



EUROPEAN COMMISSION  
Competition DG

***CASE AT.39398***

## **ANTITRUST PROCEDURE**

**Council Regulation (EC) 1/2003 and  
Commission Regulation (EC) 773/2004**

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Article 7(2) Regulation (EC) 773/2004

Date: 5.7.2012

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EUROPEAN COMMISSION

Brussels, 5.7.2012  
SG-Greffe(2012)D/10698  
C(2012) 4776 final

**EuroCommerce a.i.s.b.l.**  
**Avenue des Nerviens, 9-31**  
**B-1040 Brussels**  
For the attention of [...], Director General

**Subject: Case 39398 – VISA MIF**  
**(Please quote this reference in all correspondence)**  
**Commission Decision partially rejecting the complaint**

Dear Sir/Madam,

- (1) I refer to your complaint of 15 June 2009 lodged with the Commission against Visa Europe regarding alleged violations of Article 101 of the Treaty on the Functioning of the European Union ('TFEU') in connection with Visa Europe's immediate debit, deferred debit, and credit Intra-Regional Multilateral Interchange Fees ('MIFs') applicable to commercial and consumer cards transactions. I also refer to the meetings between the Commission and EuroCommerce's representatives and your submissions by which you provided additional information<sup>1</sup>.

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<sup>1</sup> See, in particular: [...];  
[...];  
[...];  
[...];  
EuroCommerce's press release of 15 June 2009 about its complaint against Visa Europe;  
EuroCommerce's press release of 2 October 2009 about Visa fees increase;  
[...];  
[...];  
[...];  
[...];  
[...].

- (2) For the reasons set out below, following the adoption of a decision pursuant to Article 9 Council Regulation (EC) No 1/2003<sup>2</sup> ('the Commitment Decision'),<sup>3</sup> which made legally binding on Visa Europe commitments concerning the Intra-Regional and certain domestic MIFs for consumer immediate debit card transactions and other network rules, the Commission considers that there is insufficient European Union interest in conducting a further investigation into those parts of your complaint that relate to aspects of Visa Europe's conduct which are covered by the Commitment Decision. Pursuant to Article 7(2) of Commission Regulation (EC) No 773/2004, your complaint is therefore partially rejected.

## **1. THE COMPLAINT**

- (3) In your complaint you alleged that Visa Europe restricted competition under Article 101(1) TFEU by setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the EEA, by means of Visa Europe's Intra-Regional MIFs for immediate debit, credit and deferred debit, commercial and consumer cards. You further alleged that the restrictive effect of these MIFs set by Visa Europe is enhanced by certain network rules and practices within the Visa system, such as the Honour All Cards Rule ('HACR'), the rules on cross-border acquiring, and the practice of blending merchant service charges ('MSC') for different types of payment cards. You also complained about the lack of transparency that characterises the markets for the acquiring and the issuing of payment cards. In your view, this restriction does not fulfil the conditions for an exemption under Article 101(3) TFEU.

## **2. PROCEDURAL STEPS UNDER REGULATION (EC) NO 1/2003**

- (4) Your complaint was lodged following the adoption of a Statement of Objections against Visa Europe on 3 April 2009, and against Visa Inc. and Visa International Services Association on 29 May 2009.
- (5) On 9 November 2009 you received a non-confidential version of the Statement of Objections, under the condition that it would be disclosed only to the "Payment Cards Group" within your organisation. A non-confidential version of the Statement of Objections was also transmitted to your economic advisor, [...], on 26 November 2009 *à titre personnel* and under the strict condition that [...] would handle the document in a confidential manner and would not use the information contained therein for any other purpose than the procedure in case COMP/39398 – VISA MIF.
- (6) On 23 November 2009 you submitted your comments on the Statement of Objections and asked for leave to participate in the Oral Hearing to be held on 30 November and 1 December 2009. [...] attended the Oral Hearing as representatives of EuroCommerce. Both in your written observations to the Statement of Objections and in your intervention at the Hearing you welcomed the assessment of the Visa Europe MIFs carried out by the

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<sup>2</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty. OJ L 1, 4.1.2003, p.1.

<sup>3</sup> Commission Decision C(2010) 8760 final of 8 December 2010 in Case COMP/39.398 – Visa MIF

Commission in its Statement of Objections and reiterated the claims expressed in your complaint.

- (7) On 28 May 2010, following Visa Europe's proposal of commitments (the 'Proposed Commitments'), a notice was published in the Official Journal of the European Union<sup>4</sup> pursuant to Article 27(4) of Regulation No 1/2003, summarising the case and the commitments and inviting third parties to submit their observations on the commitments within one month following publication ('Article 27(4) Notice'). On the same date, a copy of the Article 27(4) Notice and of the proposed commitments was transmitted to you. You submitted observations on 28 June 2010.
- (8) On 23 July 2010, Visa Europe was informed of the observations on the commitments received from interested third parties following the publication of the Article 27(4) Notice.
- (9) On 10 September 2010, Visa Europe submitted amended commitments (the 'Revised Commitments').
- (10) In a letter to EuroCommerce dated 27 September 2010, sent pursuant to Article 7(1) of the Commission Regulation (EC) No 773/2004 ('the Article 7(1) letter'), the Commission expressed the preliminary view that there was not a sufficient degree of European Union interest for conducting a further investigation of your complaint insofar as it concerns Visa Europe's Intra-Regional MIFs for consumer immediate debit card transactions. You were given the possibility to comment on the Article 7(1) letter within four weeks from the date of receipt of such letter and to acquaint yourself with the documents on which the provisional assessment of your complaint was based.
- (11) On 21 October 2010, you submitted written observations on the Article 7(1) letter.
- (12) On 26 November 2010, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted on the draft Commitment Decision<sup>5</sup>. On 26 November 2010, the Hearing Officer issued his final report on the draft Commitment Decision<sup>6</sup>.
- (13) On 8 December 2010, the Commission adopted the Commitment Decision. The Commitment Decision was notified to Visa Europe on 10 December 2010 and was not challenged pursuant to Article 263 TFEU.
- (14) On 9 February 2011 of the Commission approved the monitoring trustee proposed by Visa Europe.

### **3. RELEVANT CONSIDERATIONS FOR THE ASSESSMENT OF COMPLAINTS**

- (15) According to the settled case law of the courts of the European Union, the Commission is not required to conduct an investigation into each complaint it receives<sup>7</sup>. The courts of the

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<sup>4</sup> OJ [2010] C 138/34

<sup>5</sup> OJ [2011] C 79/03

<sup>6</sup> OJ [2011] C 79/04

<sup>7</sup> See Case T-24/90, *Automec v Commission*, [1992] ECR II-2223, para. 76.

European Union have also recognized that the Commission has discretion in its treatment of complaints<sup>8</sup>. In particular, the Commission is entitled to give different degrees of priority and refer to the European Union interest in order to determine the degree of priority to be applied to the various complaints brought before it<sup>9</sup>.

- (16) The assessment of the European Union interest raised by a complaint depends on the circumstances of each individual case. The courts of the European Union have recognised that the number of criteria for the assessment of a complaint is not limited, nor is the Commission required to have recourse exclusively to certain criteria. Where appropriate, priority may be given to a single criterion for assessing the European Union interest<sup>10</sup>. According to settled case law, a complaint may in particular be rejected if the alleged unlawful conduct to which the complaint refers has ceased<sup>11</sup>.
- (17) It is to be noted that the cessation of an infringement does not automatically lead to a finding of lack of sufficient European Union interest. The seriousness of the alleged interferences with competition and the persistence of their consequences are assessed in each case. In this context, the duration and extent of the infringements complained and their effect on the competition situation in the EEA are taken into account<sup>12</sup>.
- (18) The courts of the European Union have confirmed that "[...] *the Commission may decide that it is not appropriate to investigate a complaint [...] where the facts under examination give it proper cause to assume that the conduct of the undertakings concerned will be amended in a manner conducive to the general interest*" and that agreements by undertakings to change the incriminated conduct may also entitle the Commission to consider that the complaint no longer raises European Union interest<sup>13</sup>.
- (19) Under Article 9 of Regulation No 1/2003, where the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission, those commitments may be made binding on the undertakings by decision. Such a decision shall conclude that there are no longer grounds for action by the Commission. In such a case, a complaint will be rejected in the light of the commitments accepted by the Commission.
- (20) As part of the general context relevant for the assessment of EuroCommerce's complaint, the Commission notes that in its judgment delivered on 24 May 2012 in Case T-111/08 *MasterCard Incorporated, e.a. v. Commission*, the General Court fully confirmed the Commission's MasterCard decision<sup>14</sup> and dismissed the action brought by MasterCard. In particular for the purposes of this complaint it is worth recalling the following: while the

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<sup>8</sup> See Cases C-119/97 P, *Ufex v Commission*, [1999] ECR I-1341, para. 88; T-193/02, *Laurent Piau v Commission*, [2005] ECR II-209, paras. 44 and 80.

