pourquoi les autorités néo-zélandaises n'ont pas jugé utile de modifier la règle imposant l'acceptation de toutes les cartes d'un même réseau et pourquoi elles ont estimé que cette règle ne posait pas de problème particulier.

Le délégué de la **Nouvelle-Zélande** répond en résumant les principaux points examinés dans le cadre de l'enquête menée par les autorités de son pays sur Visa et MasterCard. Les autorités néo-zélandaises se sont principalement inquiétées du fait que les banques émettrices de cartes avaient arrêté le montant de la commission d'interchange, fixant ainsi dans les faits le montant minimum des frais de service imposés aux commerçants et que les règles associées à ces régimes – comme l'interdiction d'appliquer un supplément et la règle de non discrimination – sont anticoncurrentielles, parce qu'elles éliminent la possibilité pour les commerçants d'inciter les émetteurs à abaisser leurs commissions d'interchange. L'effet conjugué de ces règles se traduit par la possibilité pour les banques appartenant au système de fixer collectivement des commissions d'interchange élevées, sans craindre que les consommateurs se tournent vers d'autres solutions de paiement et en contraignant les commerçants d'une part à s'abstenir de prélever aux consommateurs des frais d'utilisation des cartes et d'autre part à accepter les cartes. Par conséquent, le taux d'interchange élevé se traduit par une hausse des prix pour les consommateurs. Les autorités néo-zélandaises se sont également intéressées à certaines règles d'accès aux systèmes et notamment à celles subordonnant la participation à un système à la qualité d'émetteur ou d'acquéreur.

Après avoir engagé une procédure en 2006, la Nouvelle-Zélande est parvenue en 2009 à un règlement à l'amiable. Le délégué estime que son pays a été le premier à accepter un règlement d'une grande portée couvrant les commissions et les règles du système. L'accord prévoit que les émetteurs fixeront individuellement la commission d'interchange, à condition de ne pas dépasser le plafond prévu par le système et qu'ils devront en outre la rendre publique sur leur site Internet. L'intention est d'accroître la transparence. Les règles d'interdiction des suppléments et de non discrimination ne sont plus applicables, afin que les commerçants puissent décider s'il convient ou pas de répercuter sur leurs clients la commission d'interchange, à condition de le faire savoir et de veiller à ce que le coût répercuté soit raisonnable par rapport aux frais qu'ils encourent. Dans le cadre de ce règlement à l'amiable, les règles d'accès ont également été modifiées de manière à permettre l'entrée sur le marché d'un acteur qui n'est ni un émetteur ni un acquéreur. Par conséquent, les commerçants se voient désormais communiquer le détail des frais de service, ce qui leur permet d'en distinguer les différentes composantes et accroît la transparence du régime. Toujours dans le cadre de ce règlement, les autorités néo-zélandaises se sont engagées à surveiller l'impact de ces changements et collectent également des données pour essayer d'évaluer l'effet des mesures adoptées à court, moyen et long terme. Elles mèneront une enquête auprès de plus de 3 000 commerçants pour voir quelle a été l'influence du règlement sur leurs activités et espèrent pouvoir en publier les résultats en 2015-16.

Pendant leur enquête et dans leur acte introductif d'instance, les autorités néo-zélandaises ont estimé que l'obligation d'accepter toutes les cartes d'un même réseau peut être anticoncurrentielle. Pourtant, après avoir adopté une approche globale, elles ont conclu que l'abolition de l'interdiction d'appliquer un

supplément et de la règle de non discrimination pourrait avoir un effet cumulatif de nature à résoudre la plupart des problèmes de concurrence recensés. L'abolition de la règle de non discrimination, par exemple, devrait permettre à la plupart des commerçants d'orienter les clients vers différentes cartes. Par conséquent, les autorités espèrent que le règlement à l'amiable démontrera la pertinence de leur approche.

Le président se tourne ensuite vers le Canada qui, en 2010, a engagé une action civile devant le tribunal de la concurrence afin de faire abroger l'interdiction d'appliquer un supplément et l'obligation d'accepter toutes les cartes d'un même réseau. Il demande au Canada de faire connaître sa réaction au compte rendu de la Nouvelle-Zélande en analysant les différences entre les situations respectives des deux pays et les résultats obtenus.

Le délégué du **Canada** relève que cette question spécifique vise un différend en cours, de sorte qu'il lui a été conseillé, sur le plan juridique, de s'en tenir aux notes qu'il a préparées sans engager le débat avec son collègue néo-zélandais. Il se déclare cependant en mesure d'expliquer la position du Canada sur cette question spécifique.

Visa et MasterCard sont les deux plus importants réseaux de cartes de crédit du Canada. Elles ont toutes deux adopté l'obligation d'accepter toutes les cartes, à la fois dans leurs conditions d'utilisation et dans leur règlement opérationnel. Les règles de Visa prévoient que les commerçants ne peuvent pas refuser d'accepter le produit Visa correctement présenté aux fins de paiement et les règles de MasterCard imposent de la même façon aux commerçants d'accepter toutes les cartes portant ce logo, sans la moindre discrimination, dès lors qu'elles sont correctement présentées aux fins de paiement. Pour l'essentiel, l'obligation est faite aux commerçants acceptant les cartes Visa et MasterCard comme moyen de paiement d'accepter toutes les cartes de ces deux réseaux. Cette approche du « tout ou rien » prive les commerçants de la capacité de refuser certains types de cartes de crédit comme les cartes de prestige. Par exemple, en raison de l'obligation d'acceptation à laquelle ils sont tenus, dès lors qu'un commerçant accepte une carte de crédit MasterCard ordinaire assortie d'une commission d'acceptation de 2 %, il ne peut plus refuser les cartes de prestige World Elite de la même marque pour lesquelles cette commission s'élève à 4 %. Par conséquent, au **Canada**, l'effet conjugué de cette obligation, de l'interdiction d'appliquer supplément et de la règle de non discrimination a contribué à l'élimination effective de toute concurrence entre les deux réseaux pour ce qui est de l'acceptation de leurs cartes par les commerçants.

Collectivement, ces règles anticoncurrentielles interdisent aux commerçants d'inciter les consommateurs à envisager de recourir à d'autres méthodes de paiement à bas coût et se traduisent par un renchérissement des prix pour les consommateurs, dans la mesure où les commerçants tendent à répercuter tout ou partie des frais élevés qui leur sont de ce fait imposés. Préoccupé par les effets anticoncurrentiels de ces règles, le Bureau de la concurrence a saisi, en décembre 2010, le tribunal de la concurrence. Le Bureau invoque la disposition de la Loi sur la concurrence relative au maintien des prix. Il fait valoir que l'effet cumulé de l'interdiction d'appliquer un supplément et de l'obligation d'accepter toutes les cartes a été d'éliminer la concurrence entre les réseaux Visa et MasterCard pour ce qui est de l'acceptation par les commerçants de leurs cartes de crédit respectives et a provoqué une augmentation des coûts pour les entreprises et, en fin de compte, pour le consommateur.

Les arguments du Bureau visant à obtenir une ordonnance interdisant à Visa et MasterCard de mettre en œuvre et d'appliquer leurs règles anticoncurrentielles ont été entendus par le tribunal en mai 2012. Au cours de l'audience, le Bureau a expliqué que l'élimination de l'obligation d'accepter toutes les cartes permettrait aux commerçants de décider d'accepter telle ou telle carte et de refuser, de manière sélective, les cartes de prestige qui entraînent des frais très élevés. Le Bureau pense que les preuves produites devant le tribunal démontrent clairement que l'obligation d'accepter toutes les cartes, l'interdiction d'appliquer un supplément et la règle de non discrimination appliquées par Visa et MasterCard ont pour effet cumulé de réduire, voire de supprimer, toute incitation de ces réseaux à abaisser les commissions qu'ils appliquent

pour l'acceptation de leurs cartes. Elles faussent également les indications que les prix fournissent aux clients au moment où ils choisissent tel ou tel mode de paiement aux points de vente et, plus généralement, font disparaître la concurrence entre Visa et MasterCard. Le tribunal devrait bientôt faire connaître sa décision et le délégué espère qu'il rendra une ordonnance abrogeant ces différentes règles, de manière à restaurer la concurrence qui fait défaut sur le marché canadien.

M. David Evans pense qu'il serait utile de parvenir à mettre en place un mécanisme facilitant le calcul de l'effet de ces diverses interventions sur le bien-être. Il relève que, comme l'a fait remarquer le délégué du **Canada**, les coûts de l'utilisation de la carte sont probablement répercutés sur les commerçants. La même hypothèse sous-tend d'autres affaires et d'autres initiatives comme celle prise par la Réserve fédérale australienne qui insiste pour que tous les avantages découlant d'une baisse des commissions d'interchange soient répercutés sur les consommateurs. Toutefois, il s'avère incapable de trouver une preuve empirique de ce qu'il avance dans l'une quelconque des affaires ou des interventions des autorités de réglementation qu'il lui a été donné d'étudier. Par conséquent, il ne trouve aucune preuve corroborant la théorie selon laquelle lorsqu'un commerçant bénéficie d'économies réalisées de part et d'autre (par lui-même et par la banque), il en fait profiter le consommateur. Il résulte des nombreuses études menées par des économistes que les commerçants répercutent en moyenne environ 50 % des économies de coûts sur le consommateur, le chiffre précis variant selon les circonstances. Cet état de fait est essentiel pour bien comprendre l'incidence de ces diverses interventions sur le bien-être du consommateur, dans la mesure où, d'une part, si l'on réduit le coût pour le commerçant, le consommateur en profitera (forme de répercussion), mais où, d'autre part, s'agissant des commissions d'interchange, les mêmes interventions auront un impact sur le revenu des banques qui ne manqueront pas de répercuter ce coût sur le consommateur. Pour connaître l'impact sur le consommateur, il convient par conséquent de tenir compte de ces deux effets. En règle générale, par conséquent, lorsque les taux de répercussion pratiqués par les banques sont supérieurs à ceux des commerçants, c'est le consommateur qui est finalement perdant. De sorte que l'effet définitif sur le bien-être dépend de ces deux chiffres et que l'on ne saurait se contenter d'affirmer que les commerçants vont répercuter l'intégralité des économies réalisées, car tel n'est pas le cas, aucune preuve ne permettant d'étayer ce point de vue.

M. Bolt abonde dans le sens de M. David Evans et fait remarquer que, dans l'affaire néerlandaise relative aux suppléments prélevés sur des cartes de débit, le montant de ces suppléments était parfois quatre fois supérieur à celui de la commission. Cette précision prouve que les commerces de détail essaient également d'augmenter leurs propres marges dès lors qu'ils sont autorisés à appliquer un supplément.

Le président s'adresse à l'**Estonie** concernant une autre question. En 2008, l'autorité estonienne de la concurrence a consacré une étude aux commissions multilatérales d'interchange (CMI). Selon cet organisme, les six principales banques du pays auraient finalement abandonné ce type de commissions et seraient revenues à une commission d'interchange bilatérale. Existe-t-il une relation de cause à effet entre l'étude réalisée et l'évolution du comportement des banques ? Ces dernières se seraient-elles inquiétées des conclusions de l'étude ou bien l'autorité de la concurrence leur a-t-elle suggéré d'abandonner cette pratique et, le cas échéant, pourquoi ?

Le délégué de l'**Estonie** confirme que l'autorité de la concurrence de son pays a consacré une étude aux commissions d'interchange prélevées dans le cadre de transactions effectuées dans le pays par carte de débit ou de crédit. Dans le passé et jusqu'en juin 2008, une commission multilatérale d'interchange de 1 % était prélevée. À l'issue de l'enquête, cette commission a été abrogée et les banques ont opté pour des commissions d'interchange bilatérales. Le niveau de cette commission a donc fait l'objet de négociations bilatérales au cas par cas entre deux banques données. Au cours de la procédure, les banques ont réduit leurs commissions à de nombreuses occasions, ramenant la commission d'interchange conjointement convenue qui était de 1 % en moyenne à 0.5 % à la fin de la période étudiée (2011). Certaines banques se sont même mises d'accord pour réduire encore leurs commissions d'interchange à l'avenir, en fonction de

l'augmentation du volume des paiements par carte. Les banques ayant sensiblement réduit leur commissions et ouvert davantage le système à la concurrence (dans la mesure où les commissions fixées au niveau bilatéral dépendent désormais de la stratégie commerciale de chaque banque), l'autorité estonienne de la concurrence a décidé de clore la procédure. Son analyse prouve que la réduction des commissions d'interchange en vigueur a été répercutée bilatéralement sur les frais imposés aux commerçants et, espérons-le, également sur les consommateurs.

