



Brussels, 26.2.2014  
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**COMMISSION DECISION**

**of 26.2.2014**

**addressed to:**

**Visa Europe Limited**

**relating to a proceeding under Article 101 of the Treaty on the Functioning of the  
European Union and Article 53 of the EEA Agreement**

**Case AT.39398 – VISA MIF**

(Only the English text is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>1</sup>, in particular Article 9(1) thereof,

Having regard to the Commission decision of 6 March 2008 to initiate proceedings in this case,

Having expressed concerns in the Statement of Objections of 3 April 2009 and in the Supplementary Statement of Objections of 30 July 2012,

Having regard to the Commission decision of 8 December 2010 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement in case COMP/39.398 – Visa MIF adopted to pursuant Article 9(1) of Regulation (EC) No 1/2003 in relation to consumer debit transactions<sup>2</sup>,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns<sup>3</sup>,

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<sup>1</sup> OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

<sup>2</sup> OJ C 79, 12.3.2011, p. 8.

<sup>3</sup> OJ C 168, 14.6.2013, p. 22.

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,  
Having regard to the final report of the Hearing Officer,

Whereas:

**1. SUBJECT MATTER**

- (1) This Decision is addressed to Visa Europe Limited ('Visa Europe') and concerns the following:
  - (a) the setting of multilaterally agreed interchange fees ('MIFs') by Visa Europe that apply to Intra-regional, certain domestic<sup>4</sup> and intra Visa Europe non-EEA<sup>5</sup> point of sale ('POS') transactions with Visa consumer credit cards and with Visa consumer debit cards.
  - (b) the rules relating to cross-border acquiring.
  - (c) certain transparency measures.
- (2) In its Statement of Objections of 3 April 2009 (the 'Statement of Objections'), the Commission came to the provisional conclusion that Visa Europe had infringed Article 101 of the Treaty and Article 53 of the EEA Agreement when setting MIFs.
- (3) On 8 December 2010, the Commission adopted a decision pursuant to Article 9 of Regulation No 1/2003<sup>6</sup> (the 'debit commitment decision'). This decision made legally binding on Visa Europe for four years the commitment to (i) cap at 0.20% the weighted average MIF applicable to consumer debit transactions covered by the proceedings and (ii) maintain and/or introduce a number of changes to their network rules.
- (4) In its Supplementary Statement of Objections on 30 July 2012 (the 'Supplementary Statement of Objections') the Commission expressed its objections with regard to consumer credit card MIFs. It extended the scope of the proceedings to the direct application of Inter-Regional (International) MIFs where merchants are located in the EEA and took the preliminary view that Visa Europe's rules on cross-border acquiring had infringed Article 101 of the Treaty and Article 53 of the EEA Agreement.

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<sup>4</sup> Currently in Belgium, Hungary, Iceland, Ireland, Italy, Luxembourg, Malta, Netherlands, Latvia and Sweden.

<sup>5</sup> These are transactions carried out with merchants located within the EEA with Visa consumer cards issued in non-EEA countries in the Visa Europe territory. The Visa Europe territory consists of the EEA, Andorra, Faroe Islands, Greenland, Israel, Monaco, San Marino, Svalbard and Jan Mayen Islands, Switzerland, Turkey and Vatican City.

<sup>6</sup> Commission Decision relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement in case COMP/39.398 – Visa MIF (OJ C 79, 12.3.2011, p. 8).

## 2. THE PARTIES

- (5) Visa Europe is an association of over 5 000 European banks that operates the worldwide Visa payment card scheme exclusively in the Visa Europe Territory which comprises the EEA and certain other countries on the basis of licences granted by Visa Inc. to Visa Europe within the Framework Agreement of 1 October 2007.

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

- (6) On 6 March 2008 the Commission initiated proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003. It adopted a Statement of Objections on 3 April 2009 and a Supplementary Statement of Objections on 30 July 2012 which set out its competition concerns. The Statement of Objections and the Supplementary Statement of Objections constitute a preliminary assessment for the purposes of Article 9(1) of Regulation (EC) No 1/2003.
- (7) On 15 June 2009, EuroCommerce a.i.s.b.l. ('EuroCommerce'), a retail, wholesale and international trade association, submitted a complaint pursuant to Article 7 of Regulation (EC) No 1/2003 against Visa MIFs.
- (8) On 10 May 2013, Visa Europe submitted commitments to the Commission in respect of its Intra-regional, certain domestic credit MIFs and intra Visa Europe non-EEA credit and debit MIFs, its rules relating to cross-border acquiring and certain other transparency measures (the 'Proposed Commitments').
- (9) On 14 June 2013 a notice was published in the *Official Journal of the European Union* pursuant to Article 27(4) of Regulation (EC) No 1/2003<sup>7</sup> (the 'Market Test Notice'), summarising the case and the Proposed Commitments and inviting interested third parties to give their observations on the Proposed Commitments within one month following publication.
- (10) Observations were received from seventeen third parties. On 30 August 2013 the Commission informed Visa Europe of the observations received from interested third parties following the publication of the notice.
- (11) On 5 November 2013, Visa Europe submitted amended commitments (the 'Amended Commitments') to the Commission.
- (12) On 13 December 2013, EuroCommerce withdrew the part of its complaint corresponding to the issues addressed in the Proposed Commitments offered by Visa Europe and market tested on 14 June 2013.
- (13) On 17 February 2014, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 19 February 2014, the Hearing Officer issued his final report.

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<sup>7</sup> Communication of the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.39398 — VISA MIF (OJ C 168, 14.6.2013, p. 22).

## **4. PRELIMINARY ASSESSMENT**

### **4.1. Relevant markets**

#### *4.1.1. Product market*

- (14) In its Statement of Objections and Supplementary Statement of Objections, in line with established practice<sup>8</sup>, the Commission distinguished an upstream “network market” and downstream “issuing” and “acquiring” markets.
- (15) 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.
- (16) Downstream, the financial institutions act as (i) acquirers for merchants, accepting card payments in exchange for merchant service charges ('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.
- (17) 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.
- (18) Therefore, in the Statement of Objections and the Supplementary 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 market*

- (19) According to the Commission's preliminary assessment in the Statement of Objections and the Supplementary Statement of Objections, (the 'Preliminary Assessment') 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 EEA agreement, the considerable differences in the market structure and the fact that cross-border acquiring remains limited.

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<sup>8</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.