<sup>9</sup> *Automec, supra*, paras. 77 and 85.

<sup>10</sup> See Case C-450/98 P, *International Express Carriers Conference (IECC) v Commission*, [2001] ECR I-3947, para 59.

<sup>11</sup> See, e.g., Joined cases T-133 and T-204/95, *IECC v Commission*, [1998] ECR II-3645, para. 146.

<sup>12</sup> *Ufex, supra*, paras. 93-95.

<sup>13</sup> See Case T-110/95 *IECC v Commission* [1998] ECR II-3605, paras 57 and 58 upheld in Case C-449/98 P *IECC v Commission* [2001] ECR I-3875, paras 44-47.

<sup>14</sup> Commission Decision C(2007) 6474 of 19 December 2007 in Cases COMP/34.579 — MasterCard, COMP/36.518 — EuroCommerce, and COMP/38.580 — Commercial Cards

General Court recalled the need to demonstrate objective advantages under Article 101(3) TFEU (see paragraph 206 of the judgment), which MasterCard failed to do in that case (see paragraph 237 of the judgment), the General Court did not exclude the possibility that efficiencies may derive from the MIF (see paragraphs 222-223 of the judgment).

#### **4. ASSESSMENT**

##### **4.1. Relevant market**

###### *4.1.1. Product market*

- (21) In its Statement of Objections, in line with established practice relating to payment cards<sup>15</sup>, the Commission distinguished an upstream “network market” and downstream “issuing” and “acquiring” markets.
- (22) The upstream network market is the market where payment card scheme operators compete to persuade financial institutions to join their payment card schemes and on which they provide services to such institutions in return for scheme fees.
- (23) Downstream, the financial institutions act as (i) acquirers for merchants, accepting card payments in exchange for merchant service charges (the 'MSCs'), which are typically transaction-based, and (ii) issuers of payment cards to cardholders who may be required to pay an annual cardholder fee. The services provided on the acquiring and issuing markets are complementary in nature but have distinct features and are provided to two different customer groups (merchants and cardholders). Although the respective demands of merchants and cardholders for payment card services are inter-related, the demand behaviour of the two distinct customer groups is significantly different.
- (24) The supply and demand side analyses of the acquiring and issuing markets showed that neither acquiring nor issuing of cards were sufficiently substitutable for any equivalent services for other means of payment, in particular cash, cheques, credit transfer or direct debit payments, to be considered part of the same market. The Commission left open whether acquiring and issuing markets should be further subdivided.
- (25) Therefore, in the Statement of Objections the Commission took the preliminary view that the relevant product market in these proceedings was the market for acquiring payment cards.

###### *4.1.2. Geographic markets*

- (26) According to the preliminary assessment made in the Statement of Objections, the acquiring markets are still national in scope. That conclusion was based on the strong divergences in pricing of the acquiring services in different Contracting Parties to the

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<sup>15</sup> Commission Decision C(2007) 6474 of 19 December 2007 in Cases COMP/34.579 — MasterCard, COMP/36.518 — EuroCommerce, and COMP/38.580 — Commercial Cards recital 278; and Commission Decision 2002/914/EC of 24 July 2002 in Case COMP/29.373 – Visa International – Multilateral Interchange Fee, OJ L318, 22.11.2002, p. 17, recital 43.

EEA Agreement, the considerable differences in the market structure and the fact that cross-border acquiring remains limited.

#### **4.2. Market position of the parties**

- (27) In the Statement of Objections, the Commission took the preliminary view that Visa Europe has a strong market position in terms of its membership network and the number of VISA / VISA Electron / V PAY cards issued as well as in terms of the number of merchants accepting them in the EEA.

#### **4.3. Practices raising concerns**

- (28) In the Statement of Objections, the Commission took the preliminary view that Visa Europe, which is considered an association of undertakings, infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by setting the MIFs that apply to cross-border and certain domestic<sup>16</sup> point of sale transactions with VISA, VISA Electron and V PAY consumer payment cards within the EEA.
- (29) Interchange fees are in effect paid by a merchant's bank (the 'acquirer') to a cardholder's bank (the 'issuer') after a transaction is made at a merchant outlet with a payment card. When a cardholder uses a payment card to buy goods or services from a merchant, the merchant in effect pays a MSC to its acquirer. The acquirer keeps part of the MSC (the acquirer margin), part is passed on to the issuer (the MIF) and a small part is paid to the scheme operator (scheme fees collected by Visa Europe). In practice, a large part of the MSC is determined by the MIF.
- (30) The Statement of Objections expressed a concern that the MIFs have as their object and they also have as their effect an appreciable restriction of competition in the acquiring markets to the detriment of merchants and, indirectly, their customers. The MIFs appeared to inflate the base on which acquirers set the MSCs by creating an important cost element common to all acquirers. According to the Commission's preliminary view, Visa Europe's MIFs are not objectively necessary. 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 HACR, the No Discrimination Rule (the 'NDR'), blending<sup>17</sup>, and application of different MIFs to cross-border as opposed to

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<sup>16</sup> At the time of the adoption of the Statement of Objections Belgium, Greece, Ireland, Italy, Luxemburg, Malta, the Netherlands, Sweden, and Hungary were concerned.

<sup>17</sup> The HACR is a Visa system rule which obliges merchants who have contracted to accept payments with a particular brand of card (e.g., VISA, VISA Electron or V PAY) to accept all cards properly presented of such brand without discrimination and regardless of the identity of the issuing bank or the type of card within that brand. The No-Discrimination Rule (NDR) is a Visa system rule which prevents merchants from adding surcharges to transactions with VISA, VISA Electron or VPAY payment cards, unless local law expressly requires that a merchant be permitted to impose a surcharge. Blending is the practice of acquirers whereby they charge merchants the same MSC for the acceptance of different payment cards of the same payment scheme (e.g. VISA debit and credit) or for the acceptance of payment cards belonging to different payment card schemes (e.g. VISA and MasterCard Credit cards). In the Statement of Objections, the Commission outlined its preliminary view that those rules and practices reduce merchants' capacity to constrain the collective exercise of market power of Visa Europe's members through the MIF, thereby reinforcing the anti-competitive effects of the MIF.

domestic acquirers<sup>18</sup>. Furthermore, according to the Statement of Objections, the MIFs do not meet the requirements for an exception under Article 101(3) of the Treaty of producing efficiencies with a fair share of the resulting benefit being passed on to consumers.

- (31) The Statement of Objections was also addressed to Visa Inc. and Visa International Service Association (the 'Global Visa Entities') on 29 May 2009. The objections raised against the Global Visa Entities concern in particular the potential application of the Inter-Regional MIFs by default, that is to say, inasmuch as those fees could apply to cross-border or domestic transactions with VISA consumer cards within the EEA and their involvement in setting the HACR and the NDR.