Le président se tourne vers le Taipei Chinois qui, dans sa contribution, a en premier lieu semblé indiquer qu'il n'existe aucune limitation spécifique applicable à la commission multilatérale d'interchange, tout en affirmant que, si des commissions bilatérales devaient être instaurées, le système de paiement ne se développerait pas aussi efficacement qu'avec une CMI, fût-elle élevée. Cette opinion semble en contradiction avec le point de vue qui vient d'être présenté.

Le délégué du **Taipei chinois** déclare qu'il n'existe, pour le moment, aucune restriction applicable aux commissions d'interchange. La raison tient au dynamisme du système national de cartes de crédit au sein duquel on compte pas moins de 36 établissements financiers émetteurs et plus de 33 millions de cartes, soit une moyenne de 3.8 cartes par ménage. Le marché de l'émission des cartes est très concurrentiel ; la part de marché cumulée des 5 plus grandes banques est d'environ 60 % et celle de la première banque d'environ 18 %. L'étude réalisée par la FTC du Taipei chinois il y a quelques années démontre que, si les banques émettrices et les banques acquéreuses étaient autorisées à négocier librement les commissions d'interchange, le résultat serait moins efficace et non concurrentiel dans la mesure où les transactions par carte de crédit seraient ramenées à une échelle plus modeste assortie d'une moindre liquidité. L'étude établit également que l'établissement d'une commission d'interchange a contribué à stabiliser le système de cartes de crédit et la circulation de ce type de cartes. De sorte que, en vertu de la règle de raison, la fixation de commissions d'interchange uniformisées a été considérée comme une mesure raisonnable qui s'imposait. Par conséquent, à ce stade, la commission d'interchange dans le Taipei chinois fait l'objet de négociations entre les centres nationaux de cartes de crédit et les entreprises spécialisées dans la fourniture d'informations financières (les unes et les autres étant placées sous le contrôle de la FTC) et fixée à 1.5 %.

Le président demande au délégué du Taipei Chinois s'il peut expliquer la divergence entre les conclusions énoncées par ses autorités et l'intervention estonienne et l'invite à commenter cette dernière.

Le président demande aux experts s'ils désirent commenter la question de la supériorité éventuelle des commissions bilatérales d'interchange sur les commissions multilatérales.

M. Wilko Bolt répond que, en fonction du nombre d'acteurs, les commissions bilatérales peuvent s'avérer plus efficaces que les CMI. Cependant, en présence d'un nombre important d'émetteurs sur le marché, les coûts de transaction peuvent rendre les premières impraticables, de sorte qu'il est alors préférable de négocier des commissions multilatérales.

Le délégué du **Portugal**, se référant à la présentation précédente de la Nouvelle-Zélande, veut connaître l'ampleur de la pratique des suppléments par les commerçants et le plafond maximal sur lequel se base la commission d'interchange. Ce plafond est-il calculé à l'aide du test du touriste ou de toute autre argumentation reposant sur le principe de l'indifférence des commerçants ? En fait, aux Pays-Bas, une étude récente a conclu que le test du touriste conduirait à anticiper une augmentation de la commission d'interchange de manière à maintenir le niveau d'indifférence des commerçants, dès lors que les volumes de paiement par carte augmentent nettement et où les effets d'échelle tendent à abaisser les coûts moyens.

Le délégué de la **Nouvelle-Zélande** répond que, selon les premières indications, un supplément est certainement appliqué dans son pays et que réseaux et commerçants négocient actuellement afin d'abaisser

les frais de service imputés à ces derniers. Concernant la deuxième question, dans la mesure où le rapport d'enquête n'a jamais été rendu public, il conviendrait de faire preuve de prudence lorsque l'on évoque son contenu.

Le délégué du **Portugal** fait également remarquer que, dans un petit pays comptant trois, quatre ou cinq banques, il est possible de parvenir à des accords bilatéraux alors que, dans une Europe comptant 5 000 banques, cette pratique devient impossible dans la mesure où le coût de ces dispositifs deviendrait prohibitif. Cette pratique générerait en outre des problèmes pour toute banque désirant entrer dans le système, dans la mesure où celle-ci devrait conclure des accords bilatéraux avec les 5 000 banques le composant. Par conséquent, il convient d'examiner soigneusement la définition du marché pertinent et de remettre en question de manière critique les avantages des accords bilatéraux dans un système électronique.

Le **président** aborde une autre question intéressant particulièrement deux pays aux vues opposées. Un débat a apparemment eu lieu en Lituanie concernant la question de savoir si les banques peuvent légitimement prétendre perdre de l'argent sur l'émission des cartes. Dans ce pays, les banques font valoir que la commission d'interchange est absolument indispensable et devrait sans doute être plus élevée qu'elle ne l'est. Elles avancent en outre l'argument qu'une absence de commission d'interchange pourrait conduire à une augmentation des prix et à une diminution des investissements dans les nouvelles technologies.

Le délégué de la **Lituanie** commence par préciser que l'autorité de la concurrence de son pays n'a en fait réalisé aucune étude dans le domaine des systèmes de paiement de masse. Les comportements coordonnés présumés de certaines banques qui font ainsi actuellement l'objet d'une enquête, ainsi que les systèmes de paiement, n'ont été évalués que dans la mesure où cela sert l'enquête en question. Par conséquent, l'intervention de la Lituanie se base sur l'analyse des différentes plateformes de paiement préparée par la Banque centrale du pays. Le marché de l'émission lituanien est un oligopole très étroit, puisque deux banques émettent près de 80 % de l'ensemble des cartes de paiement. Le nombre des paiements par carte croît régulièrement et, l'année dernière, leur valeur a augmenté de quelque 16 %. Cependant, bon nombre de résidents lituaniens continuent à utiliser leurs cartes de paiement principalement pour retirer des espèces à un DAB/GAB (distributeur/guichet automatiques de banque) et non pour régler leurs achats. De sorte que, l'année dernière, la valeur des transactions effectuées à ces guichets a atteint le triple de celles effectuées aux points de vente. En général, le système de paiement hors espèces en Lituanie peut être considéré comme moins développé que celui de la plupart des pays de l'UE. On s'attend par conséquent à ce que le niveau de développement du système concorde en fait avec celui des commissions d'interchange. Ainsi, en Lituanie, les banques font valoir que, si les paiements par carte augmentaient à l'avenir, elles pourraient être en mesure de réduire les commissions d'interchange. L'analyse préparée par la Banque centrale lituanienne révèle en fait que les revenus générés par les cartes de crédit et de débit ne couvrent respectivement que 75 % et 99 % des coûts supportés par les banques. Une banque a également indiqué avoir envisagé d'émettre des cartes de paiement, puis y avoir renoncé après être parvenue à la conclusion qu'une telle mesure serait trop coûteuse. Par conséquent, les banques lituaniennes font valoir que la réduction des commissions d'interchange rendrait l'émission de cartes non rentable pour les banques qui réduiraient leurs investissements dans les nouvelles technologies. À la lumière de l'analyse préparée par la Banque centrale, l'autorité lituanienne de la concurrence n'a trouvé aucune raison de mettre en doute ces arguments.

M. Bolt pose la question du degré d'acceptation des cartes par les commerçants.

Le délégué de la **Lituanie** répond que la couverture est très large en Lituanie et que seuls les très petits magasins ne sont pas en mesure d'accepter les cartes.

Le président se tourne alors vers la Lettonie qui, dans sa contribution, a révélé que, selon son autorité de la concurrence, les banques sont suffisamment incitées à promouvoir l'émission de cartes, sans qu'il soit nécessaire de les stimuler davantage en recourant par exemple à des commissions d'interchange.

Le délégué de la **Lettonie** répond que, pendant l'enquête visant un accord multilatéral conclu par toutes les banques lettones concernant la CMI (commission multilatérale d'interchange pour les paiements intérieurs par carte), les autorités ont demandé, en vain, à plusieurs reprises aux banques de produire des preuves démontrant que les avantages de cet accord pourraient compenser les restrictions de concurrence. À la fin de l'enquête, elles ont découvert que l'accord était en place depuis très longtemps et que, pendant toute cette période (depuis 2004), le niveau des commissions d'interchange n'avait pas changé. Le Conseil letton de la concurrence a imposé une amende d'un montant total de 7 800 000 EUR à l'ensemble des banques. Pour ces dernières, l'utilisation des cartes est si répandue qu'elles ont besoin d'en émettre de nouvelles si elles veulent rester concurrentielles. Pour elles, l'émission constitue donc un instrument permettant d'attirer les consommateurs. Si la CMI était fixée à zéro, les banques aimeraient augmenter les frais annuels sur les cartes, mais le montant de ces frais serait contenu grâce à la concurrence entre banques. Il est également probable que les banques subventionneraient l'émission de cartes, comme elles subventionnent d'autres services, dans la mesure où il s'agit d'un outil important pour rester concurrentielles. À ce stade, certaines banques ont fait appel de la décision de justice les concernant et d'autres ont déjà acquitté l'amende car elles font l'objet d'une procédure de faillite dans le cadre de laquelle le liquidateur a jugé préférable de ne pas introduire de recours. La prochaine audience au tribunal, prévue initialement pour début octobre 2012, a été reportée de quelques mois, car le Conseil de la concurrence en est encore au stade de la négociation d'un accord administratif avec certaines banques.

2. Mise en œuvre de la Directive sur les services de paiement en Europe

Le **président** passe ensuite à la question de la mise en œuvre de la Directive sur les services de paiement en Europe et de certaines des conséquences de cet instrument dans les pays de l'UE. Il demande au délégué de l'Union européenne de faire une première présentation du contenu de cette Directive.

Le délégué de l'**Union européenne** déclare qu'il compte analyser à la fois les aspects réglementaires et ceux relatifs à la mise en œuvre de la Directive. Tout d'abord, les paiements sont considérés comme une activité importante pour les banques, puisqu'ils représentent environ 1 % du PIB (soit 130 milliards EUR dans l'UE) et 25 % de leur chiffre d'affaires. Dans l'UE, outre la dimension nationale des paiements, il convient également de tenir compte de leur dimension transnationale – afin de permettre le fonctionnement du marché intérieur – et il est de notoriété publique que l'un des principaux obstacles au développement du commerce en ligne tient aux systèmes de paiement. Il s'agit là d'une question compliquée, dont la solution exige une coopération entre concurrents au sein d'un marché biface ou multifaces comportant le risque d'accords anticoncurrentiels de divers types.

Concernant l'aspect réglementaire et les pratiques en matière d'application, depuis la dernière table ronde de 2006, la Commission a mené en 2007 une enquête consacrée au secteur des banques de réseau, notamment sous l'angle de leurs activités de paiement. Cette enquête a été suivie de plusieurs affaires (ayant notamment débouché sur la « Décision Carte Bancaire » relative à l'entrée de nouveaux émetteurs de cartes sur le marché, sur la décision Visa/Morgan Stanley relative à des mesures prises par Visa pour exclure Morgan Stanley des marchés de l'acquisition et sur la décision MasterCard dans laquelle les Juges européens ont estimé que la CMI prélevée sur les opérations transfrontalières effectuées par des consommateurs nuisait à la concurrence en augmentant le niveau des frais de service supportés par les commerçants). Ces décisions ont donc conduit MasterCard à prendre unilatéralement l'initiative de fixer les CMI pour les cartes de débit et de crédit à respectivement 0.2 % et 0.3 % et la Commission à engager une action individuelle contre Visa. Visa s'est engagée à prélever une CMI de 0.2 % pour les cartes de crédit et la Commission lui a adressé une communication des griefs complémentaires. La Commission a

également engagé une procédure contre le Conseil des paiements européens, organe rassemblant les banques dans l'intention de travailler sur la question des paiements électroniques en Europe au risque d'exclure d'autres prestataires de services de paiement.

S'agissant de la réglementation, la Directive de 2007 sur les services de paiement introduisait la notion d'établissement de paiement (pas forcément synonyme de banque) censé fournir ce type de services et fixait également des règles en matière de suppléments et de réductions, autorisant en substance les commerçants à offrir des réductions et laissant la liberté aux États membres de décider d'interdire ou non les suppléments. Concernant les paiements transfrontaliers, un premier règlement adopté en 2009 limitait le montant des CMI en cas de débit direct. Cet instrument a été suivi du Règlement relatif à l'Espace unique de paiements en euros (Single Euro Payment Area ou SEPA) qui prévoit l'harmonisation des moyens de paiement (virements et de débits directs) à l'échelle de l'UE à compter de 2014 et interdit également l'application des CMI aux débits directs (notons que 21 États membres disposaient déjà d'un régime de débit direct sans CMI).