## 4.2. Position of the parties on the relevant market

- (20) In its Preliminary Assessment the Commission took the preliminary view that Visa Europe has a strong position on the relevant markets in terms of its membership network and the number of cards issued as well as in terms of the number of merchants accepting them in the EEA.

## 4.3. Practices raising concerns

- (21) In its Preliminary Assessment 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 point of sale transactions with VISA, VISA Electron and V PAY consumer payment cards within the EEA and also Visa Europe's rules relating to cross-border acquiring.
- (22) Interchange fees are in effect paid by a merchant's bank (the 'acquirer') to a cardholder's bank (the 'issuer') for each transaction 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), a part is passed on to the issuer (the MIF) and a 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.
- (23) The Preliminary Assessment 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 appear 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 Assessment, 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 Honour All Cards Rule (the 'HACR'), the No Discrimination Rule (the 'NDR'), blending<sup>9</sup> and the segmentation of acquiring markets due to rules restricting cross-border acquiring<sup>10</sup>. Furthermore, according to the Statement of Objections and the Supplementary Statement of Objections, the MIFs do not meet

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<sup>9</sup> The HACR is a Visa system rule which obliges merchants who have contracted to accept payments with a particular brand of card (for example, 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 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 a practice whereby acquirers charge merchants the same MSC for the acceptance of different payment cards of the same payment scheme (for example, VISA debit and credit) or for the acceptance of payment cards belonging to different payment card schemes (for example, VISA and MasterCard Credit cards). In its Preliminary Assessment 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.

<sup>10</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.

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.

- (24) In Visa Europe's system, cross-border acquirers are subject to a rule which mandates the application of the MIFs that are applicable in the country of transaction. According to this rule, cross-border acquirers must apply as a default either the Country-specific MIFs or Intra-Regional MIFs or the registered domestic MIFs. Visa issuing and acquiring members in the country of transaction and cross-border acquirers may deviate from domestic MIFs or Country-specific MIFs by concluding bilateral agreements involving lower or no interchange fees. However, cross-border acquirers are liable to be at a disadvantage if they want to enter into bilateral agreements of this type, because they are not likely to have strong links to domestic issuers. In countries where there are significant bilateral agreements involving domestic acquirers, cross-border acquirers would typically have to apply the higher Country-specific or Intra-Regional MIFs or registered domestic MIFs. This rule is also considered to be a territorial and price restriction by object and effect, which hinders acquirers in countries where the MIF is lower from offering their services in other countries at prices reflecting their low MIFs. In light of the objective of the achievement of an internal market in payments, this is a very serious restriction which appears to be unjustified. Such an artificial partitioning of acquiring markets harms consumers, as merchants are obliged to pay higher prices for acquiring services. Therefore the Commission took the preliminary view in the Supplementary Statement of Objections that the objective and the content of this rule is to maintain the segmentation of national markets by limiting the entry and price competition from cross-border acquirers.
- (25) The Statement of Objections and the Supplementary Statement of Objections were also addressed to Visa Inc. and Visa International Service Association (the 'Global Visa Entities') on 29 May 2009 and 24 April 2013. Their response to the Supplementary Statement of Objections is still pending.

#### **4.4. Effect on trade between Member States**

- (26) The Commission took the preliminary view in its Preliminary Assessment that the decisions of an association of undertakings regarding the MIFs and the rule on cross-border acquiring 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. As the Commission already stated in its Visa I decision<sup>11</sup> and Visa II decisions<sup>12</sup>, Visa cards are by their nature cross-border means of payment, that is, payment cards 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. The Intra-Regional MIFs directly affect trade between Contracting Parties to the EEA

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<sup>11</sup> Commission Decision of 7 August 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/29.373 — Visa International) (OJ L 293, 10.11.2001, p.24).

<sup>12</sup> Commission Decision of 24 July 2002, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/29.373 — Visa International — Multilateral Interchange Fee) (OJ L 318, 22.11.2002, p.17).



Agreement, because they primarily cover cross-border payments. Furthermore, all Visa MIFs, including, for example, the Country-specific MIFs applicable to domestic transactions in certain Contracting Parties to the EEA Agreement have direct influence on the pattern of trade. This is particularly evident when they are paid by cross-border acquirers located in different Contracting Parties to the EEA Agreement to their merchant customer's outlet.

## **5. PROPOSED COMMITMENTS**

- (27) The key elements of the Proposed Commitments offered by Visa Europe on 10 May 2013 are set out in Recitals 27 to 35.
- (28) Visa Europe commits to cap its yearly weighted average Intra-EEA credit MIFs applicable to transactions with its consumer credit cards at a level of 0.3% from two months following the notification of the commitment decision to Visa Europe.
- (29) The cap will also apply individually in each of those Contracting Parties to the EEA Agreement for which Visa Europe directly sets specific domestic consumer credit MIF rates and in those Contracting Parties to the EEA Agreement where the Intra-EEA Credit MIFs apply to domestic transactions in the absence of other MIFs. Until the entry into force of such cap Visa Europe commits not to increase domestic credit MIF rates directly set by Visa Europe.
- (30) Visa Europe also proposes to ensure the following, as from 1 January 2015:
- (a) that the 0.3% credit MIF cap also applies to all MIFs set by Visa Europe regarding transactions carried out with merchants located within the EEA with Visa consumer credit cards issued in countries not parties to the EEA Agreement belonging to the Visa Europe territory ('intra Visa Europe non-EEA credit MIFs'),
  - (b) that the 0.2% debit MIF cap also applies to all MIFs set by Visa Europe regarding transactions carried out with merchants located within the EEA with Visa consumer debit cards issued in non-EEA countries belonging to the Visa Europe territory ('intra Visa Europe non-EEA debit MIFs').
- (31) Visa Europe also undertook to implement International MIFs at the level agreed in a Commission decision pursuant to Article 9 of Regulation (EC) No 1/2003 with third parties who are responsible for setting International MIFs, or at the level set out in any Commission decision pursuant to Article 7 of Regulation (EC) No 1/2003 against such third parties, or resulting from any Union legislation governing the level of International MIFs.
- (32) Visa Europe commits to amend its rules on cross-border acquiring from 1 January 2015 in order to allow cross-border acquirers to offer either the domestic debit MIF or the domestic credit MIF applicable in the location of the merchant or a MIF rate of 0.2% for consumer debit transactions and 0.3% for consumer credit transactions, subject to certain conditions.
- (33) Visa Europe commits to continue to implement further transparency measures. In particular, Visa Europe commits to do the following:

- (a) to introduce a rule which requires acquirers to offer to merchants, merchant service charge pricing on a “MIF ++” basis for an administrative fee, according to which acquirers must, if requested, clearly break down, in their contracts and invoices, the MSC into three components, namely the MIF, all the other applicable payment system fees and the acquirer’s fee. Visa Europe will require acquirers to implement this rule within 12 months following the notification of the commitment decision to Visa Europe with regard to all new agreements and within 18 months for existing contracts,
  - (b) to introduce a simplified MIF structure for MIFs set by Visa Europe to provide for a reduction of at least 25% in the number of fee categories to aid transparency and comparison between rates.
- (34) Visa Europe will appoint a Monitoring Trustee to monitor Visa Europe’s compliance with the commitments. Before appointment, the Commission will have the power to approve or reject the proposed Trustee.
- (35) The commitments will be valid for a period of four years from the date of notification of the commitment decision to Visa Europe.