#### **4.4. Effect on trade between Member States and Contracting Parties to the EEA Agreement**

- (32) In the Statement of Objections, the Commission took the preliminary view that the agreements between the parties are capable of appreciably affecting trade between Member States and the Contracting Parties to the EEA Agreement within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement. VISA, VISA Electron and V PAY cards are cross-border means of payment, which can be used by cardholders not only in the country where the payment cards are issued, but also for payments at merchant outlets or for cash withdrawals in other countries. VISA, VISA Electron and V PAY cards not only can be but regularly are used for that purpose. In addition, the strong market position of the parties on the relevant national markets means that Visa Europe's MIFs have an effect on the pattern of trade between Member States. The MIFs set by Visa Europe affected and still affect trade between Contracting Parties to the EEA Agreement, because they cover cross-border payments and, in addition, apply in certain Contracting Parties to the EEA Agreement to transactions involving cross-border acquirers and cross-border issuers (unless Visa Europe's members register specific domestic MIFs with Visa Europe).

#### **4.5. Proposed Commitments**

- (33) The key elements of the Proposed Commitments offered by Visa Europe on 26 April 2010 are as set out in recitals 25 to 28 of the Commitment Decision and are as follows:
- (34) Visa Europe commits to cap its yearly weighted average cross-border MIFs applicable to transactions with its consumer immediate debit payment cards at 20 basis points (0.2%) two months following the notification to Visa Europe of the Commitment Decision. The cap will also apply separately in each of those Contracting Parties to the EEA Agreement

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<sup>18</sup> Cross-border acquiring is the activity undertaken by acquirers aiming at recruiting merchants for acceptance residing in a different EEA country than the one where the acquirer is established. Visa Europe's rules prescribe the application of the Intra-Regional MIF to cross-border acquired transactions even if they constitute domestic transactions, unless domestic MIFs have been registered with Visa Europe. In the Statement of Objections the voluntary registration of domestic MIFs with Visa Europe was considered as increasing the anti-competitive effect of the Intra-Regional MIFs, since it puts cross-border acquirers at disadvantage vis-à-vis their domestic competitors in case the unregistered domestic MIFs are lower than the Intra-Regional MIFs.



for which Visa Europe directly sets specific domestic consumer immediate debit MIF rates and in those Contracting Parties to the EEA Agreement where the cross-border consumer immediate debit MIF rates apply in the absence of other MIFs.

(35) In addition, Visa Europe committed to continue to implement and to further improve the transparency measures that were introduced by the Visa Europe Board in March 2009. In particular, Visa Europe commits:

- (a) to continue to operate the rule against blending the MSCs applicable to more than one payment card system or more than one type of Visa Europe cards and to require acquirers to itemise the MSCs according to different types of cards when invoicing.
- (b) to continue to require Visa Europe members to register all MIF rates and apply them to cross-border issued and cross-border acquired transactions;
- (c) to publish all cross-border and domestic MIFs on its website in a way that identifies an applicable interchange rate for all types of transactions and to require acquirers to inform merchants of the publication;
- (d) to ensure that commercial cards issued in the EEA are fully visibly identifiable and that all such cards can be electronically identified at POS terminals by the acquirer or merchant if the terminal has the necessary capability;
- (e) not to make any changes to the HACR as it applies to transactions with its immediate debit cards. Visa Europe already has separate HACR for VISA, VISA Electron and V PAY cards, that is to say, merchants may freely choose to accept VISA and/or VISA Electron and/or V PAY cards. In addition, Visa Europe will require its acquirers to inform merchants that they are permitted to accept VISA and/or VISA Electron and/or V PAY cards and/or the competing schemes' cards; and
- (f) to maintain its current position whereby merchants are permitted to have different acquirers for handling transactions with each type of payment card within the Visa Europe system and/or competing schemes.

(36) Visa Europe appointed a Monitoring Trustee to monitor Visa Europe's compliance with the commitments. Before appointment, the Commission approved the proposed Trustee.

(37) The commitments were proposed for a period of four years from the date of notification of the commitment decision to Visa Europe.

#### **4.6. Comments on the Proposed Commitments**

(38) In response to the publication on 28 May 2010 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, the Commission received thirteen observations on the Proposed Commitments from interested third parties. Overall, the main observations

received related to the maximum weighted average level of the MIFs and the methodology used to calculate that level. However, the respondents also made specific and in some cases technical comments concerning other Proposed Commitments.

- (39) Accordingly this section sets out the main observations submitted by EuroCommerce and other interested third parties and the Commission's assessment thereof.

#### 4.6.1. *Observations of EuroCommerce*

- (40) In its observations of 28 June 2010, EuroCommerce expressed several concerns as regards the Proposed Commitments offered by Visa Europe.
- (41) A number of issues raised by EuroCommerce relate to the methodology on the basis of which the MIF for Visa Europe's Intra-Regional immediate debit MIF has been calculated and to the level of the MIF.
- (42) EuroCommerce claims in this respect that the Merchant Indifference Test ('the MIT') is not a valid methodology for the calculation of an appropriate MIF level. Since cash is an inefficient payment instrument compared to cards, the use of cash as a benchmark for MIF setting would not allow for the economies of scale in card payments that SEPA aims to deliver. EuroCommerce also alleges that a true comparison of the costs and benefits of cash as opposed to cards would prove extremely difficult and depend on a number of assumptions and variables. In any case, in EuroCommerce's view, the application of the MIT would not result in the calculation of a socially optimum MIF.
- (43) As regards the level of the weighted average MIF provided for in the commitments, this is considered to be too high. EuroCommerce also contests the validity of the data on the cost of cash contained in the Central Banks studies, which were used as a basis for the assessment of the weighted average MIF proposed by Visa Europe.
- (44) In addition, according to EuroCommerce, the fact that the weighted average cap applicable to Visa Europe's intra-regional immediate debit card transactions is the same as the one provided for in the unilateral Undertakings offered by MasterCard on 1 April 2009, would provide for little incentives to card schemes to compete below the aforementioned MIF level. Moreover, the cap will prevent the entrance in the market of those card schemes that set lower MIFs than those applied by Visa and MasterCard.
- (45) Moreover, EuroCommerce did not accept that MIFs should be set as *ad valorem* and not as fixed or mixed fees. EuroCommerce also made a number of observations concerning the transparency measures contained in the Proposed Commitments. Firstly, it points out that it should be Visa's responsibility to ensure that its members properly inform merchants about the possibility of unblending. Secondly, given that 50% of the MIF allegedly relates to fraud and risks, transparency should be increased as regards fraud levels. Finally, the amount of the scheme fees paid by acquirers to Visa Europe should be disclosed, and it should be clarified which costs these fees are meant to cover and in which way they benefit merchants.

- (46) EuroCommerce's submission also addresses the reduced scope of the Proposed Commitments. EuroCommerce does not understand why credit and deferred debit card Intra-Regional MIFs are not included, when in its view there is no reason to have different MIFs for credit and deferred debit as opposed to immediate debit.
- (47) EuroCommerce also points out that the benefits to the merchants from the Proposed Commitments will be very limited as they do not cover domestic MIFs for all EEA countries. Furthermore, it is claimed that the Proposed Commitments do not address alleged restrictions on cross-border acquiring.
- (48) EuroCommerce expresses the opinion that the review of MIF rates should take place every six months.