Concernant la mise en œuvre de la Directive et plus particulièrement l'affaire MasterCard, le Tribunal de l'Union européenne a rendu, en mai 2012, un arrêt confirmant intégralement le jugement de la Commission. Selon cet arrêt, premièrement (i) Mastercard est considéré comme une association d'entreprises lorsqu'elle prend des décisions concernant les CMI, même si sa structure et sa forme juridique ont changé dans l'intervalle ; deuxièmement (ii) les CMI ne sont pas objectivement nécessaires au fonctionnement d'un système quadripartite de cartes de paiement et, en fait, il existe des exemples de tels systèmes opérant sans appliquer de CMI. En outre un système de paiement pourrait fonctionner si nécessaire avec une commission moins restrictive, comme c'est le cas en Australie où la baisse importante du niveau des CMI ne s'est pas traduite par un recul de l'utilisation des cartes. Les banques émettrices peuvent donc, même en l'absence de CMI, réduire leurs coûts, percevoir des revenus supplémentaires et continuer à émettre des cartes. Le Tribunal a également conclu que les CMI ont pour objet et pour effet de restreindre la concurrence, même s'il n'a pas exclu la possibilité de leur appliquer une exemption en vertu de l'article 101(3) qui impose de prouver que l'application de ces commissions se traduit par un gain d'efficacité et que les avantages sont répercutés sur les consommateurs. Les engagements que Visa a souscrits à l'égard de la Commission et les promesses de MasterCard reposent en bonne partie sur ce que M. Wilko Bolt appelle « le test du touriste » ou « test d'indifférence des commerçants » selon lequel le coût pour les commerçants de l'acceptation de la carte ne devrait pas dépasser celui de l'acceptation d'espèces. Il s'agit là, bien entendu, d'une question empirique et les taux proposés par MasterCard dans ses engagements unilatéraux se fondaient donc sur des études réalisées par les banques centrales (notamment celle des Pays-Bas) et des calculs ultérieurs effectués par les consultants de MasterCard. Théoriquement, l'application du test d'indifférence peut conduire à un résultat efficace, mais comme le précise M. Bolt, lorsque l'utilisation des cartes est très répandue, elle peut en fait provoquer une augmentation de la CMI (à savoir un effet indésirable allant à l'encontre de l'efficacité). En définitive, l'application du test d'indifférence devrait se traduire par un niveau d'acceptation plus élevé des cartes.

Par conséquent, il n'est pas forcément nécessaire de recourir aux CMI dès lors que les commerçants peuvent orienter leurs clients vers les cartes, une conclusion qui a également des implications sur des questions telles que l'interdiction d'appliquer un supplément et l'obligation d'accepter toutes les cartes.

S'agissant des initiatives politiques, la Commission a rédigé un livre vert sur les paiements par carte, par téléphone portable et par Internet et lancé une consultation à ce sujet. Cette initiative ne saurait se résumer à un simple exercice réglementaire, car elle revêt un aspect très technique et implique la participation de nombreux services au sein de la Commission. Cette dernière a appréhendé la question dans son ensemble, se fixant pour objectif ultime d'abolir toute distinction entre les paiements transfrontaliers et intérieurs. Ce livre vert propose une action multiforme qui ne se résume pas à un règlement, mais fixe également des normes et règle la question capitale de l'accès aux informations relatives aux comptes

bancaires par des tiers, en l'occurrence les prestataires de services de paiement qui ne sont pas des banques. Le délégué de la CE estime qu'il existe des moyens sûrs de garantir l'accès à ces informations par les prestataires de services de paiement, afin de leur permettre de traiter des opérations de paiement, notamment sous forme électronique.

Enfin, concernant les étapes suivantes, la Commission veillera à l'harmonisation de la pratique des suppléments et des règles qui s'y rapportent. Elle proposera également des modifications de la Directive relative aux services de paiement et de la réglementation des CMI, après avoir procédé à une évaluation d'impact. Dans ce contexte, son enquête en cours sur le test d'indifférence du commerçant – dans le cadre du contrôle du respect des engagements souscrits par MasterCard – pourrait contribuer à cette analyse.

Le président remercie la Commission pour sa présentation et donne la parole à M. Bolt.

M. Bolt demande si l'harmonisation des suppléments vise l'alignement entre pays ou entre instruments. Il soulève également la question de savoir si la Commission ne craint pas l'application de suppléments excessifs qui pourrait conduire, de manière inefficace, les consommateurs à revenir aux opérations en espèces (dans la mesure où ce moyen de paiement ne fait jamais l'objet de telles commissions), ce qui pourrait provoquer une « guerre contre les espèces ». Il désire également formuler des remarques sur la différence fondamentale entre rabais, réductions et suppléments et renvoie sur ce point à un article d'Oz Shy et Tamas Briglevics (2012) de la Boston Fed, dans lequel les auteurs analysent en outre la capacité d'orienter les consommateurs vers un instrument de paiement.

Le président invite M. David Evans à donner son avis sur ces questions. Il note que les paiements constituent une partie très importante de la micro et de la macroéconomie et que la réglementation des systèmes de paiement est capitale pour la bonne marche de la société. Il se demande si l'article 101 constitue un cadre intellectuel propice à l'établissement d'un prix adapté dans ce domaine et à l'instauration d'un juste équilibre entre paiements en espèces et paiements par carte. Il ne pense pas que la lecture des attendus et du dispositif de l'arrêt du Tribunal de l'UE puisse amener à conclure qu'il s'agissait de la meilleure manière de réglementer un aspect aussi important pour la collectivité. Selon lui, l'article 101 ne permet pas de trouver la bonne solution. Il pense que cette affaire a soulevé la question générale de savoir si les autorités de la concurrence sont les organes appropriés pour réglementer les paiements dans la société.

Le deuxième argument qu'il désire faire valoir est le suivant : les économistes savent que la commission d'interchange implicite utilisée dans le test d'indifférence des commerçants est trop faible. Les créateurs de ce test étaient Rochet et Tirole et ce second auteur a écrit, en 2011, un article intéressant dans lequel il explique pourquoi la CMI constitue simplement la limite inférieure de la fourchette d'approximation de ce que pourrait être la bonne solution. Par conséquent, il pense que le recours au test d'indifférence en tant que cadre réglementaire relève d'une approche pour le moins surprenante.

Le délégué de l'**Union européenne** répond que, lorsqu'il parle d'harmonisation des suppléments, il fait allusion à la fixation de règles, dans la mesure où celles-ci sont pour le moment définies par les États membres. Il serait possible d'harmoniser les suppléments en faisant une distinction, par exemple, entre les différentes cartes et en fixant un certain nombre de règles à cet effet. Il est d'accord avec l'argument du risque de retour aux espèces, même si telle n'était pas l'intention de la Commission à l'origine. Il pense que l'une des raisons pour lesquelles les commerçants n'ont pas recours aux suppléments tient à des motifs psychologiques. Il est d'accord pour estimer que les réductions et les suppléments, même s'ils peuvent avoir le même impact sur les prix relatifs, n'ont pas toujours un effet similaire en pratique et devraient par conséquent faire l'objet d'un examen distinct.

En ce qui concerne les commentaires de M. Evans, le délégué de l'Union européenne estime que le verbe « réglementer » soit correctement interprété. En effet, la réglementation est le résultat d'un projet de règlement ou de loi, à savoir un moyen normatif pour permettant éventuellement de fixer les CMI, tandis que l'article 101(3) est appliqué au cas par cas par les banques ou les prestataires de services de paiement (et ne saurait donc être qualifié de réglementation). Par conséquent, en l'absence de réglementation fixant les CMI, le Tribunal a estimé qu'il appartient aux banques de justifier leurs commissions et tel est précisément l'objectif de l'article 101(3). À supposer qu'un règlement plafonne les CMI, la situation serait différente et cette manière de procéder irait en définitive dans le sens proposé par M. Evans, à savoir que cette question est trop importante pour qu'il appartienne aux banques de décider et qu'elle devrait donc être du ressort du législateur. En ce qui concerne l'utilisation des CMI, la Commission a tenté d'importer un concept conçu par des économistes, mais serait prête à reconsidérer sa position si la mesure s'avérait inopportune. Enfin, elle est déjà parfaitement au courant des faiblesses qui peuvent découler du recours aux CMI et elle continuera à étudier la question en vue, notamment, d'étudier les limites du test d'indifférence des commerçants avant de soumettre une proposition de réglementation.

Le président aborde ensuite la question des suppléments et donne la parole à la Roumanie qui a décidé d'interdire cette pratique pour les cartes de paiement en se fondant sur le fait que cette interdiction est susceptible de renforcer la concurrence tout en permettant une utilisation plus efficace des instruments de paiement. Le président demande au délégué de ce pays de préciser comment les autorités en sont venues à conclure que l'interdiction d'appliquer un supplément pourrait aboutir, dans les faits, à une utilisation plus efficace des modes de paiement.

Le délégué de la **Roumanie** note que, dans le cadre d'une enquête sectorielle lancée par le Conseil roumain de la concurrence en février 2011, un sondage a été mené auprès de banques membres des réseaux Visa et MasterCard émettant des cartes de paiement en Roumanie, de 22 commerçants opérant dans différents domaines et des entreprises internationales que sont Visa et MasterCard. L'autorité de la concurrence en a conclu que l'une des raisons de la réticence des commerçants à moduler leurs prix tient à ce que cela les contraint à les recalculer en fonction du moyen de paiement utilisé, ce qui fait durer plus longtemps le règlement des achats. Une autre raison de leur réticence tient au risque d'un retour aux paiements en espèces (comme l'a indiqué M. Bolt), ce risque étant particulièrement important en Roumanie, même si les cartes y sont aujourd'hui très bien acceptées. Mais surtout, les commerçants interrogés ont fait valoir que la pratique du supplément risque de se limiter à certains segments du marché – billetterie en ligne, commerce électronique, agences de voyage et transport aérien – caractérisés par un risque de fraude plus élevé. L'une des principales conclusions préliminaires à laquelle est parvenu le Conseil de la concurrence peut se résumer ainsi : l'interdiction d'appliquer un supplément peut empêcher les commerçants de moduler leurs prix selon le mode de paiement utilisé mais, parallèlement, les réponses des commerçants interrogés montrent clairement que la décision d'interdire ou d'autoriser ces commissions implique un arbitrage complexe entre des considérations telles que l'efficacité, la protection des consommateurs, la transparence et la concurrence que le Conseil roumain de la concurrence devra sopeser avec soin.

Le président indique que le Danemark a opté pour une solution différente reposant sur un mécanisme complexe dit « système différencié » prévoyant des suppléments différents pour les cartes de débit et de crédit et pour les opérations physiques ou sur Internet. Il demande pourquoi le Danemark a cru bon de retenir cette solution.

Le délégué du **Danemark** relève d'emblée que son pays est l'un de ceux où l'usage des cartes de crédit est le plus répandu : une particularité qu'il attribue largement à l'introduction, en 1984, d'une carte nationale de débit (la Dankort) à la suite d'un accord interbancaire, ainsi qu'à une volonté politique puisque, depuis 15 ans, les frais de service de cette carte sont réglementés. Il s'agit de loin de la carte la plus utilisée dans le pays et elle peut être combinée à une carte internationale. En d'autres termes, les cartes

internationales n'occupent pas un segment très important du marché danois des cartes de paiement. Selon une enquête menée par la Banque nationale du Danemark, la Dankort est de loin l'instrument de paiement offrant le meilleur rapport coût-efficacité (y compris par rapport aux espèces) en raison du nombre élevé de paiements réalisés au moyen de cet instrument. Le système de paiement et la fixation des frais sont réglementés par la Directive, mais également par la mise en œuvre au niveau national de la Loi danoise sur le service de paiement qui fixe le montant des frais de service imposés aux commerçants, de manière à ce que ceux-ci ne supportent que la moitié du coût du système. Cette loi impose également une corrélation entre les frais imposés aux commerçants et le nombre d'opérations qu'ils ont effectuées. Les autorités mènent actuellement une enquête concernant la fixation du montant des frais de service imputés aux commerçant concernant les opérations non physiques effectuées à l'aide de la Dankort, afin d'évaluer la conformité des commissions appliquées à la clause générale qui s'y rapporte de la Loi sur les services de paiement.