## **6. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) NO 1/2003**

- (36) On 14 June 2013 the Commission published a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 setting out the Proposed Commitments offered and calling for comments. The Commission received seventeen responses from interested third parties. Accordingly this section sets out the main observations submitted by the interested third parties and the Commission's assessment thereof.

### **6.1. Observations from Visa Inc.**

- (37) Visa Inc. argued that the Market Test Notice did not explain the basis on which the cap of 0.3% had been determined. Visa Inc. therefore assumed that it was set on the basis of the merchant indifference test ('MIT'). Visa Inc. did not accept the MIT and was of the view that a merchant would be indifferent to paying higher average fees for the acceptance of card payments from non-EEA cardholders for fear of losing incremental sales.
- (38) Visa Inc. also claimed that the Commission's decision to market test the Proposed Commitments regarding international transactions raises due process concerns in two aspects: (i) the Commission seemed to take it for granted that these transactions are no different from those involving acquirers and issuers within the EEA, but the Commission has never adduced any evidence in support of this view, and (ii) Section 4.2 of the Proposed Commitments created the impression that the mere closure of the case against Visa Inc. is not an option.

### **6.2. Assessment of Visa Inc.'s observations**

- (39) The cap of 0.3% was offered by Visa Europe without explicit reference to the MIT.

- (40) The role of the Commission in the context of Article 9 of Regulation (EC) No 1/2003 is confined to verifying that the Proposed and Amended Commitments address its concerns expressed in the Statement of Objections and Supplementary Statement of Objections and that the parties have not offered less onerous commitments that also address those concerns adequately<sup>13</sup>.
- (41) When verifying the appropriateness of the weighted average MIF caps proposed by Visa Europe the Commission used its calculations under the MIT. Those calculations of the MIT-compliant MIF were based on four studies published by the central banks of the Netherlands, Belgium and Sweden<sup>14</sup> that included data on the merchants' costs of accepting payments in cash and of accepting payments made by a payment card (similarly to the calculations of the acceptable MIF levels in the Unilateral Undertakings of MasterCard<sup>15</sup>). The MIF was calculated by comparing the merchants' costs of accepting payments in cash to those of accepting payments made by a payment card (see Section 7 for further detail).
- (42) The results of those calculations demonstrate that a weighted average of 0.2% and 0.3% could, subject to certain assumptions make merchants, taken together, indifferent between accepting a cash payment or a card payment, and therefore it is sufficient to remedy competition concerns in this case. This figure represents the maximum at which the net effect on transactional costs of accepting payments cards is neutral but not negative from the point of view of the merchants. As regards the claim that merchants would be willing to pay higher interchange fees for transactions made by non-EEA cardholders because these represent sales that would otherwise not take place, this remains unsubstantiated. Furthermore, as explained in more detail in Section 7, the benefits relevant for the application of the MIT are direct, objective transactional benefits (that is to say, cost savings) enjoyed by merchants, taken together, when cards are used instead of alternative payment means, in particular cash, and not perceived benefits from attracting additional sales. Visa Inc's arguments can also be made in respect of domestic or intra-EEA transactions, but such perceived benefits are expressly excluded from the definition of transactional benefits on which the MIT is based: this is because, while an individual merchant gains from a transaction taking place in its store instead of a competitor's, this is not a benefit for merchants taken together. Likewise, a transaction made by a foreign tourist might constitute a perceived benefit for the individual merchant, but in order to establish the effect on merchants taken together, account would also need to be

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<sup>13</sup> See judgment of 29 June 2010 in Case C - 441/07 P, *Commission v Alrosa*, not yet reported, paragraph 41.

<sup>14</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, 'Coûts, Avantages et Inconvénients des Différents 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.

<sup>15</sup> in Cases COMP/34.579 – MasterCard, COMPP/36.518 – EuroCommerce, and COMP/38.580 – Commercial Cards; See press release of 1 April 2009 at [http://europa.eu/rapid/press-release\\_IP-09-515\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-09-515_en.htm?locale=en).

taken of transactions made by EEA customers when they travel abroad, which represent missed sales for merchants in their own countries.

- (43) Regarding Visa Inc.'s comments on due process these are unfounded. First Visa Europe's Proposed Commitments do not address transactions outside the Visa Europe territory. Secondly the fact that Visa Inc. have different views than those expressed in the Statement of Objections and the Supplementary Statement of Objections or in the Market Test Notice does not mean that there is a breach of due process. Third, Visa Inc. failed to specify exactly what concerns could arise with regard to due process in the present context. Finally Section 4.2 of the Proposed Commitments does not in any way imply that the closure of the case would be excluded as an option.

### **6.3. Other observations from the payment industry**

- (44) A national payment scheme commented that the maximum weighted average should apply to domestic transactions throughout Europe, and to all card transactions, either debit or credit. It also claimed that the Visa Europe Proposed Commitments must not impose conflicting operational rules such as merchant location on its members to determine the applicable MIF. It observed that the Proposed Commitments appear to impose a mandatory use of calculating the merchant fee (that is to say MIF++ pricing) and that the end date of commitments already made by domestic card schemes at a national level should be aligned with the Proposed Commitments applicable to Visa Europe.
- (45) Another international payment scheme argued that a permanent MIF cap would be harmful for free competition as this will have an adverse effect on small card schemes, as they will be unable to compete with large schemes. It also claimed that regulation in Australia and the United States of America has not resulted in a reduction in consumer prices while at the same time cardholders experienced a reduction in benefits. Rather than implementing pricing controls such as a MIF cap, the Commission should focus on initiatives to increase competition and disclosure so that merchants are well informed about the terms and conditions of card acceptance.
- (46) A bank alleged that the excessive decrease of MIFs will not lead to a decrease of consumer prices, but rather to an increase in cardholder fees and as a result reduced card use and therefore less efficient use of resources. Furthermore in its opinion domestic acquirers will be negatively affected and such preferential treatment of cross-border acquirers is an unjustified discrimination against domestic acquirers and therefore the Proposed Commitments violate the principles of proportionality and equal treatment. It contends that according to the Alrosa judgment<sup>16</sup>, where the interests of third parties are affected, it is always necessary to examine whether the commitments go beyond what is necessary<sup>17</sup>. As there are clearly no barriers created by anti-competitive conduct, the Commission is not in a position to accept any antitrust commitments which would aim solely at the completion of internal market and would not serve as a remedy to an objectively existing competition concern as