#### 4.6.2. *Assessment of EuroCommerce's observations*

- (49) As regards the proportionality of the proposed maximum weighted average MIF level and the use of the MIT, this is assessed in Section 4.9 below.
- (50) As regards the complaint that the weighted average MIF is expressed as an *ad valorem* fee, this is addressed in Section 4.6.8 below.
- (51) As regards EuroCommerce's argument that setting the weighted average cap applicable to intra-regional immediate debit card transactions at the same level for Visa Europe and MasterCard would produce negative effects on competition, the Commission notes that the MIF levels mentioned in the Commitments and in the MasterCard's Unilateral Undertakings indicate the maximum weighted average level of MIFs. The Commitments do not, however, prevent card payment schemes from setting their MIFs below the maximum weighted average indicated. In addition the Commission considers that in case both schemes apply a MIT compliant MIF level that provides a fair share of possible efficiencies for the merchants, this does not lead to negative effects on competition, rather it corrects for the distortion caused by the MIFs in the relevant market. Furthermore, on the basis of the information the Commission currently has there appears to be no justification for different maximum weighted average MIFs in line with the MIT for Visa and MasterCard cards.
- (52) With reference to EuroCommerce's observation concerning unblending, under the Commitments Visa Europe was obliged in the Commitment Decision to enforce its amended Operating Regulations. This enforcement provision ensures that the unblending provisions in the Operating Regulations is fully implemented, which requires the contracts between merchants and their acquirers to state that MSCs must not be blended between Visa and other payment cards, that acquirers offer merchants separate MSCs for Visa Immediate Debit cards, Consumer Credit and Deferred Debit Cards and Commercial Cards (unless merchants request blended pricing), and that merchants receive unblended invoices. Under these circumstances, there is no need for Visa to make additional commitments on merchant information.
- (53) In relation to EuroCommerce's observation concerning the costs of fraud and the level of scheme fees, it is further explained in Section 4.9 below that in accordance with the MIT,

the MIF level should be set so that on average merchants are not penalised if they accept cards. On this basis, the identification of individual issuer cost elements is not relevant as the methodology of the MIT does not consider issuer costs for MIFs. On the other hand, the cost of acquirer scheme fees is included in the calculation of the acquirer mark-up within the MIT and, therefore, the MIT takes account of the level of these scheme fees in determining the level of the MIF.

- (54) As regards the scope of the Commitments limited to the immediate debit cards, the investigation into credit and deferred debit card MIFs is continuing.
- (55) With respect to EuroCommerce's claim that, the application of the MIT should result in the same level of MIF both for immediate debit cards and credit and deferred debit cards, the Commission considers that if it is ascertained that the transactional benefits to merchants resulting from the use of the payment cards are the same (a difference between credit and debit may exist for instance as regards the average time taken for completing a transaction for credit and debit cards), different maximum MSC levels would not appear to be justified. However, depending on the average acquirer margin and the scheme fees paid by acquiring banks for credit and debit transactions, the appropriate MIFs could differ, even if the transactional benefits to merchants were the same (see also paragraph 100).
- (56) As regards the alleged lack of significant benefits for merchants due to the fact that the Commitments do not cover domestic MIFs in all EEA countries, in those Contracting Parties to the EEA Agreement where the domestic immediate debit MIFs are not set directly by Visa Europe but instead by its local members, a significant number of National Competition Authorities (NCAs) has already initiated investigations<sup>19</sup>. It should be also noted that the Commitments are also without prejudice to the right of the Commission to further investigate Visa Europe's MIFs for commercial card transactions.

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<sup>19</sup> Besides the Commission, the NCAs of France, Denmark, Germany, Poland, the UK, Hungary, Latvia opened proceedings in respect of Visa domestic MIFs. In Denmark the investigation was closed by a commitment decision in summer 2008. In Germany a formal investigation into Visa and MasterCard MIFs is pending. In Poland, the 2007 decision of the NCA prohibiting the Visa and MasterCard domestic MIFs has been appealed before a national court. On 13 November 2008, the national court revoked the decision of the NCA. However, the NCA brought an appeal against this court judgement to a higher court as a result of which the lower court's decision was repealed. The appeals court has supported the Polish NCA's position regarding the market definition and the restriction of the competition and instructed the lower court to reassess the conditions for exemption and the fines. In the UK, the OFT has been investigating Visa's current UK interchange fee arrangements relating to consumer cards. In Hungary, the NCA investigated the domestic interchange fees agreement in the Visa Europe and MasterCard payment card schemes since 2005. Following the formal opening of the case by the NCA, Hungarian commercial banks decided to abolish the agreement in July 2008 with effect as of 1 January 2009. In September 2009, the Hungarian Competition Authority fined eight Hungarian banks for violating competition rules by setting uniform interchange fees for transactions with payment cards of the two international schemes (Visa, MasterCard). Visa and MasterCard were also fined for anti-competitive behaviour in that their rules facilitated banks to conclude agreements that hindered competition. This decision has been appealed before the national court and the procedure is now pending. The Latvian Authority has also recently adopted a decision prohibiting the MIFs agreed under the MasterCard and Visa systems by the Latvian banks and imposed fines.

- (57) In the Statement of Objections, the Commission was concerned that certain rules on cross-border acquiring reinforced the restrictive effect of the MIFs. The concern that certain cross-border acquirers could be foreclosed from competition with local acquirers due to different MIF rates applicable to both groups has however been removed by the mandatory registration and application of domestic MIFs agreed by local members<sup>20</sup>. As regards the obligation for a cross-border acquirer to charge the MIF of the place of the merchant, the Commission has not investigated this point fully and reserves its right to investigate it further in the future.
- (58) Finally, Article 9 (2) of Regulation 1/2003 to which the review clause in the Commitments refers provides sufficient opportunity for review of the maximum weighted average MIF. An automatic periodic review however is not feasible given the complexity of determining the maximum weighted average MIF on the basis of the MIT. If the Commission reopens the proceedings as a result of the application of Article 9 (2) of Regulation 1/2003, EuroCommerce will be entitled to submit a new complaint on that matter.
- (59) For the purposes of this decision the comments of EuroCommerce are the ones that are directly relevant, but for the sake of completeness and along the lines of the reasoning of the Commitment Decision, the observations of other parties are also assessed.

4.6.3. *Observations of [a competitor]*

4.6.4.

(60) [...]

4.6.5. *Assessment of [a competitor's] observations*

(61) [...]

4.6.6. *Other observations from the payment industry*

- (62) The Commission received observations from five other payment institutions.
- (63) Four payment card schemes argued that (i) MIFs do not restrict competition, (ii) cash is not the right comparator as it does not provide a number of additional benefits that cards do provide, (iii) the MIT is based on a non-repeat customer and fails to appreciate that card payments increase sales for merchants, (iv) 0.2% is not the right level for immediate debit MIFs, and (v) the review clause provides for uncertainty as to what MIF level will finally be acceptable.
- (64) One member bank of Visa Europe welcomed the fact that a certain MIF appears to be acceptable for the Commission but expressed a desire for the calculation of the 0.2% cap to be made public and for the Commission to clarify its position on other MIFs as well.

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<sup>20</sup> Visa Europe committed to continue to require its members to register all MIF rates and apply them to cross-border issued and cross-border acquired transactions

- (65) Finally, a new entrant payment card scheme, which is not affiliated to Visa Europe's member banks, opposed the setting of a weighted average MIF cap and, more specifically, the cap of 0.2%, which it considers as unacceptably high for stakeholders. It also argued that aligning the cost of cards to the cost of cash lacks ambition as electronic payments should be more competitive than cash in its view. Most importantly, it voiced its concern that the international schemes apply rules preventing banks from co-badging<sup>21</sup> their cards with other brands.

#### 4.6.7. *Assessment of the observations from the payment industry*

- (66) As regards the claim that the Proposed Commitments address unjustified concerns and go too far, the role of the Commission in the context of Article 9 of Regulation (EC) No 1/2003 is confined to verifying that the Commitments address the concerns expressed in the Statement of Objections and that the parties have not offered less onerous commitments that also address those concerns adequately<sup>22</sup>.
- (67) As regards the proportionality of the proposed maximum weighted average MIF level and the use of the MIT, this is assessed in Section 4.9.
- (68) As regards the review clause, it is necessary in order to ensure that the maximum weighted average MIF continues to correspond to the actual conditions on the markets. In any case the possibility to "*reopen the proceedings*" and review commitments is included in the text of Article 9(2) of Regulation (EC) No 1/2003.
- (69) Finally co-badging can be a helpful entry route for some payment card schemes, but may also have anti-competitive effects in some cases. There does not appear to be a strong enough justification to refuse the Proposed Commitments on those grounds.