En ce qui concerne la question soulevée par le président, le modèle différencié a été récemment introduit au Danemark, et fait une distinction entre les transactions physiques et non physiques d'une part et les cartes de crédit et de débit d'autre part. Cette mesure a été prise du fait que la réglementation antérieure était contraire à la Directive. Aucune règle uniforme ne s'appliquait aux cartes de paiement émises au Danemark et celles émises à l'étranger. La différenciation entre transactions physiques et non physiques découlait de la volonté politique, justifiée par l'anticipation de certains problèmes, d'éviter l'application d'un éventuel supplément sur les premières, tout en l'autorisant sur les secondes. Les règles ont été instaurées pour que les commerçants ne puissent pas appliquer un supplément en cas d'utilisation d'une carte de débit, mais puissent le faire en cas d'utilisation d'une carte de crédit et qu'ils soient ainsi incités à orienter les clients vers le type de carte le plus rentable. Un autre changement tient à l'interdiction générale d'appliquer des suppléments supérieurs aux frais réels que le commerçant acquitte lui-même, de sorte qu'il n'est pas incité à surfacturer les achats des consommateurs au contraire de ce qui se passait avec le système de plafonnement des frais sur les cartes de paiement internationales auparavant en vigueur. Compte tenu du caractère récent de la réglementation, les autorités danoises n'ont pas encore pu évaluer pleinement ses effets sur le système, mais ont d'ores et déjà constaté qu'elle incite davantage les commerçants à orienter les consommateurs vers les cartes de paiement les plus rentables ; elles suivront de près les retombées de cette nouvelle réglementation et continueront d'examiner l'évolution des frais de service imposés aux commerçants.

En réponse à la question de M. Bolt concernant la nature des frais imputés aux commerçants pour les transactions physiques par carte Dankort, le délégué du Danemark confirme qu'il s'agit d'un prélèvement annuel, tandis que pour les opérations non physiques, des frais forfaitaires, légèrement majorés en fonction du montant du paiement, sont prélevés à chaque transaction.

M. Bolt se déclare ensuite surpris de constater que les cartes de crédit se révèlent beaucoup plus chères que les cartes de débit en termes de coûts sociaux et exprime le désir de connaître les raisons intrinsèques de cette différence.

Le délégué du **Danemark** indique que ces résultats proviennent d'une étude réalisée par la Banque nationale du Danemark. Le coût très faible de la Dankort serait dû au fait que tous les adultes au Danemark possèdent cette carte, ce qui explique son usage très répandu. Par conséquent, il serait plus judicieux de faire une comparaison entre les cartes de débit et les cartes de crédit internationales.

M. Evans répond en soulignant que, selon une étude de la Banque centrale européenne, le coût social des cartes de crédit est effectivement légèrement supérieur à celui des cartes de débit. Il ignore la raison de cette différence et présume qu'elle peut sans doute s'expliquer par la répartition du coût de la fraude.

Le président se tourne ensuite vers la **Norvège** qui dispose d'un système différent dans lequel les sociétés de carte de crédit ne peuvent pas interdire les suppléments. Il estime que le cas de la Norvège soulève une question intéressante, dans la mesure où la pratique des suppléments n'y est pas si répandue,

sauf pour les paiements par Internet. Il désire savoir pourquoi, alors qu'ils ont la possibilité d'appliquer un supplément, les commerçants s'abstiennent de le faire et si cela ne signifie pas qu'il conviendrait de se désintéresser de la question de l'interdiction de cette pratique dans son ensemble qui n'a au bout du guère d'importance dans la vie réelle.

Le délégué de la **Norvège** présente un bref tour d'horizon du système de cartes de paiement de son pays. En Norvège, un système national de carte – BankAxept (mis en place dès les années 1980) – est utilisé dans 82 % des transactions. Selon une enquête réalisée par la Banque nationale de Norvège en 2008, le coût social de ces cartes est largement inférieur à celui des cartes internationales. Le gouvernement norvégien a mis en œuvre la Directive sur les services de paiements et l'a transposée en droit interne et a décidé de prohiber l'interdiction d'appliquer un supplément. Par conséquent, les systèmes de cartes opérant en Norvège ne peuvent plus empêcher un commerçant de répercuter ses frais de carte sur le titulaire de la carte. Cette prohibition a été mise en œuvre en droit interne par la Loi sur l'accord financier et elle est entrée en vigueur le 1^{er} novembre 2009. Pour analyser les effets de la nouvelle législation, l'autorité norvégienne de la concurrence a adressé, en 2012, un rapport au ministère des Finances. Les réponses des acquéreurs interrogés font apparaître que les commerçants norvégiens qui appliquent un supplément sont très minoritaires.

Plusieurs raisons peuvent expliquer la faible incidence de cette pratique. Tout d'abord, le système BankAxept en vigueur en Norvège se caractérise par une utilisation très répandue des cartes, l'absence de CMI et des coûts très faibles à la fois pour les titulaires de carte et pour les commerçants. Par conséquent, les commerçants norvégiens n'ont jamais eu beaucoup recours aux suppléments. Deuxièmement, les prestataires de terminaux EFTPOS (permettant un transfert électronique au point de vente) en Norvège ont mis beaucoup de temps à élaborer et à intégrer des options de facturation de suppléments dans le logiciel de leurs appareils. Troisièmement, même si le plus grand prestataire norvégien de terminaux, NETS, a informé la NCA que les commerçants pouvaient désormais accéder à ces options, l'utilisation de celles-ci suppose une configuration spécifique de chaque terminal. Quatrièmement, le rapport a aussi révélé que les commerçants trouvent toujours coûteux de mettre en œuvre et de mettre sur pied un système de tarification efficace pour moduler leurs prix. Enfin, en raison de la concurrence que se livrent les commerçants entre eux, les premiers à avoir adopté ce système semblent être désavantagés. Ainsi, l'annonce au début de cette année par SAS, première compagnie aérienne de Norvège codétenue par l'ensemble des États scandinaves, de son intention d'appliquer prochainement un supplément lui a valu une si mauvaise publicité qu'elle y a renoncé. De même, Norges Gruppen, la plus grande chaîne de superettes du pays, a fait savoir qu'elle comptait commencer à appliquer des suppléments si l'utilisation des cartes internationales dépassait un seuil critique, ceci principalement parce qu'elle projette d'installer un système de communication sur ses terminaux.

Le délégué du **Portugal** revient sur la différence entre les commissions d'interchange prélevées sur les cartes de crédit et de débit et estime qu'elle est due à la prime de risque, dans la mesure où le danger de défaut de paiement est plus élevé avec les premières alors qu'il est, en principe, inexistant avec les secondes. Il se demande également s'il serait judicieux d'introduire une différence entre les cartes de débit à prélèvement immédiat et différé, dans la mesure où les secondes ne sont pas non plus sans comporter un certain risque. Enfin, il se demande pourquoi la Commission a cru bon de fixer les commissions d'interchange à 0.2 % pour les cartes de débit et à 0.3 % pour les cartes de crédit, alors que cette différence n'est pas suffisante pour couvrir la prime de risque liée à une réserve de crédit.

M. Bolt répond qu'il n'est pas tout à fait exact que les cartes de débit ne comportent aucun risque de défaut de paiement. Dans certains pays, comme les États-Unis et les Pays-Bas, il est possible d'obtenir une possibilité de découvert à l'aide d'une carte de débit, ce qui génère un certain risque de défaut de paiement, inférieur cependant à celui lié aux cartes de crédit.

En ce qui concerne la présentation de la Norvège, il fait remarquer que, compte des statistiques relatives aux paiements compilées par ce pays au cours des 20 dernières années, la Norvège pourrait faire le bonheur des chercheurs. Concernant les suppléments, il a toujours cru qu'au Danemark et en Norvège, les banques appliquent déjà elles-mêmes une forme de commission à leurs clients dans la mesure où elles prélèvent des frais à leurs clients qui retirent des espèces à un DAB/GAB en dehors des heures de banque ou qui utilisent les guichets automatiques d'une autre banque que la leur, alors que dans bon nombre de pays l'utilisation des DAB/GAB est presque toujours gratuite. Il se demande si ce système est toujours en place et, le cas échéant, si l'on peut conclure qu'à supposer que les commerçants leur appliquent un supplément, les consommateurs paient alors dans les faits deux fois pour l'utilisation de leur carte, une fois au profit du commerçant et la deuxième au profit de la banque.

Le délégué de la **Norvège** répond qu'il en est toujours ainsi : plusieurs banques – mais pas toutes – prélèvent une commission au titre de l'utilisation des cartes aux DAB/GAB en dehors des heures de banque ou bien au guichet d'une autre banque. Il signale, toutefois, que la majorité des retraits sont effectués directement sans frais dans les magasins ordinaires sous la forme de remises en espèces.

Le **président** remercie tous les délégués qui sont intervenus et oriente la discussion sur les conséquences des décisions Visa et MasterCard de la Commission de l'UE au niveau des pays européens. Dans sa contribution, la Hongrie a notamment soulevé cette question. Elle estime que la décision rendue en 2010 par la Commission à l'encontre de Visa a notamment eu pour conséquence de contraindre cette société de cartes à plafonner la moyenne pondérée de ses commissions d'interchange sur les cartes de débit pour les paiements intérieurs dans des pays comme la Hongrie où elle fixait librement ces commissions. Dans sa contribution, la Hongrie a fait remarquer que cette évolution s'est soldée par des conditions de concurrence inéquitables qui ont donné lieu à certains problèmes de concurrence liés principalement au fait que MasterCard n'a pas été soumise à la même contrainte. Le président désire savoir comment la Hongrie a résolu le problème.

Le délégué de la **Hongrie** commence par décrire la situation dans son pays. Les banques hongroises ont commencé par décider d'abandonner leur accord interbancaire sur les commissions d'interchange nationales après l'ouverture d'une procédure à leur encontre par l'autorité hongroise de la concurrence. En 2009, MasterCard et Visa ont décidé d'introduire des commissions d'interchange nationales sur le marché hongrois. La Commission européenne a engagé des procédures distinctes contre MasterCard et Visa et, concernant MasterCard, l'affaire a abouti à un plafonnement des CMI transfrontalières qui n'a pas affecté ses commissions d'interchange nationales. En ce qui concerne les cartes de débit de Visa, la Commission a décidé d'accepter les engagements de ce réseau et un plafond a été fixé à la fois pour ses CMI transfrontalières et pour ses commissions d'interchange nationales sur les cartes de débit. Il en a résulté, en Hongrie, une commission moyenne pondérée d'environ 0.2 % sur les cartes de débit Visa contre une commission d'interchange nationale de 0.8 % pour MasterCard. Cette différence importante s'expliquait par le plafonnement des commissions d'interchange nationales que Visa pouvait prélever : une contrainte à laquelle MasterCard n'était pas soumis. Les commissions d'interchange constituant la principale source de revenus du système de cartes de paiement, les banques hongroises ont été intéressées par une augmentation de ces commissions. Elles ont donc commencé à transférer leur portefeuille de cartes de paiement de Visa vers MasterCard. Visa a fait savoir qu'elle ne comptait pas affronter MasterCard sur le marché hongrois, car les règles du jeu y étaient par trop inégales. La part de marché de MasterCard étant supérieure à 75 % en Hongrie, l'autorité hongroise de la concurrence de ce pays a décidé d'engager une procédure à son encontre afin de vérifier si elle abuse de sa position dominante sur le marché hongrois pour le verrouiller grâce à ses commissions d'interchange.

L'affaire est en cours. La procédure a été engagée en juin 2012, de sorte que le délégué n'est pas en mesure de livrer beaucoup de détails si ce n'est que les faits sont examinés sous l'angle d'un éventuel abus de position dominante.

Le président donne la parole à la Pologne dont la Banque centrale a tenté de négocier un accord sur les commissions d'interchange en octobre 2011. Cependant, MasterCard a décidé d'abandonner les discussions par peur de la réaction de la Commission européenne face à toute tractation multilatérale à ce sujet. Par conséquent, les efforts déployés par la Banque nationale de Pologne en vue de parvenir à un accord n'ont pas abouti. Le président demande à la Pologne de dresser un tableau plus complet de cette réalité. Quel était le contenu de l'accord auquel la Banque nationale désirait aboutir ? Pourquoi MasterCard a-t-elle décidé de se retirer et quelles ont été les conséquences de ce retrait ?