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<sup>16</sup> Case C-441/07 P: Judgment of the Court (Grand Chamber) of 29 June 2010 — European Commission v Alrosa Company Ltd (OJ C 234, 28.8.2010, p. 3).

<sup>17</sup> Paragraph 41 of the Alrosa judgment.

required by Article 9 of Regulation (EC) No 1/2003. Preferential treatment of cross-border acquirers is also likely to lead to cherry picking of large merchants by cross-border acquirers and consequently higher costs for small merchants who will be served by domestic acquirers and to the setting up of artificial cross-border acquirers, the costs of whom will be borne by consumers.

- (47) One acquirer welcomed the alignment of interchange fees and noted that harmonization should also include scheme fees. It claims that the implementation of cross-border acquiring should not result in the cross border interchange fee proposed by Visa Europe only being applicable for big retailers, which would be the case if the merchant must be identified by a “Single Merchant Identifier” assigned by Visa Europe. In any case, any information provided by the acquirer should not be used for data analytics for example to resell information to a third party. Also, the cross-border interchange fee proposed by Visa must not mandate the use of the Visa Europe System. It welcomed separation in pricing between "interchange and scheme fees" and simplification of fees, and noted that price transparency must be provided at merchant request only.
- (48) Another acquirer argued that in order to ensure a level playing field for all acquirers within the EEA, especially the acquirers located in countries with high domestic interchange fees, the definition of cross-border acquiring should be broadened. The definition of Cross-border Acquiring as set out in the Article 10 of the Proposed Commitments should be extended to acquirers whose principal place of business or branch by which the acquiring is offered is in a Contracting Party to the EEA different from the Contracting Party to the EEA where the merchant is located. Otherwise acquirers whose principal place of business is in a given Contracting Party to the EEA would encounter a competitive disadvantage in regard to their main merchant customer base in that country in comparison to an acquirer domiciled in other Contracting Parties to the EEA.
- (49) Another acquirer claimed that the Proposed Commitments could have disproportionate effects on United Kingdom acquirers. Other markets across the EEA are at different stages of development and some have considerable barriers to entry, for example local standards, terminal requirements, domestic scheme fees. It could therefore be easier for acquirers from other Contracting Parties to the EEA Agreement to come into the United Kingdom than it will be for a United Kingdom acquirer to enter another EEA market.

#### **6.4. Assessment of other observations from the payment industry**

- (50) Domestic MIF rates set by local Visa Europe members are not covered by the scope of these proceedings, therefore the Commission is not in a position to demand commitments on those rates. In any case, cross-border acquiring is expected to bring MIFs down to a comparable level domestically. In addition national competition authorities or national courts are well placed to assess MIFs set by local members domestically.
- (51) As regards "merchant location", that is to be interpreted in accordance with the rules of the Visa scheme, and the commitments do not change the notion of "merchant location". This has been clarified by the Amended Commitments which set out the precise definition of "Merchant Outlet" in Section 10 thereof.

- (52) Regarding MIF ++ pricing, the Proposed Commitments do not impose its mandatory use in general, Section 5.1 of the Proposed Commitments merely imposes the obligation on acquirers to offer the possibility of MIF++ pricing if a merchant requests it. In the case of cross-border acquirers however, under Section 6.1 of the Proposed Commitments, MIF++ pricing will be mandatory. In the Commission's view, requiring MIF++ pricing and unblending<sup>18</sup> for merchants who want to benefit from lower rates by cross-border acquirers ensures that merchants are aware of where the benefits they receive from lower MIFs come from and is not too burdensome. In particular, this ensures that the acquirers do not offer lower prices for a bundle of all card payments including Visa Europe's competitors. The effect is to prevent free-riding on Visa Europe's lower MIFs by other card schemes and to provide transparency to merchants. This encourages merchants to steer customers to the card scheme offering the best value for money.
- (53) As far as the alignment of the end date of commitments already made by domestic card schemes at a national level with the commitments applicable to Visa Europe, it is not clear from the observations why they should be aligned and the Commission does not consider that there is any justification for their alignment.
- (54) In the Commission's view the argument that small card schemes will be unable to compete with large schemes as merchants would be reluctant to accept high cost cards, confirms that the Amended Commitments will address competition concerns in the market by enabling merchants to have more bargaining power towards card schemes and by closing the gap between their card acceptance costs and the benefits they receive in exchange. There is no evidence or indication that small card schemes will be worse affected by the merchants' increasing bargaining power.
- (55) With regard to the claim that regulation in Australia and the United States of America has not resulted in a reduction in consumer prices while at the same time cardholders experienced a reduction in benefits, there is no credible and convincing evidence demonstrating this. The Commission is of the view that, on the basis of evidence from Australia and elsewhere, a decrease in interchange fees generally seems to be associated with a higher acceptance of cards, and it seems that in countries with low MIFs card usage is higher, for example in Norway and Canada. Higher acceptance of cards is a clear benefit to consumers. Also, since MIFs are only small percentages of purchase prices, the amount of the cost passed on from retailers to consumers is difficult to identify. In general, pass through will depend on the retail sector concerned the size of the merchant, its use of payment instruments and the degree of competition faced by the merchant. It is logical to assume that the pass-through by merchants will be greater than the pass-through by banks, given the higher level of competition in the retail sector and the current lack of consumer mobility in the field of retail banking.
- (56) With regard to the argument that the Proposed Commitments discriminate against domestic acquirers the Commission believes that this is not the case. First the Proposed Commitments aim to remedy a situation where cross-border acquiring was

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<sup>18</sup> Unblending is a practice whereby acquirers charge merchants different MSC for the acceptance of different payment cards belonging to different payment card schemes (for example, VISA and MasterCard Credit cards).

restricted and cross-border acquirers were disadvantaged compared to domestic ones. In addition there exist no acquirers that only provide cross-border services. All acquirers are domestic acquirers in a certain country and cross-border acquiring will also be facilitated for all of them. The Proposed Commitments therefore do not discriminate between acquirers, they are treated equally. At the same time the Commission expects that, faced with increased competitive pressure from cross-border acquiring, domestic acquirers (and issuers) may decide that they also need to offer lower MSCs (and thus agree on lower domestic MIFs) to keep their clients. Local banking communities are free to decide on lower domestic MIFs and to reduce the gap between domestic and cross-border rates, so as to enable them to compete with acquirers engaged in cross-border acquiring.