#### 4.6.8. *Observations from merchants' representatives other than EuroCommerce*

- (70) Besides EuroCommerce, six merchants' associations submitted observations on the Proposed Commitments.
- (71) They object to the use of the MIT for a number of reasons and argue that the cap of 0.2% is too high and non-transparent as to how it has been calculated. According to one respondent if it were applied in the UK, it would lead to an increase of debit MIFs by over 10%. One large merchant, however, welcomed the 0.2% cap for debit and called for its extension to all schemes. In addition, merchants' representatives claimed that an *ad valorem* fee was not justified and that not all merchants would benefit equally. It was argued that immediate debit card payments would still be more expensive than cash for

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<sup>21</sup> Co-badging, -also referred to as co-branding- involves the application of the trade mark (logo) of a payment system on the face of a card with another payment scheme's logo. So far co-badging has occurred mainly between domestic debit card schemes and international card schemes such as Visa and MasterCard in order to achieve acceptance of transactions with national schemes' debit cards outside the home country. However, co-badging is also seen by newly created payment schemes as a means to enter the payment card market (in particular in light of the SEPA Card Framework (see footnote 36)) and to exert competitive pressure on the international schemes.

<sup>22</sup> See judgment of 29 June 2010 in Case C - 441/07 P, *Commission v Alrosa*, not yet reported, paragraph 41.

certain categories of merchants. Nonetheless, a number of merchants' representatives called for extension of the Proposed Commitments to also cover credit and deferred debit card MIFs.

- (72) As regards the transparency measures, some merchants argued that the HACR should be abolished in particular for different card types within the VISA brand (commercial, pre-paid, magnetic stripe) and that the No Discrimination Rule (NDR) preventing surcharging and discounting should be clarified. Some merchants complained that all the barriers to cross-border acquiring had not been removed by the Proposed Commitments (in particular that MIFs remain tied to the location of the merchant rather than that of the acquirer) and that acquirers continue to discourage merchants from having unblended fees. They also asked for publicity of the relevant rules adopted by Visa Europe in March 2009, which are proposed to be made binding upon Visa Europe and for more transparency on the costs of fraud as well as on the scheme fees. Some merchants were also worried that the published MIFs might not be easily found on Visa Europe's website. Finally, some merchants requested a periodic review of the cap (every 6 or 12 months).

4.6.9. *Assessment of the observations from merchants' representatives other than EuroCommerce*

- (73) As regards the proportionality of the proposed maximum weighted average MIF level and the use of the MIT, the Commission refers to its assessment of proportionality in Section 4.9 below.
- (74) The maximum weighted average MIF is proposed at an *ad valorem* level but Visa Europe will be free to set the individual MIF rates as fixed, *ad valorem* or a combination of the two or to set specific MIF rates for certain categories of merchants. Moreover, nothing prevents the merchants and their acquirers from having MSCs at fixed, *ad valorem* or combined levels. The Proposed Commitments ensure that overall merchants do not bear a MIF that exceeds the weighted average MIF, but the Proposed Commitments do not determine the actual MSCs paid by individual merchants. This would be impractical and would interfere unnecessarily with the functioning of the market.
- (75) As to the scope of the Commitments being limited to immediate debit card MIFs, the investigation into credit and deferred debit card MIFs is still continuing.
- (76) In the Statement of Objections, the HACR and the NDR were identified as rules that reinforce the restrictive effect of the MIFs, i.e. not as possible infringements in themselves. This is in line with the complaint from EuroCommerce. In the context of commitments on immediate debit MIFs, it is not necessary to require the abolition of the HACR by Visa Europe. This is without prejudice to the right of the Commission to further investigate the HACR in isolation or in connection with other MIFs. With respect to the NDR, Article 52(3) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market<sup>23</sup> prohibits any

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<sup>23</sup> OJ L319, 5.12.2007, p.1.

limitation of discounting and surcharging unless a Member State opts out from the latter prohibition<sup>24</sup>.

- (77) As regards the cross-border acquiring, the call for availability of information on the costs of fraud and schemes fees, and the review clause, these issues are addressed in Section 4.6.2 above.
- (78) In response to observations from merchants' representatives, Visa Europe offered to make it easy for merchants to find the MIF rates on its website by introducing a link to pages with the interchange fee information under the Business & Retailers menu of the Visa Europe website homepage.

#### **4.7. The Revised Commitments**

- (79) In response to the observations received following publication of the Notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, Visa Europe modified the Proposed Commitments with a revised proposal on 10 September 2010, the Revised Commitments. In particular the Revised Commitments ensured that:
  - (a) the provisions on the Monitoring Trustee are aligned with the Commission's usual practice on trustees; and
  - (b) the MIFs are published in a way that makes it easy for merchants to find the MIF rates on Visa Europe's website.

The Revised Commitments were made binding in the Commitment Decision.

#### **4.8. The Article 7(1) Letter**

- (80) By letter of 27 September 2010, the Commission informed EuroCommerce, in accordance with Article 7(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty,<sup>25</sup> that the Revised Commitments appeared to address the Commission's competition concerns in respect of Visa Europe's immediate debit MIFs without being disproportionate. Accordingly, the Article 7(1) expressed the preliminary view that there was not a sufficient European Union interest to investigate further EuroCommerce's complaint inasmuch as it concerns Visa Europe's Intra-Regional immediate debit card MIFs.

##### *4.8.1. EuroCommerce's reply to the Article 7(1) letter*

- (81) On 21 October 2010, EuroCommerce responded to the letter of 27 September 2010. In its reply, EuroCommerce reiterated its doubts concerning the appropriateness of the MIT as

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<sup>24</sup> "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, Member States may forbid or limit the right to request charges taking into account the need to encourage competition and promote the use of efficient payment instruments."

<sup>25</sup> OJ L 123, 27.04.2004, p. 18.



the methodology for the calculation of the MIF, criticizing in particular its assumptions and conclusions, disputing that MIFs are passed on to consumers and that the application of the MIT would encourage consumers to make efficient choices with respect to payment instruments. It stressed that the only service which truly benefits merchants is the acquirer's processing and therefore no MIFs, but only the costs of this processing should be attributed to merchants.

- (82) EuroCommerce asserted that even if the MIT test is used, the level of the weighted average MIF is too high. EuroCommerce expressed its doubts concerning the figures used for the calculation. It emphasized that data submitted by EuroCommerce indicates that the cost of cash is not higher than 3 eurocents per transaction and that the four central bank studies are outdated. Furthermore, EuroCommerce provided a list of cost items (such as for instance the costs associated to the implementation of fraud prevention standards or to responding to cardholders queries) that in its opinion should be taken into account when calculating the cost of cards under the MIT.
- (83) EuroCommerce also repeated its concern that the acceptance by the Commission of the same weighted average cap for both Visa Europe and MasterCard immediate debit cards would prevent competition between the two schemes as well as the entrance in the market of those card schemes that set lower MIFs than those applied by Visa Europe and MasterCard.
- (84) EuroCommerce also repeated its position that the MIF rate should be set as a fixed fee per transaction rather than *ad valorem*. EuroCommerce added that it is unfair that Visa Europe could set a different MIF for certain merchants or categories of merchants. EuroCommerce is also of the view that this negates the transparency rules of their purpose, as no individual merchant could verify whether he is paying a weighted average MIF of 0,2%.
- (85) In addition, EuroCommerce made a number of observations concerning scheme fees and the cost of fraud. As regards scheme fees, EuroCommerce disagreed with the statements of the Commission that the MIT-compliant MIF takes into account the level of the scheme fees as these are wholly hidden and argued that there is no guarantee that Visa Europe will not increase scheme fees or introduce other charges that would increase the costs of card acceptance to merchants. As regards fraud, EuroCommerce expressed the view that the MIT provides no incentive for banks to tackle fraud as they can recoup fraud costs through the MIF and that merchants have to bear extra costs due to fraud prevention standards (PCI-DSS) imposed on them by card schemes.
- (86) Furthermore, EuroCommerce argued that the application of the MIT does not benefit all merchants equally, and that neither Visa Europe nor the Commission have presented any convincing arguments of these alleged economic benefits. EuroCommerce also claims that in offering the commitments Visa Europe has not put forward any arguments to show that the requirements of Article 101(3) TFEU are met and therefore the infringement continues.