Le délégué de la **Pologne** résume une longue histoire qui a commencé en 2002 avec la plainte d'un syndicat de commerçants, laquelle a débouché sur une enquête qui a ensuite donné lieu, en 2006, à une décision de justice. Les autorités compétentes ont estimé que les commissions d'interchange appliquées étaient contraires au droit polonais de la concurrence. La décision a été le résultat d'un long débat au tribunal. Le juge a décidé de suspendre la procédure jusqu'à ce que les juridictions européennes aient rendu un jugement définitif dans l'affaire MasterCard. Confrontée à cette incertitude, la Banque nationale de Pologne a alors décidé de négocier un accord du fait que le problème du niveau élevé des commissions d'interchange prenait de plus en plus d'ampleur. Elle a réuni autour d'une table tous les acteurs concernés – représentants des commerçants, de banques émettrices, des deux grands réseaux de cartes de paiement et d'associations de défense des consommateurs et des banques acquéreuses – dans le but de faire baisser les commissions d'interchange pour favoriser l'acceptation des réseaux. MasterCard a exprimé de fortes réserves concernant ce groupe de travail, faisant valoir que de tels contacts entre concurrents risquaient d'être interprétés comme une violation du droit de la concurrence. Elle ne craignait pas tant la Commission européenne que l'autorité polonaise de la concurrence. Le délégué ne sait pas très bien dans quelle mesure il s'agissait ou pas d'une décision stratégique. À l'issue de toutes ces négociations et discussions sur le niveau des commissions d'interchange, la Banque nationale a fini par proposer une réduction des CMI : assortissant cette mesure de conditions accessoires comme le renforcement de la transparence du marché et la promotion des paiements hors espèces. Toutefois, en raison de l'intransigeance de MasterCard, aucun accord n'a pu être trouvé. Les hommes politiques ont commencé à se saisir de la question et plusieurs avant-projets de loi visant à plafonner soit les commissions d'interchange, soit les frais de service imputés aux commerçants ont été soumis au Parlement.

3. Structure du marché, obstacles à l'entrée et concurrence

Le président, M. Frédéric Jenny, aborde ensuite la question des différences existant entre les structures des systèmes de paiement et des problèmes spécifiques que cela pose pour la concurrence.

Il donne la parole à Israël où un système très concentré est en place au sein duquel les principales banques ont créé une coentreprise exploitant le seul réseau de cartes de crédit et de DAB/GAB du pays, ce qui ne manque pas, bien entendu, de soulever certaines préoccupations au regard de la concurrence.

Le délégué d'**Israël** explique que le secteur bancaire dans son pays est très concentré : les cinq plus grands groupes bancaires contrôlent plus de 90 % du marché bancaire des particuliers et les trois sociétés de cartes de crédit émettant et acquérant des cartes de crédit sont contrôlées par les quatre plus grandes banques. Isracard est contrôlé par la banque Hapoalim, Leumi-Card par la banque Leumi et CAL à la fois par la banque Discount et par l'International Bank. Ces banques ont sensiblement réduit les commissions d'interchange – les ramenant de 1.38 % en 1998 à 0.7 % pour 2014 – et proscrivent la règle interdisant d'appliquer un supplément. Une coentreprise formée par les cinq plus grandes banques, Shva, a été créée en 1979 et contrôle le seul réseau de cartes de crédit et de DAB/GAB ; elle possède en outre des GAB et gère ainsi une portion substantielle des retraits en espèces. Cette situation soulève trois questions principales. Premièrement, que faire concernant le monopole des cartes de crédit et des DAG/GAB ? Deuxièmement, que faire concernant le fait que ces réseaux sont contrôlés par les banques qui gèrent aussi les sociétés de cartes de crédit, ce qui soulève des problèmes d'intégration verticale qui pourraient entraver

l'entrée de nouveaux arrivants sur le marché des cartes de crédit ou des activités bancaires ? Troisièmement, le contrôle des GAB par Shva affaiblit-il la concurrence entre les guichets automatiques, compte tenu du fait que les banques qui détiennent cette coentreprise exploitent également leurs propres GAB. L'autorité israélienne de la concurrence a reçu diverses plaintes concernant les frais de connexion imputés par Shva aux entités qui souhaitent se connecter au réseau de cartes de crédit. En vertu des conditions imposées par l'autorité de la concurrence dans le cadre de l'exemption de 2008, Shva est censée garantir le libre accès et peut imposer des frais de connexion (toute contestation étant soumise à un arbitrage). Cependant, depuis 2008, diverses entreprises ont tenté sans succès de se connecter à Shva. Shva a ainsi voulu facturer à une banque internationale – désireuse de s'implanter sur le marché israélien de la carte de crédit – le coût historique de mise en place du système, ce qui a fini par décider cet établissement bancaire à renoncer à son projet. De même, plusieurs plaintes ont été formulées concernant le long délai nécessaire à la connexion au système de Shva. Ces facteurs ont contribué à faire naître des soupçons de blocage de l'entrée sur le marché et de protection des sociétés de cartes de crédit en place qui sont propriétaires de Shva.

Dans le cadre du renouvellement de l'exemption accordée à Shva en 2008, l'autorité de la concurrence a conclu à l'absence d'éléments justifiant de répercuter sur les nouveaux arrivants les coûts historiques de mise en place du système, ceux-ci étant amortis depuis longtemps. L'autorité a donc accordé une exemption temporaire pour six mois supplémentaires, tout en décidant de réexaminer les problèmes de concurrence évoqués ci-dessus. Elle a, en particulier, décidé d'examiner la question de savoir s'il serait possible de créer une concurrence entre plusieurs réseaux de cartes de crédit en Israël et si le réseau actuellement aux mains de Shva peut rester la propriété des banques en raison des problèmes qu'une telle intégration verticale soulève. Elle a également imposé à Shva de céder ses GAB à une entité indépendante, par crainte que le fait que ces guichets soient la propriété de Shva, tout en étant en concurrence avec les réseaux indépendants de GAB des banques, n'atténue sensiblement la concurrence sur ce marché.

Le président se tourne ensuite vers l'Allemagne qui dispose d'un régime national de cartes de débit très populaire, Girocard, ainsi que d'un système de débit électronique direct, ELV, principalement élaboré hors du secteur bancaire. Récemment, en 2011, le Bundeskartellamt a engagé une procédure à l'encontre de la principale association bancaire allemande, parce que celle-ci propose des services de portefeuille électronique qui pourraient remettre en cause la viabilité d'ELV. Le président voudrait donc en apprendre un peu plus sur la structure du marché allemand et sur les problèmes de concurrence liés à ELV.

Le délégué de l'**Allemagne** commence par souligner que, même si elles sont d'un usage courant dans son pays, les cartes de crédit ne représentent qu'un part réduite du marché (environ 25 % de tous les paiements), dans la mesure où les clients les considèrent comme trop onéreuses par rapport aux autres systèmes qui sont au nombre de deux. Premièrement, la Girocard (monnaie électronique) est le principal système de paiement en Allemagne depuis son introduction dans les années 1990 par les quatre principales associations bancaires de ce pays. Il permet aux consommateurs de payer à l'aide d'une carte de débit au point de vente en utilisant leur code PIN. Le commerçant acceptant la Girocard verse une commission à la banque émettrice ; le secteur de la distribution de produits pétroliers bénéficie d'un taux préférentiel, car il s'est opposé au système à certain moment. Le commerçant est tenu de n'appliquer aucun supplément et aussi d'accepter toutes les cartes émises sous ce logo. Dans le cadre du régime de système de cartes mixtes, la Girocard porte également le logo de l'une des organisations internationales de cartes et peut ainsi être utilisée à l'étranger. Concernant les paiements effectués en Allemagne, les consommateurs privilégient ce système de cartes de débit, ce qui réduit la concurrence entre les modes de paiement. Depuis peu, il est possible d'utiliser la Girocard directement au sein de l'EAPS (Euro Alliance of Payment System), réseau fédérant plusieurs régimes nationaux de cartes de débit en Europe.

Le deuxième régime est le système ELV d'autorisation directe de débit qui a été principalement élaboré par des prestataires de services de services techniques et non par les banques. Ce système utilise

aussi des cartes de débit, mais c'est le client qui autorise le détaillant à prélever un certain montant sur son compte en apposant une signature. La carte de débit sert uniquement à extraire les données requises relatives au compte et au code d'identification bancaires. Le système offre davantage de choix, ainsi que la possibilité de réduire les coûts encourus par les commerçants qui l'acceptent, car les prestataires de ce système ont introduit certaines modifications sur mesure dans le produit afin de pouvoir répondre aux besoins spécifiques des titulaires de carte et des commerçants : évaluation des risques potentiels de défaut de paiement, garanties de paiement, etc. Actuellement, la part de marché de Girocard en Allemagne avoisine les 50 % et celle du système ELV les 25 %. L'Allemagne espère surtout que le SEPA se révélera suffisamment souple pour permettre la compensation et le règlement des opérations ELV et voudrait s'assurer que, lors de la définition de formats européens de ce type, ce système ne souffre pas de la formulation inappropriée d'exigences relatives aux données. L'argument principal de l'Allemagne peut se résumer comme suit : les processus d'unification en cours dans l'Union européenne devraient s'avérer suffisamment souples pour permettre aux mécanismes concurrentiels préexistants de subsister.

M. Bolt demande si le système de débit direct concerne les paiements aux points de vente, car aux Pays-Bas un tel système sert aux télépaiements comme les paiements périodiques de primes d'assurance santé ou de factures de gaz ou d'électricité, et n'est pas utilisé par les commerçants. Il voudrait aussi connaître la structure tarifaire du système ELV. Existe-t-il une commission d'interchange appliquée au débit direct ou bien le système fonctionne-t-il sans paiements compensatoires ?

L'Allemagne confirme qu'ELV sert à régler des achats aux points de vente. Le client du magasin ignore donc normalement quel système de paiement il utilise et remarque simplement qu'on lui demande parfois son code PIN et parfois une signature. Le système ELV reposant sur la signature est le dispositif de débit direct. Ni Girocard, ni ELV ne sont dotés de l'architecture quadripartite des systèmes de paiement internationaux tels que MasterCard et Visa et n'appliquent par conséquent pas de commission d'interchange. Lorsqu'une opération est dirigée sur Girocard, le commerçant doit verser une commission *ad valorem* à la banque émettrice. Cette commission est *collectivement* fixée par les associations bancaires assurant l'exploitation du système. Avec ELV, chaque commerçant négocie *individuellement* la commission qu'il devra verser à son prestataire de services pour obtenir une autorisation et une garantie de paiement. Cette commission est nettement inférieure à celle versée par le commerçant dans le cadre du système Girocard. Il convient également d'observer que, dans certains cas, les associations bancaires ont accepté d'abaisser la commission du système Girocard en raison de la pression concurrentielle exercée par le système ELV.

L'Allemagne confirme que, même si l'élaboration du système ELV a été le fait de prestataires de services techniques, les commerçants ont également beaucoup poussé à cette innovation.

Le président demande ensuite à la Suisse de rendre compte d'une affaire intéressante survenue avec MasterCard en 2011, lorsque cette organisation a décidé d'introduire une commission d'interchange sur ses cartes de débit, ainsi que sur ses cartes Maestro et MasterCard Débit. Il aimerait connaître l'analyse de la Commission suisse de la concurrence et l'argument ayant pesé en faveur de l'instauration de cette commission d'interchange dans le cadre d'un système qui en était auparavant dépourvu.

Le délégué de la **Suisse** commence par expliquer qu'aucune CMI n'est appliquée pour Maestro qui est le réseau de cartes de débit le plus important du pays. En 2004, pour la première fois, les émetteurs et les acquéreurs de Maestro ont demandé à la Commission de la concurrence de pouvoir instaurer une CMI. À l'époque, la Commission a fait savoir que l'application d'une CMI provoquerait l'ouverture immédiate d'une enquête, de sorte que les intéressés ont renoncé à leur projet.