- (57) With regard to the alleged higher costs for small merchants as a result of cross-border acquiring and cherry-picking of large merchants, the Commission notes that small merchants already now pay higher fees than large merchants. Cross-border acquiring, however, is expected to lower the fees both for small and big retailers from their current levels, although initially big retailers are more likely to benefit from fee decreases. Also, with the expected domestic fee reductions (see recital (56)) small merchants will also be able to reap the benefits of the modified rules of cross-border acquiring.
- (58) Cross-border acquiring will not be conditional on the use of the Visa Europe system for processing as clarified by Section 6.1 (b) of the Amended Commitments. As far as data analytics is concerned this is outside the scope of the current investigation and the use and handling of such data will be governed by the applicable laws and regulations.
- (59) The reference to the principal place of business of the acquirer has been removed from the Amended Commitments which now defines a cross-border acquired transaction by reference to the location of the merchant outlet and the location of the merchant's acquirer. Accordingly the location of the merchant's acquirer is determined under Visa Europe's regulations and rules as the Member State in which the merchant's acquirer is a Principal Member, Associate Member or a member of a Group Member of Visa Europe (see the definition of "Cross-Border Acquired Transaction" in Section 10 of the Amended Commitments).

#### **6.5. Observations from the complainant and other merchants' associations and merchants**

- (60) The complainant, EuroCommerce, as well as other retail associations and some individual merchants made eight submissions on the Proposed Commitments.
- (61) EuroCommerce and one retailer argued that setting a weighted average cap lacks transparency, and is difficult to calculate and verify. Merchants will not be able to ascertain whether the correct rates are applied and as a result they will not be able to complain. In its view, instead of a weighted average, a simple commonly applied cap should be introduced. It states that retailers' benefits will be dependent on particular market conditions and it is not clear from what date each individual country would benefit. It should be clarified which countries are referred to as falling within the category of Intra Visa Europe non-EEA credit MIFs.

- (62) EuroCommerce, other retail associations and a number of merchants are of the view that the maximum weighted average should apply to domestic transactions throughout Europe and that commercial cards should also be addressed. EuroCommerce's position is that the commitments should also make it clear that it may apply also to Visa Inc. if it became the owner of the Visa system in Europe.
- (63) As regards cross-border acquiring, EuroCommerce does not believe that the Proposed Commitments will sufficiently enhance competition in the card payments market between schemes, issuers and acquirers as it does not allow merchants to take advantage of MIFs in Member States other than where they are based. EuroCommerce, as well as another merchants' association does not see the economic logic or justification for the commencement date of 1 January 2015 and considers it should be implemented immediately. EuroCommerce considers that the conditions specified for merchants are too onerous. Clause 6.1(b) of the Proposed Commitments implies that increased security will be required for all such transactions and it would allow Visa Europe to impose security requirements with increased costs for merchants who will have no say in whether such security is the most efficient or beneficial. MIF++ pricing for an administrative fee may be burdensome and complicated especially for smaller merchants.
- (64) As regards transparency, and MIF++ pricing in particular, EuroCommerce is concerned that rather than providing transparency, the Proposed Commitments will add more complexity by applying four proposed components to MSC rates and EuroCommerce and also one retailer believes that this service should be offered free of charge automatically. In addition it fails to see the justification for the delay in the implementation of these measures. EuroCommerce believes that simplification of fees appears to be a beneficial proposal. However, in its view, it will increase the complexity of MIFs as the introduction of MIFs for specific sectors is excluded from the proposed percentage reduction. Also, there is no information given in the Proposed Commitments as to what will be done with the fee ranges which are 'removed' that is to say, if they are merely fed into higher-cost areas of the MIF table, then the overall result could be an increase in fees for some merchants.
- (65) EuroCommerce believes that clause 7.1 of the Proposed Commitments on consumer protection measures is unacceptable as its meaning is quite unclear and it may entitle Visa Europe to levy additional charges for undefined 'consumer protection measures' at their discretion. One retailer calls on the Commission to ensure that the protection consumers will receive isn't provided at the direct expense of the merchant and is not used to put barriers in place that will hinder the adoption of cross-border acquiring.
- (66) EuroCommerce and one retailer are of the view that the four years' duration of the Proposed Commitments is insufficient and the wording of the circumvention clause is too restrictive, as it would allow Visa Europe too great a scope for introducing new types of fees which in practice would circumvent the purpose of the Proposed Commitments. In its view this could allow Visa to introduce many types of fees to replace the MIF fees – for example direct transaction fees. According to one retailer the wording of this clause makes reference to fees, but it would be stronger if it made reference to additional costs rather than fees. Also they believe that more transparency should be provided on how the Commitments are implemented, and the Trustee's report should be available to a wider group of stakeholders.



- (67) EuroCommerce argues that the definitions in clause 10 of the Proposed Commitments are highly complex: this in itself militates against its transparency and therefore its fairness. The definitions are also redacted in that the figure for the threshold for domestic interchange fees is not given. Overall the definitions create confusion, lack of clarity and render it impossible to comment on. Also in EuroCommerce's view Visa Europe may not be able to verify the accuracy of all information used. This means there will be no certainty or reliability as to whether the Proposed Commitments are being respected.
- (68) Some merchants are of the view that the Commission should make public the assumptions and data used by Visa Europe so that merchants can understand how the MIF level was derived. They also argue that the Commission should investigate the extent to which Visa's network rules are anticompetitive and contribute to high interchange fees.
- (69) One merchant is concerned that Visa Europe's freedom to set Intra EEA Credit MIF's for particular categories of transactions, in particular in order to incentivise the adoption by merchants and their acquirers of secure technology and innovation, could potentially force merchants to invest in system developments for which they see no direct benefit. Visa may make adoption of that technology mandatory and for some categories of merchants, who perhaps currently have little exposure to fraud, this may result in significant additional cost, lost sales and poor customer service.