- (87) EuroCommerce also disagreed with the Commission's views on the potential difference in the level of MIFs for debit and deferred debit/credit transactions.
- (88) EuroCommerce also claimed that the Revised Commitments must be subject to an immediate review according to the results of the cost of cash study.
- (89) EuroCommerce requested the Commission to take action against the aspects of the case which remain open and against the HACR, and brought to the attention of the Commission an increase in Visa's Inter-Regional MIF rates.
- (90) Finally the Commission notes that in its reply to the Article 7(1) letter EuroCommerce did not object specifically to the criteria of lack of Union interest being met but commented only on the substance of the Commitments.

#### 4.8.2. *Assessment of EuroCommerce's reply to the Article 7(1) letter*

- (91) EuroCommerce's concerns regarding the appropriateness of the MIT and its application in the present case have already been fully addressed in the Article 7(1) letter and in Section 4.9 below. EuroCommerce's specific comments on the MIT are addressed in the following paragraphs.
- (92) EuroCommerce claims that the assumptions on which the MIT theory rests are not reasonable and are 'disconnected from the reality in which merchants operate'. First, it should be noted that the MIT is specifically designed to take into account a principal feature of competition in the retail market, that is to say merchants' near inability to refuse payment cards. EuroCommerce does not explain in which respect it considers the assumptions underpinning the MIT theory to be unreasonable. The model's assumptions underpinning the Commitment Decision take into consideration the structure of the payment cards market, cardholders' card usage patterns and competition between merchants.
- (93) EuroCommerce contends that MIFs are not passed on to cardholders and that cardholders do not take into account the costs and benefits of merchants when choosing how to pay. First, it should be pointed out that, although pass-on of the MIF to cardholders is unlikely to be perfect, it is subject to the competitive pressure among issuing banks. While MIFs are identified mostly only by the merchants as a distinct component of the per transaction charge, the MIF influences the prices on both sides of the payment scheme faced by cardholders and merchants (and subsequent customers). The fact that cardholders typically do not face a (either negative or positive) fee per transaction does not mean that the MIF revenues received by issuing banks do not have an impact on the setting of annual cardholder fees or volume of rebates offered to cardholders. This conclusion remains valid even if as noted in the MasterCard decision it remains unclear to what extent the issuers indeed pass the fee proceeds on to their customers (recital 741) and it was also held that the assumption of a symmetric pass-through on the issuing and acquiring side is not realistic based on the Australian example (Annex 4, paragraph 5 of the MasterCard decision). As EuroCommerce itself points out, the payment cards that carry the highest MIFs are those that compensate cardholders for usage through 'gifts'.

- (94) Second, it is true that cardholders do not take into account the costs and benefits of merchants when choosing how to pay – they only take into account their own benefit. However, the MIT implies that MIFs are capped at the level of the transactional benefits that card payments generate for merchants as compared to an alternative payment instrument. As such, the methodology promotes the internalization of the network externalities that cardholders exert on merchants and their subsequent purchasers. This means that cards which induce more efficient payment procedures than other means of payment can be promoted on the issuing side via a MIF. To the extent that the MIFs are passed on by the issuing banks to the cardholder in the form of rebates and/or reduced cardholder fees, it will ensure that cardholders make more efficient payment choices, being effectively led by the MIF to internalize the cost saving that card usage entails for the merchants. At the same time, the MIT ensures that when cardholders decide how to pay - on the basis of their own expected benefit - they do not, on average, impose negative externalities on merchants (i.e. costs that exceed merchants' benefits from accepting card transactions).<sup>26</sup> Thus merchants are on average neutral vis-à-vis the form of payments chosen by customers.
- (95) As regards EuroCommerce's criticism of the reliability of the underlying data, at the time of the adoption of the Commitment Decision, the four Central Bank studies were the most reliable sources of data on the relevant costs of accepting cash and card transactions under the MIT. Furthermore, the Commitment Decision clearly establishes that the 0.2% MIF cap can be reviewed if new and more reliable information on the costs of cash and of cards becomes available. However, any such review needs to be based on reliable data obtained on the basis of a methodology that takes into account all relevant cost elements incurred by merchants for cash and card payments alike. Such costs include labour, equipment and other third party services. The BRC study referred to by EuroCommerce looks at fewer cost items, which could explain the difference in the results.
- (96) By investigating MIFs set by four-party payment card schemes, and by accepting commitments from Visa Europe with respect to the level of its MIFs, the objective of the Commission is not to set the prices of payment cards for merchants or cardholders, but to ensure that such price setting by the card schemes, which involves a collective agreement among competing banks (or a decision of their association), does not restrict competition to the detriment of consumers. In order to establish the level at which MIFs comply with this condition, the Commitment Decision relies on the MIT, which seeks to ensure that the total costs of card transactions do not exceed the transactional benefits that merchants derive from accepting payment cards. In this context transactional benefits are in particular the savings accruing to merchants from card payments, by reducing their cost relative to alternative payments, in particular those by cash.
- (97) When assessing the weighted average MIF level provided for in the Commitments, all relevant costs of the respective payment means (cash and cards) available to the Commission were taken into account. As regards the cost items listed by EuroCommerce, all relevant costs that the acceptance of cards and cash impose on merchants need to be

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<sup>26</sup> In other words, by means of correcting the MIF via the MIT, the cardholder will face the true costs of his actions ("internalization") and will be prevented from creating negative externalities ("externalization") on merchants.

taken into account in determining the MIT-compliant MIF. The Commission intends to prepare a study on costs and benefits to merchants of accepting different payment methods containing all relevant items. Pursuant to the Commitments, the results of the study on the cost of different payment means could lead to a modification of the maximum weighted average MIF.

- (98) EuroCommerce contends that the MIT provides no incentives for banks to tackle fraud, but rather encourages them to ignore it as they can recoup fraud costs through the MIF. However, as noted above, the MIT is not designed to take into account costs involved in offering card payment services to cardholders (issuer costs). Under the MIT there is no direct link between the MIF and the costs of fraud to the issuer, and as such, between the MIF and banks' fraud-reduction incentives. As a consequence, since most fraud costs are finally borne by issuers, for any given level of MIF determined on the basis of the MIT, a reduction of fraud costs for card payments would, just as a reduction in any other cost, allow banks to provide card payment services more efficiently, incentivizing them to reduce these costs. In addition, concerning fraud costs incurred by the merchants, under the MIT, banks have an interest in decreasing such costs, as if those costs increase they reduce the efficiency of the card scheme compared to cash and so are liable to decrease the level of the MIT compliant MIF. Therefore, the argument that the MIT encourages banks to ignore fraud costs is unfounded.
- (99) As noted above, two or more schemes can in principle apply the same efficient MIT compliant MIF level. As concerns the alleged barriers to new entry caused by the acceptance of the same weighted average MIF level for MasterCard and Visa Europe immediate debit cards, the Commission's objections were primarily related to the downstream acquiring market (the relevant market) and not to the upstream network market, although market conditions in the upstream network market were taken into account in the analysis of the restrictive effects in the acquiring markets. As competition in the upstream network market, alleged competition problems therein and entry barriers were not analysed in depth, and since the Commitments removed the Commission's concerns in the relevant market as regards the Intra-Regional and certain domestic MIFs for consumer immediate debit card transactions, there are no grounds to call into question the Commitments on this basis.
- (100) EuroCommerce repeats its preference that the MIF should be set as a fixed fee per transaction rather than *ad valorem*. This argument is addressed, in paragraph 73 above. EuroCommerce further argues in this context that Visa Europe could set a different MIF for certain merchants or merchant categories and in effect create an uneven playing field resulting in certain merchants subsidising others. In this regard, in assessing the compatibility of an agreement with Article 101 TFEU the decisive factor is its overall impact on consumers within the relevant market and not the impact on individual members of the respective consumer group<sup>27</sup>. Moreover, setting specific MIF rates for certain categories of merchants is a long standing industry practice and is not a result of the Commitments. Also, this practice has not specifically been objected in

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<sup>27</sup> See in particular paragraph 87 of the Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08)

EuroCommerce's complaint. Furthermore, contrary to EuroCommerce's allegation, the weighted average *ad valorem* rate will not compromise transparency. MIF rates must be published by Visa Europe in a manner easily accessible to merchants and compliance with the weighted average will be verified by an independent Trustee according to Section 3.2 and 4.1 of the Commitments.