En 2009, Visa a demandé à pouvoir appliquer une CMI sur sa carte de débit V-PAY. La Commission de la concurrence a estimé que, s'agissant d'un nouveau produit de nature à concurrencer le principal

acteur du marché (à savoir la carte Maestro), il n'y aurait pas lieu d'ouvrir une enquête sur les commissions d'interchange pendant la phase d'introduction de la nouvelle carte – estimée à trois ans – tant que la part de marché de V-PAY n'excéderait pas 15 % et sa CMI 2 %. À la suite de cette décision, MasterCard a demandé en 2011 de pouvoir instaurer une CMI non seulement pour Maestro, mais aussi pour une nouvelle carte de débit, encore inconnue en Suisse, la carte MasterCard Débit. La Commission de la concurrence (CC) a procédé à une analyse différente concernant les cartes Maestro et MasterCard Débit. Pour elle, Maestro étant de loin le principal système de cartes de débit en Suisse et n'ayant pas de réels concurrents, rien ne justifiait – sous l'angle économique – l'introduction d'une CMI pour ce système, faisant savoir que cette mesure entraînerait l'ouverture d'une enquête de sa part. En ce qui concerne MasterCard Débit, la CC a conclu que, comme pour V-PAY, il s'agissait de l'arrivée d'une nouvelle carte de débit sur le marché et a décidé de ne pas ouvrir d'enquête pendant la phase d'introduction de trois ans, tant que la carte n'aurait pas atteint une part de marché supérieure à 15 % et que sa CMI n'excéderait pas 2 %. Une autre condition imposait à MasterCard de ne pas inviter ses émetteurs et ses acquéreurs à adopter la nouvelle carte à la place de l'ancienne carte Maestro. Par conséquent, en Suisse, Maestro, qui est le principal système de cartes de débit, n'applique pas de CMI, tandis que cette pratique est tolérée dans certaines conditions concernant les nouvelles cartes V-PAY et MasterCard Débit.

Le président demande ensuite si la Suisse ne craint pas que ses décisions n'entraînent un comportement anticoncurrentiel des nouveaux arrivants qui pourraient être tentés de rester en dessous du seuil de 15 % du marché afin de continuer à appliquer leur CMI.

Le délégué de la **Suisse** répond que la part de marché de 15 % n'est pas un seuil au-delà duquel leur CMI serait automatiquement jugée illégale, mais qu'il s'agit d'une limite à partir de laquelle la CC pourrait décider d'ouvrir une enquête sur l'impact de la CMI sur le marché.

M. Bolt désire poser une question à la Suisse concernant la question de savoir pourquoi aucun système national de carte de débit n'a été mis en place dans ce pays, contrairement à ce qui se passe dans de nombreux autres pays européens comme la Suède, le Danemark, la Norvège, la Hollande et la Belgique. L'existence de la carte de débit Maestro pourrait-elle être la cause de cette situation ?

La **Suisse** répond qu'il s'agit bien là de la raison historique. Le pays était en effet doté d'un système permettant d'effectuer des transactions au niveau national, tandis que Maestro servait aux opérations internationales. À partir de 2005, MasterCard a unifié tous ces éléments au sein d'un seul et même système : Maestro.

4. Innovation, réglementation et autres questions de mise en œuvre

Le **président** introduit la dernière partie des débats consacrée à l'innovation, à la réglementation et à d'autres questions de mise en œuvre et donne la parole à M. David Evans.

M. Evans commence par examiner l'importance accordée au consommateur par l'analyse de la concurrence, estimant que celui-ci est généralement quelque peu négligé. Dans cet esprit, il déclare vouloir formuler quatre observations succinctes. La première est liée à un argument déjà énoncé plus tôt dans la journée : plus la commission d'interchange imputée au commerçant est faible, plus le revenu retiré par la banque l'est aussi, ce qui peut avoir deux conséquences sur le consommateur : premièrement, face à une réduction d'un euro de la CMI, le commerçant en garde une partie pour lui et en répercute une autre sur le consommateur sous la forme d'une réduction de prix ; deuxièmement, la banque voit son profit baisser dans la mesure où elle est perdante sur la réduction d'un euro de la commission d'interchange et ne regagne qu'une partie de cette perte en la répercutant sur le consommateur. Pour connaître l'impact d'une telle mesure sur les consommateurs, il est donc indispensable de tenir compte de ces deux aspects. À supposer que les taux de répercussion soient les mêmes, le consommateur gagne d'un côté ce qu'il perd de

l'autre. Cependant, si ces taux sont supérieurs à ceux prélevés par le commerçant, le consommateur perdra davantage du côté de la banque que ce qu'il aurait gagné du côté du commerçant et réciproquement. De sorte qu'il convient réellement d'enquêter dans toutes ces affaires afin de savoir quelles en sont les retombées réelles sur le bien-être du consommateur et quels taux de répercussion sont concrètement appliqués.

Selon certaines études réalisées par des économistes, les commerçants appliquent de manière généralisée des taux de répercussion, dont la moyenne se situe toutefois autour de 50 %. Selon certaines études, les banques appliquent, de leur côté, des taux compris dans une fourchette de 70-80 % à plus de 100 %, situés en moyenne à 80 %. Si on se fie à ces chiffres, les commerçants répercutent donc 50 % et les banques 80 %, de sorte que ces dernières s'attribuent une partie des bénéfices, les commerçants sont gagnants et la perte pour le consommateur correspond à la différence entre 80 et 50 %. On pourrait débattre sur ces chiffres. Cela étant, fondamentalement, l'analyse qui doit être faite, selon la conclusion de ces études, est bien celle-ci, et l'on ne peut en principe partir du postulat que le taux de répercussion est de 100 % pour les commerçants ni que les banques s'accaparent tous les bénéfices.

Si l'on examine la situation prévalant aux États-Unis, ce pays s'est doté d'une réglementation visant les commissions d'interchange applicables aux cartes de débit après que les commerçants ont exercé des pressions en ce sens aux Congrès et non à la suite d'une intervention de l'autorité de la concurrence. On pourrait donc se demander s'il n'existe pas un dysfonctionnement du marché du côté du système de cartes. On pourrait également s'inquiéter de savoir si, en effet, les commerçants exercent des pressions en vue de faire baisser les commissions d'interchange à leur profit et ce qui pourrait donner lieu à une fixation monopsonistique des prix. En privilégiant excessivement les intérêts des commerçants, on risque de porter atteinte à ceux des consommateurs. M. Evans pense également que les consommateurs sont souvent oubliés lors de l'examen des règles adoptées par les systèmes de cartes et imposées aux commerçants. Par conséquent, à supposer que les commerçants peuvent imposer des suppléments, ils pourraient commencer à le faire de manière discriminatoire et des éléments concordants prouvent que, lorsqu'ils le peuvent, il se livrent effectivement à de telles pratiques en facturant aux clients davantage que les coûts qu'ils assument, ce qu'un système de cartes ne saurait raisonnablement tolérer.

Le dernier point concernant le consommateur vise la tendance des analyses à se concentrer sur le coût des paiements. M. Evans fait valoir que, si tout le monde rédige des études sur les coûts des paiements pour la collectivité ou les commerçants, comme c'est le cas notamment de l'étude publiée récemment par la Banque centrale européenne, la seule manière de comprendre quelle pourrait être la solution efficace pour les paiements – s'il convient de privilégier davantage les paiements électroniques, les paiements en espèces, les paiements par chèque ou les paiements par carte de débit ou de crédit – du point de vue du bien-être social consiste à tenir compte à la fois du coût et des avantages, ainsi que du point de vue du consommateur. Ainsi, même si le paiement en espèces peut se révéler vraiment bon marché pour les commerçants, il peut s'avérer que le consommateur paie, quant à lui, une commission élevée lorsqu'il effectue un retrait sur un GBA comme c'est le cas en Norvège et comme cela s'est vérifié à Boston en février dernier. M. Evans reproche aux études en question de ne pas estimer l'avantage que le consommateur retire de ces différents moyens de paiements et l'intérêt qu'ils ont à payer au moyen d'une carte de débit ou de crédit. Or, ces avantages doivent être intégrés dans le calcul.

M. Evans est déçu de constater que l'ensemble des parties – banques, associations de cartes ou autorités de la concurrence – ont des discussions théoriques sur les marchés bifaces qui ne s'accompagnent guère de travaux empiriques susceptibles d'alimenter le débat et de fournir ne serait-ce qu'un début de solution. Il déplore l'absence d'études solides décrivant à la fois le coût et les avantages des systèmes de paiement et, par conséquent, lorsque l'on se demande s'il conviendrait de recourir davantage aux cartes de débit ou de crédit ou bien s'il faudrait réduire les commissions d'interchange, on ignore en fait les conséquences qu'auraient telles mesures faute de connaître, pour chaque instrument de paiement, le mode

de calcul du bien-être social. Il conclut en affirmant que les consommateurs devraient explicitement faire partie intégrante de ces discussions et que leurs intérêts devraient être mis en balance avec ceux des commerçants, afin de parvenir à une réponse correcte à ces questions.

M. Bolt abonde dans le sens de M. Evans sur de nombreux points et notamment sur le fait que le comportement des consommateurs, lorsqu'ils effectuent un paiement, n'est pas uniquement motivé par le coût, mais aussi par des avantages. En revanche, il n'est pas d'accord avec M. Evans au sujet de la capture de la réglementation et sur le fait que les commerçants s'emploient réellement à gagner à leur cause les autorités de la concurrence, n'étant pas sûr de la réalité de telles initiatives.

Le délégué de la **Commission européenne** se démarque légèrement de ce qui a été dit sur la question des taux de répercussion. La Commission a mené une enquête consacrée au secteur des banques de réseau, en se concentrant sur les paiements et a constaté que les taux de répercussion pratiqués par ces établissements sont en réalité très faibles et ne dépassent jamais 20 %. Elle a aussi constaté que la concurrence entre commerçants est beaucoup plus féroce que la concurrence entre banques. Le souci du consommateur découle du fait qu'une CMI est en fait une commission cachée dont le consommateur ignore l'existence et le taux. De plus, même s'il connaît l'existence de la CMI, il ne dispose d'aucun moyen d'action. Ne serait-il donc pas préférable de supprimer la CMI afin que l'indication que fournit le prix aux consommateurs soit correcte et de les laisser décider seuls du moyen de paiement qu'ils préfèrent utiliser et s'ils souhaitent garder la même banque sachant que celle-ci applique des commissions élevées ? Il émet par conséquent des doutes sur le calcul des taux de répercussions présenté par M. Evans, qui lui paraît éloigné de la réalité.

La déléguée des **États-Unis** estime que le raisonnement relatif à la répercussion pose un problème de logique ; à supposer, qu'un commerçant applique un taux de répercussion de 50 % et la banque un taux de 100 %, la conséquence serait qu'il conviendrait de relever la commission d'interchange, pour la porter par exemple à 10 %, ce qui accroîtrait de 5 % seulement les prix pratiqués par les commerçants et de 10 % ce que la banque reverse au consommateur, de sorte que le consommateur en retirerait un avantage au détriment du commerçant, ce qui ne semble pas très logique. Elle estime aussi que, si les banques ne se livrent pas concurrence sur la commission d'interchange, elles s'affrontent toutefois généralement – du moins aux États-Unis – sur diverses prestations telles que les points de fidélité, les avantages divers, l'accès aux salons des aéroports, etc., et qu'il n'est tout simplement guère efficace de comparer ces prestations aux réductions de prix pratiquées par les commerçants. Se pose en outre le problème du subventionnement croisé : lorsque les prix augmentent chez les commerçants, les personnes qui ne paient pas par cartes de crédit acquittent elles aussi un prix plus élevé. La déléguée des États-Unis estime, par conséquent, que le raisonnement relatif à la pratique de la répercussion soulève plusieurs difficultés.

M. David Evans commence par répondre à la déléguée des États-Unis. Selon lui, toute analyse des commissions d'interchange sous l'angle du bien-être doit obligatoirement inclure un examen des taux de répercussion, qui ferait ressortir l'effet et l'avantage marginaux d'un changement de politique. Concernant les remarques formulées par le délégué de l'UE, il reconnaît que les études réalisées par la Commission postaient sur des questions pertinentes, mais juge leurs conclusions très divergentes de celles de dizaines d'études économiques, de sorte que les chiffres qu'elles avancent peuvent être contestés. Bien que n'étant pas autorisé à parler au nom des pays européens, il ne pense pas, – à en juger par l'exemple des États-Unis ou de l'Australie, que les banques aient appliqué des taux de répercussion de 20 % même lorsque la réduction des commissions d'interchange a eu un impact plutôt spectaculaire sur les consommateurs. Son dernier argument porte sur l'indication fournie par le prix. Premièrement, rien ne donne à penser qu'une commission d'interchange socialement optimale, même si elle était inférieure à celle fixée par des intérêts privés, serait tellement différente. Par conséquent, à supposer que la commission d'interchange optimale fixée par des intérêts privés soit de 2 %, rien ne permet de conclure que la commission d'interchange socialement optimale serait, elle, de 20 centimes voire nulle. Deuxièmement, et cette question est liée à

celle des suppléments, les prix ne donnent aucune indication correcte puisque la plupart des commerçants ne les modulent pas en fonction de l'instrument de paiement utilisé. Même ceux qui le font agissent à mauvais escient et, en règle générale, les prix pratiqués par les commerçants ne procurent aucune indication correcte aux consommateurs.