#### **6.6. Assessment of observations from the complainant and other merchants' associations and merchants**

- (70) The maximum weighted average MIF is proposed as a rate set according to value but Visa Europe will be free to set the individual MIF rates as fixed, according to value 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, according to value or combined levels. The Proposed Commitments ensure that overall, merchants do not bear a cost that exceeds the weighted average MIF, but the Proposed Commitments do not determine the actual MIF levels that apply to individual transactions. That would not be necessary for the efficiencies to be passed on to consumers. In addition a Trustee will verify that the calculation is correct and transparent. It is clear from Section 10 on "Definitions" that the countries falling within the category of Intra Visa Europe non-EEA credit MIFs are those outside the EEA but within the Visa Europe territory: Andorra, Faroe Islands, Greenland, Israel, Monaco, San Marino, Svalbard and Jan Mayen Islands, Switzerland, Turkey and the Vatican City.
- (71) With regard to the extension of the scope of the Proposed Commitments to domestic MIFs in all Contracting Parties to the EEA Agreement, as referred to in recital (50), domestic rates set by local members are not covered by the scope of proceedings. In those countries where the domestic MIFs are not set directly by Visa Europe but instead by its members, a significant number of National Competition Authorities have already initiated investigations. The Commission also expects that Visa Europe's commitments on cross-border acquiring will lead to increased competitive pressure on domestic MIFs and consequently a decrease in MIF rates throughout Europe. Insofar as commercial cards are concerned the Proposed Commitments are without prejudice to the right of the Commission to further investigate Visa Europe's MIFs for commercial card

transactions. In addition the Commission understands that should Visa Europe be sold to Visa Inc. under the terms of their existing contract, Visa Inc. would – as the purchaser of the shares in Visa Europe – be legally bound by the terms of this Decision.

- (72) Visa Europe has offered to reform its system in such a way that banks will be able to apply either the domestic rate or a reduced cross-border interchange fee for both debit and credit transactions when they compete for clients cross-border. MIF levels show wide divergence between Member States. Regarding consumer card transactions, their weighted average level ranges from between 0.1-0.2% to 1.4-1.5% in the Member States. Therefore in most Member States, by benefiting from cross-border acquiring merchants will be able to benefit from rates lower than current domestic rates. This change in Visa Europe's system should have a significant effect on competition but a delay of less than a year appears to be justified, since Visa Europe needs to change its rules and communicate such changes to its members and acquirers and issuers will need to make the necessary business and technical arrangements to implement the rule changes. Insofar as the security requirements are concerned, they are specified in Clause 6.1(b) of the Proposed Commitments as EMV, Verified by Visa or equivalent, therefore Visa Europe will not be free to introduce unspecified new requirements with increased costs in the future. In the Commission's view, MIF++ pricing and unblending for merchants who want to benefit from lower rates by cross-border acquirers is a reasonable and proportional measure. The transparency it creates may raise merchant awareness of MIF differences between different schemes. The potential countermeasures of merchants, that is to say, surcharging and refusing cards can help prevent issuers from moving their card portfolio's to other schemes with higher MIFs.
- (73) As regards EuroCommerce's comments on transparency and MIF++ pricing in particular, the Commission believes that simplification of MIF tables will in any event increase transparency, as sector-specific MIF rates already exist. Also it is unlikely that some fee ranges could be simply fed into higher-cost areas since they would all be subject to the MIF cap. Since acquirers incur additional costs when providing MIF++ pricing, it is justified that they may charge a reasonable fee covering such costs. Also the acquiring markets are generally competitive so merchants can change acquirer in order to get a better deal.
- (74) Clause 7.1 of the Proposed Commitments is clearly limited to entitling Visa Europe to continue to adopt consumer protection measures in relation to cross-border acquiring in particular concerning matters such as fraud, currency conversion, refunds and charge backs. Section 7 of the Proposed Commitments has been amended by the Amended Commitments with the addition of a sentence which ensures that consumer protection measures shall not unjustifiably restrict access to cross-border acquiring.
- (75) The duration of four years envisaged by the Proposed Commitments is long enough to allow for a significant change in market practices, while at the same time ensuring that the effects of the Proposed Commitments on the market are re-assessed within a reasonable period of time. Current market trends, such as the migration to Single

Euro Payments Area ('SEPA')<sup>19</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.

- (76) The Commission is of the view that clause 9.3 of the Proposed Commitments is worded very broadly in order to prevent the introduction of economically or legally equivalent fees. Direct transaction fees, which are scheme fees, would certainly be covered by that clause.
- (77) The Commission considers that the Definitions contained in the Proposed Commitments are clear and not unnecessarily complex.
- (78) The provisions in the Proposed Commitments relating to the Trustee and to the Trustee's reports are in line with the general practice of the Commission regarding the monitoring of commitments.
- (79) Concerning data used by Visa Europe, the Commission refers to Section 6.2. With regard to other network rules that might be anticompetitive, the Commission may investigate them if it has indications of competition concerns.
- (80) Regarding the concern that Visa Europe may have freedom to set Intra-EEA Credit MIF's for particular categories of transactions in particular in order to incentivise the adoption of secure technology and innovation, the Commission believes that if merchants see no direct benefit from incentive rates they are not compelled to make such investments.

#### **6.7. Observations from consumer associations**

- (81) One consumer association commented on the Proposed Commitments. This consumer association is concerned that the Commitments will not affect high MIF cards. It also believes that there is a need to harmonise the presentation of fee tables of different card schemes to make them comparable. Comparability will facilitate better informed decision-making by policymakers and supervisors. The consumer association also believes that the Proposed Commitments would not create a level playing field, because MasterCard has not proposed commitments concerning the same countries, and therefore issues on the payments market can only be addressed through legislation.

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<sup>19</sup> SEPA means Single Euro Payments Area, a process initiated by European banks supported by the Eurosystem and the Commission, in order to integrate retail payment systems, in view of transforming the Euro area into a true domestic market for the payment industry.