- (101) EuroCommerce disagrees with the statement that the MIT compliant MIF takes into account the level of the scheme fees, since in its view these are wholly hidden. In fact the MIT computes the MIF by comparing the costs of cash with those of cards. One of the elements that make up the cost of cards is the cost of services provided by acquiring banks. This includes all MSC components with the exception of the MIF, therefore it includes scheme fees. *Ceteris paribus*, any increase in scheme fees would increase the total cost of cards, and thereby decrease the difference between the cost of cash and the cost of cards, leading to a decrease of the MIT compliant MIF. As regards EuroCommerce's concern that Visa Europe could increase scheme fees or other charges which are outside the regulatory review, the Commitments in Section 5.2 contains an anti-circumvention clause according to which Visa Europe shall refrain from setting and implementing other fees that are economically and/or legally equivalent to Intra-Regional Multilateral Interchange Fees applicable to Immediate Debit transactions, including but not limited to Visa Europe's scheme fees charged to acquirers and / or issuers. The compliance of Visa Europe with this provision is verified by the Trustee. Non-compliance could lead to opening of proceedings or the imposition of penalty payments under Regulation (EC) No 1/2003.
- (102) As regards EuroCommerce's concern that Visa Europe could introduce new card variants with higher interchange fees, the Commitments apply to Visa Europe's immediate debit card transactions regardless of the brand carried by the card with which the transaction is made. Therefore even if Visa Europe were to introduce a new payment card brand, the new immediate debit cards would still be covered by the Commitments.
- (103) As regards EuroCommerce's criticism that the MIT does not benefit merchants equally – as noted above - the application of the MIT benefits merchants overall in conformity with the requirements of European competition law. The MIT quantifies the transactional benefits of card payments merchants enjoy compared to payment by cash. For instance, such transactional benefits arise where card payments reduce merchants' costs as compared to cash payments e.g. because transportation and security expenses for cash are saved or back-office labour times are reduced. The calculation of the MIT based on the best available data has led to the conclusion that the costs of cash acceptance are higher than the costs of card acceptance (excluding the MIF), in other words merchants enjoy transactional benefits when accepting cards.
- (104) As concerns EuroCommerce's argument that Visa Europe has not put forward any arguments to show that the requirements of Article 101(3) TFEU are met, in proceedings under Article 9 of Regulation 1/2003 there is no finding of infringement and the undertaking concerned is thus not under an obligation to show that the requirements of Article 101(3) TFEU are met.

- (105) Furthermore EuroCommerce disagrees with the Commission's conclusion that if transactional benefits to the merchants are the same for credit and debit cards, different maximum levels of MSC would not appear to be justified and EuroCommerce also points out that in the same paragraph the Commission recognizes that the average transaction time may differ for debit and credit cards. Neither the Article 7(1) letter nor the Commitment Decision reached a final conclusion on the appropriate level of credit and deferred debit MIFs. They merely set out some of the factors that could influence the calculation<sup>28</sup>. Furthermore, the other elements of the MSC may vary between credit and debit cards leading to different MIT compliant MIFs, even if the MIT compliant MSCs are the same (or nearly the same) In any case EuroCommerce's argumentation appears to be contradictory to its earlier position. In its comments on the market test, EuroCommerce was of the view that there is no reason to have different MIFs for credit and deferred debit as opposed to immediate debit card transactions.
- (106) Finally as far as EuroCommerce's view that the Commitments must be subject to immediate review according to the results of the cost of cash study is concerned, the Commitment Decision states that the Commission may reopen proceedings on its own initiative if more reliable data for calculating the immediate debit weighted average MIF rate based on the Merchant Indifference Test becomes available (for example the Commission's study on costs and benefits to merchants of accepting different payment methods).

#### **4.9. Proportionality of the Commitments**

- (107) According to settled case law, the principle of proportionality requires that the measures adopted by institutions of the European Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued<sup>29</sup>. Although Article 9 of Regulation (EC) No 1/2003, unlike Article 7 of that Regulation, *"does not expressly refer to proportionality, the principle of proportionality, as a general principle of European Union law, is none the less a criterion for the lawfulness of any act of the institutions of the Union, including decisions taken by the Commission in its capacity of competition authority"*<sup>30</sup>. The *"application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must, however, take into consideration the interests of third parties."*<sup>31</sup>
- (108) The Commitments are appropriate and necessary to address the concerns identified in the Statement of Objections without being disproportionate. In this respect, the Commission had to evaluate the full package of the Commitments and not only its individual elements.

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<sup>28</sup> See in particular paragraph 49 of the Article 7(1) letter.

<sup>29</sup> See for instance, Case T-260/94, *Air Inter v Commission* [1997], ECR II-997, paragraph 144 and Case T-65/98, *Van den Bergh Foods v Commission* [2003], ECR II-4653, paragraph 201.

<sup>30</sup> Case C-441/07 P, *Commission v. Alrosa*, [2010], not yet reported, paragraph 36.

<sup>31</sup> *Ibidem*, paragraph 41.

- (109) Certain elements of the proportionality of the Commitments have already been examined indirectly in the assessment of the observations submitted by the complainant and other third parties in the market test (see Section 4.6). Recitals (110) to (120) verify the proportionality of the main commitment to reduce the weighted average immediate debit card MIFs set by Visa Europe to 0.2%.
- (110) When analysing the weighted average immediate debit card MIF cap in the Commitments, the MIT, a methodology originally developed in economic literature<sup>32</sup> to assess efficient interchange fees, was applied.
- (111) According to the MIT, interchange fees should be such that on average the MSCs do not exceed the transactional benefits that merchants derive from accepting payment cards. Such transactional benefits are the direct benefits of a card payment for a merchant relative to alternative payments, in particular cash. Cash is legal tender and the most common alternative to payments with immediate debit cards. From an implementation point of view - in order to avoid circularity - it is also important that cash involves no MIF. Cash is therefore the most appropriate comparator for the costs of cards when calculating the MIT-compliant MIF. Provided that MIFs for different payment means are set with reference to the cash comparator, the overall cost to merchants should be the same leaving the merchant indifferent on the consumers' choice between payment instruments in respect of the same set of transactions. This would promote effective competition among alternative classes of payment instruments.
- (112) Transactional benefits of card payments compared to an alternative payment instrument have to be quantified and measured in monetary terms. The lower the costs of a given payment instrument (for example, costs of transaction time or fraud), the higher are its transactional benefits. The MIT-compliant MSC should not exceed the level of the measured transactional benefits. In order to compute the MIF compliant with the MIT the average acquirer margin and the scheme fees paid by the acquirer are deducted from the MIT-compliant MSC (see recitals (117), (118) and (119) for more details). Therefore, an increase in scheme fees or acquirer margin for card payments should lead to a lower MIF under the MIT.
- (113) Economic theory shows that under reasonable assumptions which appear to apply to the payment card markets, the MIFs which comply with the MIT allow merchants and their customers to benefit from increased card use<sup>33</sup>. To the extent that the MIFs are passed on to the cardholders by the issuers, they ensure that cardholders make efficient choices with respect to payment instruments. MIFs that comply with the MIT allow cardholders to internalise, - when choosing their payment instrument - the transactional benefits for merchants. By ensuring that overall, merchants are indifferent between accepting and handling card payments and other means of payments, such a MIF creates a level playing

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<sup>32</sup> In particular, to the article jointly authored by Professor Jean-Charles Rochet and Jean Tirole, ("Must Take Cards and the Tourist Test", No 496, IDEI Working Papers from Institut d'Économie Industrielle (IDEI), Toulouse, [http://idei.fr/doc/wp/2008/must\\_take\\_cards.pdf](http://idei.fr/doc/wp/2008/must_take_cards.pdf)).