M. Bolt ajoute que le fait que des personnes qui paient en espèces subventionnent celles qui règlent leurs achats par carte de crédit est un faux problème. Il estime que si les paiements par carte sont socialement plus avantageux que les règlements en espèces, la personne qui paie en espèces exerce une externalité négative sur les titulaires de carte. Le subventionnement des cartes par les espèces est donc une bonne chose dans la mesure où, en définitive, l'avantage que retire la collectivité des paiements par carte est plus important de celui que lui procurent les paiements en espèces.

Le **président** remercie tous les participants pour cet échange de vues et revient à l'examen des contributions des pays. Il demande au délégué du Royaume-Uni de décrire certaines innovations récentes survenues dans son pays dans le domaine des systèmes de paiement.

Le délégué du **Royaume-Uni** annonce qu'il compte décrire la nouvelle technologie utilisée pour les systèmes de paiement dans son pays. Il désire ensuite évoquer trois implications potentielles de cette nouvelle technologie et trois difficultés qui en découlent. Premièrement, cette innovation repose sur les paiements par carte sans contact : une technologie mise au point depuis un certain temps déjà et permettant d'effectuer des transactions d'un faible montant sans être contraint de recourir à un code PIN, ce qui accélère considérablement le processus pour le commerçant. Ce domaine des technologies de la communication est très prometteur, car les puces correspondantes commencent à être montées sur les téléphones portables et pourraient en théorie être connectées à différents dispositifs gérant des activités autres que les services de paiement, comme les systèmes de transport en commun ou les programmes de fidélité, ce qui pourrait rapidement profiter au consommateur. La phase d'adoption constitue la principale difficulté dans la mesure où, même si la technologie des paiements sans contact existe depuis un certain temps, son usage est encore très limité. Il s'agit là d'un problème classique pour les systèmes de paiement. Les commerçants pourraient tirer avantage de cette technologie à condition de procéder à des investissements afin de pouvoir traiter ce type de paiements par carte au point de vente et ils sont peu incités à investir tant que les titulaires de type de cartes sont peu nombreux et s'en servent peu. Parallèlement, ces cartes n'ont guère d'attrait pour les consommateurs tant que seul un très petit nombre de commerçants les acceptent. Ce système en est donc encore à ses balbutiements au Royaume-Uni, mais son essor pourrait entraîner un recul encore plus important du recours aux espèces, dans la mesure où il est principalement destiné aux petits paiements, l'idée étant de pouvoir sortir sans emporter son portefeuille, mais uniquement son téléphone portable.

La deuxième implication concerne l'innovation. Traditionnellement, les préoccupations relatives au rythme de l'innovation dans le domaine des systèmes de paiement sont principalement liées au fait que ces systèmes sont détenus et contrôlés par les banques. Ces nouvelles technologies pourraient stimuler la concurrence entre banques en les encourageant à les adopter plus rapidement que leurs concurrents et surtout elles pourraient permettre aux acteurs non bancaires que sont les opérateurs de téléphonie mobile désireux d'offrir ces services d'accéder au marché, ce qui stimulerait encore davantage l'innovation.

Troisièmement, il convient de se demander si cette évolution laisse entrevoir la perspective d'une intensification de la concurrence entre les systèmes de paiement. Certes, il sera toujours nécessaire de disposer d'un système établissant un lien entre les deux comptes, mais les nouvelles technologies permettraient de choisir les modalités de cette connexion. Certains pourraient choisir de procéder en recourant à la fonctionnalité LINK de leur carte de débit, d'autres en optant pour un moyen plus direct et en utilisant par exemple des modes de paiement plus rapides pour transférer les fonds.

En ce qui concerne les difficultés, la première qui se pose serait d'adapter la réglementation aux nouveaux produits et aux nouveaux prestataires de services, tout en veillant à mettre en place des protections adéquates contre la fraude et à garantir la stabilité financière, mais aussi en s'assurant que cette réglementation ne ferme pas la porte aux nouveaux prestataires potentiels. La deuxième difficulté pour les autorités de la concurrence consisterait à essayer de comprendre – dans la mesure où cette nouvelle technologie est susceptible de provoquer une mutation profonde du marché – l'ampleur de cette évolution, à déterminer si elle peut entraîner des problèmes de concurrence et à les régler sans tarder avant que le marché ne bascule vers tel ou tel système particulier. Enfin, la dernière difficulté concerne la politique sociale. On peut légitimement se demander si ces technologies accroîtront l'exclusion sociale, dans la mesure où elles remplaceront plus ou moins les paiements en espèces et où certaines catégories sociales pourraient avoir du mal à les maîtriser. De même, certaines franges de la population pourraient ne pas avoir accès aux technologies et aux téléphones portables requis.

Le président s'adresse alors au BIAC qui, dans sa contribution, a également mentionné l'évolution des paiements électroniques et des paiements par portable. Il demande à son délégué d'exprimer son point de vue sur ces innovations et sur la manière dont elles vont bouleverser les modèles économiques des acteurs utilisant les systèmes de paiement.

Le délégué du **BIAC** commence par faire savoir qu'il compte traiter certains points examinés au cours de la journée. Il rappelle d'emblée que la situation a beaucoup évolué depuis la dernière table ronde de 2006, en raison de la crise financière, de l'arrêt MasterCard, du renforcement de la transparence avec la publication d'un livre vert par la Commission européenne, de la publication par Visa et MasterCard (sur leur site Web) des commissions d'interchange qu'elles appliquent et de toute une série d'innovations. Parmi ces dernières, il convient de citer le Google portefeuille, le portefeuille mobile O2, le système de paiement sans carte en usage au Royaume-Uni, ainsi que la création d'une coentreprise de téléphonie mobile par Vodafone et O2 au Royaume-Uni.

Une bonne partie des évolutions ont lieu hors d'Europe où la situation évolue plus lentement, en raison principalement de l'incertitude quant au futur régime réglementaire de l'UE. La concurrence a changé, car les banques considèrent désormais les opérateurs de téléphonie mobile comme des concurrents, du moins au Royaume-Uni. Pour que cette concurrence soit effective, encore faudrait-il que les opérateurs en question jouissent d'un libre accès aux systèmes de paiement. La question de la sécurité est également très importante, dans la mesure où il s'agit d'un secteur où les risques de fraude sont élevés. La mise en balance de la sécurité et de liberté d'accès est un exercice délicat ; chaque pays s'y essaie selon des modalités qui lui sont propres, ce qui peut poser des problèmes aux systèmes de paiement opérant à l'échelle du continent européen. L'argument de M. Evans selon lequel il faut toujours tenir compte des deux parties en présence est important lui aussi. Concernant les notions de plafonnement des commissions, de supplément, d'assouplissement de l'obligation d'accepter toutes les cartes d'un même réseau et de transparence, il existe également deux manières de les appréhender. Ainsi, comme on l'a vu, le plafonnement des commissions peut atténuer les préoccupations des commerçants qui risquent toutefois de ne pas en répercuter tous les avantages sur les consommateurs, tandis que les banques finiront bien par récupérer d'une manière ou d'une autre les coûts d'exploitation de ces systèmes en appliquant par exemple des frais annuels aux consommateurs comme elles le font déjà dans bon nombre de pays.

L'application de suppléments peut, par ailleurs, avoir des conséquences imprévues comme cela a été le cas au Royaume-Uni où l'OFT a été contrainte de modifier la législation, car Ryanair a voulu imposer un supplément de six ou sept livres sterling aux personnes désirant payer leurs billets d'avion par carte de crédit. S'agissant de la question de l'assouplissement de l'obligation d'accepter toutes les cartes d'un même réseau, différents pays ont adopté des approches distinctes et il convient de ne pas perdre de vue que, pour le consommateur, le fait de pouvoir voyager dans le monde entier en étant en mesure d'acquitter ses achats par carte dans le plus grand nombre de magasins possible est un avantage. En ce qui concerne la

transparence, tout le monde convient qu'il faudrait accroître la transparence dans ce secteur afin de permettre aux clients de faire des choix plus éclairés. La recommandation du BIAC est la suivante : les autorités de la concurrence ne devraient intervenir que lorsqu'il est évident que leur action est proportionnée et indispensable à la protection des consommateurs d'une part et d'autre part que les mesures correctives imposées seront indiscutablement bénéfiques au consommateur. Cela impliquerait d'évaluer d'autres solutions que la réglementation, ainsi que les avantages et les inconvénients de la situation en cas d'adoption d'une réglementation.

Le président s'adresse alors à la déléguée des États-Unis dont la contribution mentionne, elle aussi, des innovations de la technologie mobile et des produits destinées à faciliter l'utilisation des cartes de débit et de crédit. Il émet l'avis que les États-Unis pourraient aussi souhaiter commenter certains des points soulevés.

La déléguée des **États-Unis** commence par souligner l'importance de la sécurité en cas de paiement par téléphone portable. Elle explique que le numéro de compte et les informations à caractère personnel sont stockés sur un composant appelé « élément sécurisé » pouvant être intégré au téléphone ou à un dispositif relié à celui-ci, consister simplement en un logiciel ou être lui-même stocké sur des serveurs distants (le « cloud »). Ces différents choix concernant la manière de traiter l'élément sécurisé pourraient avoir une importance pour la concurrence, en raison d'un possible « goulot d'étranglement ». Si, par exemple, l'élément sécurisé est simplement intégré au téléphone mobile, l'opérateur occuperait une position de force sur le marché, dans la mesure où il contrôlerait l'accès au téléphone et, partant, au consommateur. Mais, par contre, si l'information sécurisée était accessible au moyen d'une application activée depuis le téléphone mais stockée en réalité sur le « cloud », on serait alors vraisemblablement dans une situation plus proche d'un système où l'entrée sur le marché est libre, puisque n'importe quel prestataire pourrait promouvoir les applications requises. Par conséquent, la technologie choisie déterminera le poids des opérateurs de télécommunications et des prestataires de services de téléphonie mobile et l'importance des obstacles à l'entrée.

Une autre question de concurrence qu'il convient d'évoquer est liée au fait qu'il existe, à tout le moins, des problèmes inhérents aux marchés bifaces auxquels sont confrontés les commerçants, les banques, les fournisseurs de matériel et les consommateurs ; tous doivent en effet s'organiser pour utiliser une plateforme permettant le paiement des biens et services. Dans ce contexte, il est très difficile pour un acteur d'attirer les consommateurs vers une nouvelle plateforme et pour surmonter le problème de l'adoption du système, la création d'une coentreprise dans le cadre de laquelle plusieurs parties – dont certaines concurrentes entre elles – pourront coopérer, s'avèrera probablement indispensable.

Cette question ne manquera pas d'attirer immédiatement l'attention des autorités de la concurrence qui pourraient se retrouver confrontés à deux problèmes en cas de création d'une telle coentreprise : celle-ci pourrait avoir une telle ampleur qu'elle annihilerait toute concurrence entre les plateformes ou bien être si restreinte que des acteurs importants du marché qui, pour une raison ou une autre, ne pourraient former eux-mêmes une coentreprise concurrente, en seraient exclus ce qui aurait pour effet de verrouiller le marché. Enfin, la déléguée des États-Unis fait remarquer que nous voyons aujourd'hui émerger des systèmes novateurs, peu onéreux et efficaces reposant sur une nouvelle technologie permettant de se connecter directement sur un compte bancaire et aux consommateurs de régler leurs achats à moindre coût. Cette évolution pourrait poser des problèmes de concurrence au sens large du terme, dans la mesure où les acteurs historiques du marché feront tout ce qui est en leur pouvoir pour s'assurer qu'une telle évolution ne se produira pas.