## **6.8. Assessment of observations from consumer associations**

- (82) Concerning high MIF cards, the Commission is not aware that Visa Europe has high MIF or premium consumer card rates, and there are no higher MIFs for specific card types. Even if the occurrence of this cannot be excluded in the future, the more high MIF cards issued, the more Visa Europe would need to decrease the MIF of other cards. The share of high MIF cards can only be marginal, as Visa Europe will need to comply with the overall 0.3% cap.
- (83) The comparability of fee tables as well as the creation of a level playing field goes beyond the scope of this case and the Proposed Commitments. However, in order to decrease the risk of market distortion due to the lack of a level playing field, the Commission accepts that in the Amended Commitments the cap for domestic MIFs will only apply after two years following the notification of the commitment decision to Visa Europe in those EEA countries for which Visa Europe directly sets specific domestic consumer credit MIF rates and in those EEA countries where the Intra-EEA Credit MIFs apply to domestic transactions in the absence of other MIFs (see also recital (95)). Until the entry into force of such a cap Visa Europe commits in Section 3.2 of the Amended Commitments not to increase domestic credit MIF rates directly set by Visa Europe.
- (84) In addition, precisely with the aim of creating a level playing field, parallel proceedings were opened against MasterCard Incorporated, MasterCard International Incorporated and MasterCard Europe Sprl<sup>20</sup> covering aspects that were included in the Visa case.

## **6.9. Observations from others**

- (85) Two other comments were received by the Commission on the Proposed Commitments.
- (86) One of the commentators claimed that interchange fees could actually increase for some merchants. Therefore within the weighted average it would be preferable to additionally set a limit on the level of MIF for each category.
- (87) It also argued that it is understood that the 0.2% and 0.3% caps are set based on the merchant indifference methodology, with regard to which there are two concerns. First, for merchants with high transaction values, interchange fees for debit cards would rise, which goes against the objective of the exercise. Therefore it is recommended that debit fees be capped. Secondly, with the use of this methodology, charges are likely to rise over time as cash usage decreases and its costs increase. Therefore a cost-based method would be more appropriate.
- (88) It also commented on cross-border acquiring. In its view the definition of cross-border acquiring refers to the acquirer's principal place of business, but it is not clear how the principal place of business is defined. A preferable solution would be that any acquirer operating within an EEA Member State that is distinct from the

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<sup>20</sup> See the Commission's press release at: [http://europa.eu/rapid/press-release\\_IP-13-314\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-13-314_en.htm?locale=en).

merchant's state could apply the alternative MIF. It is unclear why the proposed implementation date is 2015. It also claimed that for these commitments to become a viable long-term solution, particularly in relation to cross-border acquiring, the policies would have to be implemented across all major card schemes.

- (89) Another comment provided remarks about the Trustee, notably that: (i) it should have both technical and legal qualifications, (ii) its Mandate should be public, and (iii) the Trustee's work plan should be public. The comment also suggested the setting up of a dedicated webpage for information exchange with stakeholders.

#### **6.10. Assessment of observations from others**

- (90) The weighted average cap is calculated for all merchants and not for individual merchants, so interchange fees are not likely to increase but rather to decrease even for merchants with high transaction values as interchange fees will decrease. In addition, credit MIFs have always been set according to value in all countries and for cross-border transactions. Finally, the weighted average cap does not determine the way MIFs are set: there are even MIFs set according to value or combined (fixed plus according to value) debit MIFs in the EEA. Regarding the assumption and data used by Visa Europe, the Commission refers to Section 6.2. As regards the future increase of MIT MIFs due to increasing cash costs, this is most likely to be beyond the timeline of the duration of this commitment decision, but it is a factor that certainly needs to be considered in the future. However the MIT is based on marginal costs and it is not clear that the marginal cost of cash will increase as a result of a decrease in its use.

- (91) As regards cross-border acquiring and the principal place of business, this is discussed in recital (59).

- (92) The concerns regarding the Trustee and the stakeholders are addressed in recital (78).

#### **6.11. The Amended Commitments**

- (93) Overall, the observations received did not allow the Commission to identify new competition concerns and contained no points such as to make the Commission reconsider the concerns it expressed in the preliminary assessment. In view of the results of the market test, the Commission maintains the position that it took in the Market Test Notice, namely that the Proposed Commitments are adequate to meet the competition concerns expressed in the Preliminary Assessment.

- (94) In response to the comments received pursuant to the Market Test Notice, Visa Europe modified the Proposed Commitments with an amended proposal on 5 November, 2013.

- (95) The Amended Commitments have been modified so that the cap for domestic MIFs will apply after two years following the notification of the commitment decision to Visa Europe in those Contracting Parties to the EEA Agreement for which Visa Europe directly sets specific domestic consumer credit MIF rates and in those Contracting Parties to the EEA Agreement where the Intra-EEA Credit MIFs apply to domestic transactions in the absence of other MIFs. This will minimise the disruption in the markets concerned and avoid the risk of issuers moving to cards with higher MIFs, which could even, under extreme circumstances, lead to an overall

increase in total MIFs. Until the entry into force of such cap Visa Europe commits not to increase domestic credit MIF rates directly set by Visa Europe (see also recitals (81) and (83))

- (96) As regards the commitments relating to cross-border acquiring the Amended Commitments clarify that the location of the merchant's acquirer is determined under Visa Europe's regulations and rules as the Member State in which the merchant's acquirer is a Principal Member, Associate Member or a member of a Group Member of Visa Europe. The Amended Commitments now also defines the merchant location by including the definition of "merchant outlet" in its Section 10 on Definitions. In addition Section 9.3 of the Amended Commitments now provides that Visa Europe shall not modify its rules relating to cross-border acquiring in a way that has the object or effect of making it disproportionately more difficult for acquirers or merchants to qualify for Visa Europe's Cross-Border Acquiring Programme.
- (97) The Amended Commitments also clarify, in its Section 10 on Definitions, that the single merchant identifier means the identifier assigned by Visa Europe at the request of the merchant, to merchants belonging to the same group of companies or to each franchise arrangement, for which there is a single merchant relationship.
- (98) Section 6.1(b) of the Amended Commitments makes it clear that cross-border acquired transactions do not need to be processed by Visa Europe.
- (99) Section 7 of the Amended Commitments is amended by an additional sentence which ensures that consumer protection measures shall not unjustifiably restrict access to cross-border acquiring.

## **7. PROPORTIONALITY OF THE AMENDED COMMITMENTS**

### **7.1. Principles**

- (100) The principle of proportionality requires that the measures adopted by institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.<sup>21</sup>
- (101) In the context of Article 9 of Regulation (EC) No 1/2003, application of the principle of proportionality entails, first, that the commitments in question address the concerns expressed by the Commission in its Preliminary Assessment and, second, that the undertakings concerned have not offered less onerous commitments that also address those concerns adequately.<sup>22</sup> When carrying out that assessment, the Commission must take into consideration the interests of third parties.<sup>23</sup>

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<sup>21</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>22</sup> Case C-441/07 P *Commission v Alrosa*, [2010] ECR I-5949, paragraph 41.