<sup>33</sup> MEMO/09/143 of 1 April 2009; <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/143&format=HTML&aged=0&language=EN&guiLanguage=en>

field for competition between alternative payment instruments while it prevents card schemes from exploiting the reluctance of merchants to turn down card payments as they are afraid that their competitors would steal their customers if they refuse to accept card payments.<sup>34</sup> The MIT compliant MIF can therefore be characterised as economically desirable.

- (114) In this context, a MIF that is above the MIT-compliant level would not appear to allow that efficiencies from increased card use outweigh the anti-competitive effects of the MIFs and a fair share of the resulting benefits would not be passed on to consumers, (the merchants and their subsequent customers). Such MIFs have as a consequence that card payments become more expensive than cash payments for the merchants. Card use would therefore create negative externalities for merchants, while the price signals on the cardholder side (assuming the pass-through of the excessive MIFs by the issuer) would prompt cardholders to further increase their card use as opposed to other payment means (perfect surcharging in theory would be able to correct for this effect, but surcharging is not allowed in all Contracting Parties to the EEA Agreement and where allowed only a minority of merchants surcharges in practice). Merchants pass on this cost increase to consumers via higher retail prices, but this effect is ignored by card users, since this cost is hidden being born not only by the individual card user, but by the users of other means of payment as well. Consumers would collectively be better off by reducing card usage at high interchange fee levels; but individually, they have no incentive to do so.
- (115) In this case, and for the reasons set out above, the proposed weighted average immediate debit card MIF cap of 0.2% has been assessed under the MIT.
- (116) That amount was calculated by comparing the merchants' costs of accepting payments in cash to those of accepting payments made by a payment card (excluding the MIF). The calculations of the MIT-compliant MIF are based on four studies published by the central banks of the Netherlands, Belgium and Sweden comparing the costs of cards with those of cash<sup>35</sup>. Those calculations are without prejudice to a further calculation should new information regarding the costs of cards as compared to the costs of cash become available.
- (117) First, for each study the costs and benefits that immediate debit card and cash payments generate for the merchants were identified.

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<sup>34</sup> See by analogy for instance recitals 504, 506, footnote 570 and Annex 2 § 24 of the MasterCard decision, COMP/34579 – MasterCard, COMP/36.518 — EuroCommerce, COMP/38.580 — Commercial Cards (notified under document C(2007) 6474). The non-confidential version of the Decision is available on DG Competition's website under the case number COMP/34.579.

<sup>35</sup> De Nederlandsche Bank, 'Betalen Kost Geld', March 2004 (with a summary published under the title 'The cost of payments' in the DNB Quarterly Bulletin); data from this study has also been used in Brits, H and C Winder, 'Payments are no free lunch', De Nederlandsche Bank Occasional Studies Vol. 3, No 2, 2005. Banque Nationale de Belgique, 'Couts, Avantages et Inconvenients des Differents Moyens de Paiement', December 2005. Bergman, M, Guibourg, G, and Segendorf, B, 'The Costs of Paying – Private and Social Costs of Cash and Card Payments', Riksbank Research Paper Series No 112, 2007. EIM, 'Het toonbankbetalingsverkeer in Nederland', 2007.



- (118) Secondly, for each study, on the basis of the cost information, merchants' cost functions for each of the payment instruments, namely immediate debit cards and cash were computed. The merchants' cost function of a payment instrument identifies the level of the relevant costs that on average merchants have to bear in relation to the total number of transactions and the total value of the transactions handled.
- (119) Thirdly, for each study a unique cost figure was computed on the basis of the cost function for each payment instrument. For each study cost figures were derived for credit and deferred debit cards, immediate debit cards and cash. With respect to immediate debit cards, an estimated acquirer mark-up (that is to say, the sum of the average acquirer margin and scheme fees) was also included.
- (120) By comparing the immediate debit MIF computed on the basis of the four studies, the maximum weighted average immediate debit MIF proposed by Visa Europe did not appear to be in excess of the requirements of the MIT for the purposes of the Commitment Decision and of the present decision. A higher average immediate debit MIF rate would not ensure the pass on of a fair share of the resulting benefits to consumers. At the same time, the Commitments only cap the MIF rates and do not prevent Visa Europe from introducing lower MIF rates. Therefore those commitments are necessary and appropriate.
- (121) In the light of these considerations, the Commitments were made binding for a period of four years following notification of the Commitment Decision to Visa Europe. The duration envisaged by the Commitments is long enough to allow for a significant change in market practices, while at the same time ensuring that the effects of the Commitments on the market are re-assessed within a reasonable period of time. Current market trends, such as the migration to SEPA<sup>36</sup> are expected to significantly change the conditions of competition in the EEA. Potential new entrants and technological innovations, such as the emergence or failure of online and mobile payments platforms can greatly contribute to this transformation. The likelihood of those developments may increase the tendency towards effective competition and downward pressure on MIFs in this market. In the light of this it appears that a period of four years is appropriate.

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SEPA (Single Euro Payments Area) is an initiative set up by the European banking industry aimed at the creation of a fully integrated market for retail payment services in the euro area, with no distinction between cross-border and national payments in euro. In the context of card payments, a framework – that is to say, a set of high-level principles and rules- has been defined. The SEPA card framework will be implemented by individual card schemes, with the aim of establishing an integrated SEPA market where card-holders can make payments in euro abroad with the same ease and convenience as they do in their home countries. The attainment of this objective may lead to the replacement of the various national schemes with international schemes who already have a pan-euro dimension; to alliances between national schemes and international schemes with a view to covering the entire euro area, and to the entry of new pan-euro payment schemes in the market.

## 5. CONCLUSION

- (122) Making the Commitments legally binding on Visa Europe with the Article 9 Decision of December 2010 meets the concerns expressed in the Statement of Objections insofar as they concern Visa Europe's Intra-Regional MIFs for consumer immediate debit card transactions applicable to cross-border transactions and to domestic transactions in those countries where the cross-border MIF rates apply in the absence of other MIFs or are set directly by Visa Europe.
- (123) In the light of the above, a further investigation into Visa Europe's Intra-Regional consumer immediate debit MIFs would be time-consuming, and unlikely to establish the existence of an infringement that significantly affects the functioning of the common market. On this basis, there is no sufficient European Union interest in a further investigation concerning Visa Europe's Intra-Regional MIFs for consumer immediate debit cards transactions.
- (124) In this respect, the Commission considers that it had to evaluate the Commitments as a whole and not their individual elements. In this regard, even if certain minor issues raised by EuroCommerce are not fully addressed in the Commitments, the Commitments, taken as a whole, substantially addresses the concerns expressed by the Commission in the present case in respect of Visa Europe's MIFs for consumer immediate debit card transactions applicable to intra-regional cross-border transactions and to domestic transactions in those countries where the cross-border MIF rates apply in the absence of other MIFs or where the MIF rates are set directly by Visa Europe. The Commission recalls that in its reply to the Article 7(1) letter EuroCommerce did not object specifically to the criteria of lack of Union interest being met but commented only on the substance of the Commitments. In the conclusion of its letter EuroCommerce first urges the Commission not to accept the proposed Commitments but then adds *"In any event, whatever the Commission decides, we ask for an assurance that any commitments accepted by the Commission will be reviewed following the results of the Commission's independent costs of cash study"* The Commission notes that this request is specifically met in the Commitment Decision in the review clause, which refers to that study. In this context, in the light of all relevant circumstances and in particular of the complex and difficult nature of the case, the Commission considers that the European Union interest does not warrant continuing the investigation any further on the aspects that are covered by the Commitment Decision.
- (125) Therefore in view of the above considerations, there are insufficient grounds for acting on part of your complaint. Consequently your complaint is rejected insofar as it concerns Visa Europe's MIFs for consumer immediate debit card transactions applicable to intra-regional cross-border transactions and to domestic transactions in those countries where the cross-border MIF rates apply in the absence of other MIFs or where the MIF rates are set directly by Visa Europe.

**6. PROCEDURE**

- (126) An action challenging this Decision may be brought before the General Court of the European Union in accordance with Article 263 TFEU.

*For the Commission*

[...]

Joaquin Almunia  
*Vice-President*