La déléguée des **États-Unis** aborde ensuite la question de l'innovation et des tensions entre innovation dans le domaine des services de cartes d'une part et réduction des commissions d'interchange d'autre part. Elle commence par faire valoir que, même si les questions soulevées aujourd'hui sont très

complexes, elles ne le sont pas au point que la politique de la concurrence ne puisse être de quelque utilité. Il décrit ensuite les types de mesures prises par le ministère de la Justice de son pays sur ces marchés dans le but de renforcer la liberté dont disposent les banques d'émettre des cartes sur les réseaux des concurrents, afin de stimuler la concurrence et la liberté des commerçants d'orienter les consommateurs vers des modes de paiement moins onéreux. Il relève que le renforcement de la transparence sur les coûts est jugé important pour les consommateurs, parce que, même s'ils ont du mal à s'en faire une idée précise, cela pourrait les aider à faire des choix plus éclairés sur le type de cartes qu'ils désirent acquérir. Il note que, selon M. Evans, les avantages statiques pour le bien-être découlant des réductions des commissions appliquées aux commerçants pourraient s'avérer contreproductifs. Il relève également que, pour M. Evans, s'il est vrai que les commerçants ne répercutent pas en réalité cette réduction des commissions sur les consommateurs et que les banques répercutent sur eux l'intégralité de l'augmentation des frais, les consommateurs pourraient pâtir de la réduction des commissions d'interchange. Cependant, à l'instar du délégué de l'UE, le délégué des États-Unis n'est pas convaincu que ce soit le cas. Il ne voit pas pourquoi la réduction de tarif dont bénéficient les commerçants – qui se traduit dans les faits par une diminution de leurs coûts marginaux – ne serait pas répercutée intégralement à mesure que la concurrence se renforce. Il préfère cet effet aux formes plus ou moins opaques de répercussion pratiquées par l'émetteur de la carte. Il conclut en affirmant que ces sujets sont autant de questions supplémentaires auxquelles il convient de répondre, mais que les types de mesures prises par les États-Unis – comme le fait de laisser aux commerçants la liberté d'orienter les consommateurs vers des modes de paiement moins onéreux et aux banques celle d'émettre des cartes sur les réseaux des concurrents – peuvent permettre à la concurrence de s'exercer d'un côté au moins du marché, pour aboutir à une situation où les consommateurs obtiennent ce qu'ils désirent et où les effets secondaires potentiels de la réglementation sont atténués.

M. **David Evans** convient que l'effet sur le bien-être du consommateur devrait être analysé et qu'il faudrait étudier soigneusement la manière dont les commerçants et les banques peuvent aussi modifier la qualité de leurs services à la suite d'une baisse des commissions.

Le **président** demande alors à la France de donner des détails sur une affaire de concurrence mise au jour au moment où est apparue une innovation dans le domaine du traitement des chèques et des commissions interbancaires.

Le délégué de la **France** confirme que son pays a adopté ces dernières années une série de mesures visant les commissions interbancaires. Certaines ont en particulier été adoptées après la migration des banques vers un système de compensation électronique en 2000, lorsque les banques ont cessé de s'échanger physiquement des chèques au sein d'une chambre de compensation. À l'heure actuelle, les banques appliquent à la fois une commission interbancaire de 0.43 EUR par chèque et une commission exceptionnelle en cas d'annulation d'une opération par erreur. L'autorité de la concurrence a estimé que la fixation conjointe de ces commissions constituait une restriction de la concurrence.

L'autorité a tenu compte des avantages économiques découlant de la compensation électronique des chèques, mais non de l'argument des banques faisant valoir que la commission interbancaire serait une incitation pour les banques qui jugeaient le coût d'adhésion au nouveau système trop élevé. L'autorité de la concurrence a estimé que les banques tireraient aussi des avantages de la modernisation qui aurait pour effet d'abaisser leurs coûts administratifs et d'accélérer le processus de compensation, de sorte qu'aucune banque ne serait lésée du fait de sa participation au nouveau système. Elle a donc estimé que la commission interbancaire était superflue et ne saurait, à ce titre, bénéficier de l'exemption prévue par l'article 101(3) du TFEU. En ce qui concerne les commissions exceptionnelles, l'autorité n'a trouvé qu'une commission dont le niveau n'était pas proportionnel au service fourni. Le délégué de la France souligne que la décision a été infirmée par la Cour d'Appel de Paris en 2011 et qu'un pourvoi en cassation a été formé.

L'autorité est également intervenue récemment dans deux affaires relatives, respectivement, aux commissions interbancaires du système de cartes de paiement dans le cadre duquel les parties se sont engagées à réduire leur commission de plus de 35 % et du système des moyens de paiement hors espèce dans le cadre duquel les parties se sont engagées à supprimer la commission interbancaire à compter du 1^{er} septembre 2013.

Le président donne ensuite la parole à la Turquie.

Le délégué de la **Turquie** résume l'expérience de son pays en soulignant que la part des transactions par carte de crédit y a sensiblement augmenté et que ce marché est très innovant. L'autorité turque de la concurrence (TCA) concentre cependant son attention sur BKM, société anonyme créée par des banques turques afin de procéder à la compensation des paiements par carte. En 2005, après avoir reçu une plainte, la TCA a ouvert une enquête contre BKM afin d'établir si le droit de la concurrence avait été violé du fait que des banques contrôlées par BKM avaient fixé les taux des commissions de compensation. Pendant l'enquête, BKM a demandé une exemption en faisant valoir que sa pratique n'est pas contraire à la Loi sur la concurrence et que chaque élément constitutif du taux de la commission de compensation fixée constituait un élément de coût supporté par les banques émettrices. De plus, la garantie de paiement fournie par la banque émettrice couvrait le risque de fraude et devait donc être facturée et le délai de paiement – résultant de la période séparant la date de la transaction de la date du paiement représentait un autre coût, dit de financement, pour les banques émettrices. À l'issue de l'enquête, la TCA a noté que la commission de compensation couvrait une partie des coûts et revenus des banques émettrices et acquéreuses et que la fixation d'un taux commun applicable à la commission de compensation entre banques empêchait la concurrence du côté de l'émission comme du côté de l'acquisition, de sorte que les banques émettrices ne pouvaient pratiquer leur propre prix pour les services qu'elles fournissaient aux banques acquéreuses. Dans ce contexte, la TCA a conclu que la pratique de BKM consistant à fixer les taux des commissions de compensation était contraire à la Loi sur la concurrence. En ce qui concerne l'examen de la demande d'exemption, elle a relevé que la fixation de ces taux dans le cadre d'accords mutuels conclus entre toutes les banques faisant partie du système nécessitaient de passer un grand nombre d'accords et s'avérait inefficace. Elle a donc conclu que cette pratique pouvait faire l'objet d'une exemption, à condition d'adopter un mode de calcul des commissions fondé sur les coûts et que le taux d'intérêt au jour le jour fixé par la Banque centrale serve de base à la formule appliquée par BKM pour calculer les coûts de financement. L'exemption a été accordée pour deux ans.

À l'expiration de ces deux ans, BKM a demandé le renouvellement de l'exemption et, dans son évaluation, la TCA a sollicité l'opinion des autorités de réglementation compétentes comme la Banque centrale de Turquie et l'Agence de réglementation et de contrôle des banques. Le conseil de la TCA a conclu que la fixation conjointe de commissions interbancaires pouvait bénéficier d'une exemption exceptionnelle jusqu'en avril 2009, à condition que le taux total de la commission résultant de l'application de la formule soit publié sur le site Internet de BKM pour renforcer la transparence.

Enfin, à la fin de la deuxième période d'exemption en 2009, BKM a sollicité une troisième et dernière exemption à durée indéterminée. Il a aussi demandé l'autorisation d'utiliser les taux d'intérêt au jour le jour de la Banque centrale de Turquie pour calculer les commissions de compensation. La TCA a refusé, de crainte que cette pratique n'augmente le coût de financement de 140 millions TRL (90 millions USD) dans le coût total du dispositif pour l'année 2008. Le Conseil de la concurrence de la TCA a décidé que les taux d'intérêt au jour le jour du marché de la pension de la bourse d'Istanbul pourraient servir de base valable pour calculer les coûts de financement. Il a donc été décidé qu'une exemption individuelle pouvait être accordée à la fixation des taux conjoints des commissions d'interchange pendant cinq ans, à condition que les taux d'intérêt du marché de la pension de la bourse d'Istanbul servent de base au calcul et que BKM repense ses procédures de contrôle indépendant afin de garantir la fiabilité des données et de

standardiser les calculs auxquels procèdent les banques participantes (qui constituent ensemble 80 % du marché).

Le délégué souligne que cette affaire illustre l'approche de la TCA concernant les cartes de crédit et les marchés bifaces. D'une part, la TCA recherche une commission de compensation permettant à toutes les parties de tirer un avantage légitime du système et d'en supporter le coût, d'autre part elle est désireuse de mettre en place un mécanisme de contrôle du marché par d'autres organismes publics et initie des mesures en vue de supprimer les obstacles juridiques entravant l'arrivée de nouveaux entrants sur un marché concurrentiel.

Le président remercie la Turquie pour son exposé et présente ses excuses à l'Islande dont la contribution n'a pu être entendue, faute de temps. Il donne alors la parole au Portugal pour une brève intervention.

Le délégué du **Portugal** félicite le Comité de la concurrence de l'OCDE d'avoir organisé cette discussion d'autant plus utile qu'elle porte sur un domaine où l'écart entre l'action des autorités de la concurrence et les préceptes de la théorie économique est d'ores et déjà probablement trop important. Il relève que l'interopérabilité, l'innovation et l'élargissement du choix entre plusieurs services de paiement ont été retardés dans la mesure où nous nous trouvons dans une impasse et où les incertitudes quant à l'engagement en faveur d'une initiative aussi importante pour l'économie européenne dans son ensemble ne sont pas levées. Il soutient que ce qui nous manque, c'est une compréhension du fonctionnement du marché et des marchés bifaces et une meilleure connaissance des dysfonctionnements de ce marché qui imposent l'adoption d'une réglementation. Il conclut en affirmant que la réglementation est la moins mauvaise des solutions, étant donné toutes les difficultés exposées au cours de la réunion.

Le président remercie le délégué du Portugal d'avoir plaidé en faveur de l'instauration d'une réglementation. Il souligne qu'au cours de la journée, les participants ont cherché à en savoir plus sur ce qu'ils ne connaissaient pas et sur ce qu'ils devraient connaître. Il relève que ses collègues ignoraient beaucoup de choses concernant les taux de répercussion et que cette notion est essentielle dans un marché multifaces, estimant qu'il s'agit d'une question essentielle dans la mesure où, sur ce type de marché, toute action concernant l'un des côtés du marché peut avoir des répercussions pour l'analyse d'un autre côté. Il fait remarquer que les participants ne savaient pas grand-chose à propos du coût relatif des différents systèmes de paiement et estime qu'ils ont recueilli certaines indications méthodologiques très utiles et ont en outre probablement acquis une certaine dose d'humilité au sujet de ce qu'il convient de faire en cas de modification des commissions d'interchange ou des contraintes accessoires dont elles font l'objet.

Il relève que les États-Unis ont ouvert une voie en suggérant que les autorités de la concurrence pourraient prendre certaines mesures « sans regret », même si elles ne disposent pas de toutes les informations factuelles ; elles pourraient notamment donner aux banques toute la liberté voulue pour lancer un système de paiement. À ce sujet, il demande à M. Bolt de fournir des exemples d'initiatives que les autorités de la concurrence pourraient adopter « sans regret », malgré le caractère lacunaire des informations dont elles disposent, en d'autres termes, les initiatives qui profiteraient sans aucun doute à la collectivité, en gardant à l'esprit que si de telles initiatives n'existent pas, force serait d'en revenir à la réglementation comme le délégué du Portugal vient de le préconiser.

M. Bolt répond qu'il s'agit-là d'une question difficile à laquelle il ne peut répondre que brièvement. Il commence par reprendre à son compte l'observation du délégué du Portugal selon laquelle il s'agit d'un marché intéressant dont les dysfonctionnements ne peuvent pas se corriger d'eux-mêmes compte tenu de problèmes de coordination, des économies d'échelle, des externalités et des effets liés au caractère biface et/ou de réseau pur du marché. Il conviendrait également de déterminer qui doit supporter le coût de la lutte contre la fraude et de la sécurité. Le secteur privé peut-il régler tout seul ces problèmes ?

Ces questions mériteraient probablement que les autorités ou les instances de réglementations étudient de près le secteur des systèmes de paiement. Même si toute réglementation exige toujours une grande prudence, car elle peut avoir des conséquences imprévues, il estime que les autorités devraient se demander comment supprimer les restrictions pesant sur le comportement des participants au marché, comme l'interdiction d'appliquer des suppléments ou l'obligation d'accepter toutes les cartes d'un même réseau. En effet, même si les commerçants ne profitent pas réellement des avantages qui en découleraient, la menace de l'adoption d'une réglementation peut déjà se suffire à elle-même. M. Bolt pense en outre qu'il pourrait être difficile de tenter de supprimer, par exemple, les obstacles à l'entrée ou à la sortie compte tenu des économies de réseau actuelles, même si cela serait encore la meilleure façon de progresser.

Le président se félicite du caractère extrêmement interactif de cette session entre les délégués et les experts et remercie MM. Evans et Bolt d'avoir stimulé les débats.

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