<sup>23</sup> Case C-441/07 P *Commission v Alrosa*, [2010] ECR I-5949, paragraph 41.

## 7.2. Application in the present case

- (102) The Amended Commitments are sufficient to address the concerns identified in the Statement of Objections and the Supplementary Statement of Objections as regards Visa Europe's Intra-EEA Credit MIFs, Domestic Credit MIFs set by Visa Europe, Intra Visa Europe Non-EEA Credit and Debit MIFs and Visa Europe's rule on the applicable MIF in the case of cross-border acquiring. In this respect, the Commission must evaluate the whole package of the Amended Commitments and not only its individual elements. Visa Europe has not offered less onerous commitments in response to the Preliminary Assessment that would address the Commission's concerns adequately. The need to ensure increased deterrence through the imposition of fines has been removed by the submission of the Amended Commitments which will be made legally binding and enforceable through this decision. This effectively removes the risk of recidivism and has positive effects on the market structure and European consumers.
- (103) Certain elements of the proportionality of the Proposed and Amended 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 6).
- (104) When analysing MIF levels, the MIT, a methodology originally developed in economic literature<sup>24</sup> and then further developed by the Commission to assess efficient interchange fees, was applied. This methodology is used by the Commission as a benchmark or proxy for assessing compliance with Article 101(3) of the Treaty as a methodology that is economically robust enough to ensure that merchants benefit from card acceptance.
- (105) According to the MIT, the 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 accrued to a merchant are the direct benefits of a card payment relative to alternative payments, in particular cash. Cash is legal tender and the most common alternative to payments with immediate debit cards that involves no MIF.
- (106) Transactional benefits of card payments compared to an alternative payment instrument have to be quantified and measured in monetary terms. 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.
- (107) Economic theory indicates that the MIFs which comply with the MIT should allow merchants and their customers to benefit from increased card use. 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. Furthermore, MIFs that

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<sup>24</sup> In particular, in 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)).

comply with the MIT allow cardholders, when choosing their payment instrument, to internalise the transactional benefits for merchants.

- (108) By ensuring that merchants, taken together, are indifferent between accepting and handling card payments and other means of payments especially cash, such a MIF creates a level playing 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. In this context, a MIF that is above the MIT-compliant level would not appear to create benefits for merchants and consumers that would outweigh the possibly anti-competitive object and effect of the MIFs and a fair share of the resulting benefits would not be passed on to consumers, the merchants and their subsequent purchasers.
- (109) That amount was calculated by comparing the merchants' costs of accepting payments in cash to those of accepting payments made by a payment card. The calculations of the MIT-compliant MIF were based on four studies published by the central banks of the Netherlands, Belgium and Sweden comparing the merchants' costs of accepting payments made by cards with accepting payments made by cash.<sup>25</sup>
- (110) Firstly, for each study the costs and benefits that credit and deferred debit card payments and cash generate for the merchants were identified. Secondly, for each study on the basis of that cost information, merchants' cost functions for each of the payment instruments, namely credit and deferred debit cards and cash were computed. The merchants' cost function of a payment instrument identifies the level of fixed costs as well as transaction-linked and value-linked variable costs that on average merchants have to bear in relation to the total number of transactions and the total value of the transactions handled. 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.
- (111) The Commission therefore has indications that a weighted average of 0.3% for credit cards and 0.2% for debit cards could under certain assumptions make merchants, taken together, indifferent between accepting a cash payment and a card payment. This figure represents the maximum at which the net effect of *accepting payments cards* is neutral but not negative from the point of view of merchants as a whole.
- (112) By comparing the MIF computed on the basis of the four studies, the maximum weighted average caps MIF proposed by Visa Europe do not appear to be in excess of the requirements of the MIT. A higher average MIF rate would not give the merchants any additional benefit from the potential efficiencies generated by the

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<sup>25</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.



immediate debit MIFs. At the same time, the Amended Commitments only cap the MIF rates and do not prevent Visa Europe from introducing lower MIF rates. Therefore those commitments sufficiently address the competition concerns identified by the Commission.

- (113) Visa Europe's Amended Commitments on cross-border acquiring are also sufficient to address the competition problems identified by the Commission. They are expected to significantly lower the barriers to entry to national acquiring markets in the EEA and to foster price competition as explained in recitals (56)-(57) and (72). Visa Europe has not offered less onerous commitments in this regard.
- (114) The Amended Commitments should be made binding for a period of four years following notification of this Decision to Visa Europe. The duration envisaged by the Amended Commitments is long enough to allow for a significant change in market practices, while at the same time ensuring that the effects of the Amended Commitments on the market are re-assessed within a reasonable period of time. Current market trends, such as the migration to SEPA<sup>26</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.
- (115) The Commission has taken into consideration the interests of third parties, including those of the interested third parties that have responded to the Market Test Notice.
- (116) This Decision accordingly complies with the principle of proportionality.

## **8. CONCLUSION**

- (117) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes commitments, offered by the undertakings concerned to meet the Commission's concerns expressed in its preliminary assessment, binding upon them. Recital 13 of Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the preliminary view of the

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<sup>26</sup> 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.

Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of the Market Test Notice.

- (118) In the light of the Amended Commitments offered, the Commission considers that there are no longer grounds for action on its part against Visa Europe and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case against Visa Europe should therefore be brought to an end. The Commission retains full discretion to investigate and open proceedings under Article 101 of the Treaty and Article 53 of the EEA Agreement as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

*Article 1*

The Commitments listed in the Annex shall be binding on Visa Europe Limited for four years following notification of this Decision.

*Article 2*

It is hereby concluded that there are no longer grounds for action by the Commission in this case against Visa Europe Limited as regards Visa Europe Limited's Intra-EEA Credit multilaterally agreed interchange fees ('MIFs'), Domestic Credit MIFs set by Visa Europe Limited, Intra Visa Europe Non-EEA Credit and Debit MIFs, International MIFs and Visa Europe Limited's rule on the applicable MIF in the case of cross-border acquiring, and the proceedings against Visa Europe Limited should therefore be brought to an end.

*Article 3*

This Decision is addressed to:

Visa Europe Limited, 1 Sheldon Square, London W2 6TT, United Kingdom.

Done at Brussels, 26.2.2014

*For the Commission*  
*Joaquín ALMUNIA*  
*Vice-President*

