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COMMISSION OF THE EUROPEAN COMMUNITIES

COMMISSION DECISION

of 3.10.2007

relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement

in case COMP/D1/37860

MORGAN STANLEY / VISA INTERNATIONAL AND VISA EUROPE

(Only the English text is authentic)

(Text with EEA relevance)

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community and the European Economic Area Agreement,

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 EC Treaty, and in particular Article 7(1) and Article 23(2) thereof, [1]

Having regard to the Commission's decision to initiate proceedings in this case by issuing a Statement of Objections on 2 August 2004,

Having given the undertakings and associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objections in accordance with Article 27 (1) of Regulation (EC) No 1/2003 and 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[2], which right to a hearing was waived by the undertakings,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions[3],

Having regard to the final report of the hearing officer in this case,

Whereas:

1. THE PARTIES

1.1. Morgan Stanley

(1) Morgan Stanley, formerly known as Morgan Stanley Dean Witter & Co (hereinafter "Morgan Stanley USA"), a company incorporated in Delaware (USA), is a financial services organisation providing a range of credit and investment services. It was created in 1997 following a merger between Morgan Stanley Group Inc. and Dean

[1] OJ L1, 4.1.2003, p.1. Regulation as last amended by Regulation (EC) N° 411/2004 (OJ L68, 6.3.2004, p. 1)
[2] OJ L123, 27.4.2004, p. 18.
[3] Meetings of the Advisory Committee of 17 and 28 September 2007.

Witter, Discover & Co.[4] Prior to 22 February 1993, Dean Witter, Discover & Co. was a wholly owned subsidiary of Sears, Roebuck & Co.[5]

(2) In the United States, Morgan Stanley USA operates the Discover Card/NOVUS proprietary network, on which it issues its Discover card[6]. The Discover card is only issued in the USA[7]. As for its acceptance, "*the Discover network only operates in the United States, and to a limited extent, in relation to a small number of Canadian outlets (generally Canadian outlets of US companies, for example, hotels) and destination travel in some Puerto Rican and Caribbean islands.*"[8] The Discover network is not operative in the Community / in the EEA.[9]

(3) On 23 February 1999, Morgan Stanley USA incorporated a bank in the United Kingdom, Morgan Stanley Dean Witter Bank Limited (now Morgan Stanley Bank International Limited), hereinafter "Morgan Stanley Bank".[10] Consumer Banking Group International, which is a division of Morgan Stanley Bank, is the non-USA business division of Morgan Stanley's global credit services. It is headquartered in London and is responsible for credit card activities in the Community.

(4) The United Kingdom is the only country in Europe where Morgan Stanley Bank has card operations. Until Morgan Stanley Bank's admission as a Visa member on 22 September 2006[11], Morgan Stanley Bank's card operations were confined to issuing MasterCard cards. Consumer Banking Group International of Morgan Stanley Bank has been issuing the so-called Morgan Stanley Card in the United Kingdom as a member of the MasterCard network since August 1999.[12] The Morgan Stanley Card is a MasterCard card with a Morgan Stanley logo on it, not a Discover card. It is accepted by all merchants that accept MasterCard.

(5) Morgan Stanley Bank does not acquire merchants for acceptance of MasterCard. Morgan Stanley USA claims that it is impossible to enter the merchant acquiring market without membership of both the MasterCard and Visa networks[13], and Morgan Stanley Bank was not a member of Visa until 22 September 2006.

(6) In April 2000 Morgan Stanley USA complained to the Commission that "*one particularly harmful impact of Visa's Rule 2.12(b) is that it prevents MSDW from*

[4] The Complaint, p. 3. (Commission file p. 460)
[5] Ibid.
[6] The Discover Card/NOVUS network was established in the United States by Sears in 1985, but eventually it became a division of Dean Witter, Discover & Co. (the Complaint, p. 3) (Commission file p. 460)
[7] Morgan Stanley's submissions of 18 September 2000, p. 2, (Commission file p. 840) and 20 January 2003, p. 8. (Commission file p. 3146)
[8] Morgan Stanley's submission of 18 September 2000, p. 2. (Commission file p. 840). Also, see witness statement of the head of Morgan Stanley's Global Credit Services Business before the High Court of Justice of England and Wales of 17 January 2001, p. 5. (Commission file p. 1689)
[9] Morgan Stanley's submissions of 18 September 2000, p. 3, (Commission file p. 841) and 11 December 2000, p. 4 and 11. (Commission file p. 1562 and 1569)
[10] Witness Statement of the head of Morgan Stanley's Global Credit Services Business before the High Court of Justice of England and Wales, 17 January 2001, p. 5. (Commission file p. 1689) In 2004 Morgan Stanley Dean Witter Bank Limited was renamed Morgan Stanley International Limited.
[11] Letter from Visa to the Commission of 27 November 2006 (Commission file pp. 12328-12344)
[12] Ibid.
[13] As pointed by Morgan Stanley on page 5 of its Strategic Plan (Commission file pp. 10768-10769) and as set out in Morgan Stanley's submission of 18 September 2000, p. 8. (Commission file p. 846).

acquiring as a merchant acquirer for Visa transactions"[14] and, from 2002, it refined and developed a strategic plan and an implementation plan to establish an *integrated* issuing and acquiring business[15] (that is to say, inter alia, to reward Morgan Stanley Bank cardholders who use their cards at Morgan Stanley Bank-acquired merchants[16]) in the United Kingdom and other Member States, which it claimed to be ready to launch in May 2005 if it were granted membership of Visa[17].

(7) Morgan Stanley USA and Morgan Stanley Bank jointly submitted a complaint to the Commission ("the Complaint") on 12 April 2000.[18] The complainants will hereinafter be referred to together as "Morgan Stanley", unless otherwise indicated.

1.2. Visa

(8) Visa International Service Association ("Visa International") is a corporation registered under the laws of Delaware (USA). Visa International operates the Visa card network. In connection with this, Visa International manages trademarks, lays down the rules of the network and provides authorisation and clearing services to its member financial institutions via a world-wide computer and telecommunications network, called VisaNet. Visa International itself does not issue Visa cards to cardholders nor does it contract with merchants for Visa card acceptance. These activities are undertaken by its member financial institutions or banks that have received a licence for these purposes from Visa.

(9) Visa International regulates and co-ordinates the Visa network through its By-Laws and Operating Regulations. These By-Laws and Operating Regulations are adopted by the Board of Visa International and bind all Visa members throughout the world.[19]

(10) Visa International has divided the territories in which it is active into six regions, namely: Asia-Pacific, Latin America and Caribbean, United States, Canada, Central and Eastern Europe, Middle East and Africa (CEMEA) and Western Europe (which it refers to as Visa's "EU Region"). In addition to the Member States of the European Union,[20] Visa's "EU Region" (hereinafter "the Visa EU Region") also covers Iceland, Liechtenstein, Norway, Turkey, Israel and Switzerland. Banks operating in each of the six Regions are represented by their appointees to the Regional Board of Directors. The Board of Visa International has delegated the right to manage the activities of the Regions to the respective Regional Boards, together with the right to adopt additional rules for their respective Regions on certain matters, provided they are consistent with the pertinent rules of Visa International (for example, the Regional Board of Visa

[14] Section 2.3, p.4 of the complaint (Commission file p. 461)

[15] Statement of the head of Morgan Stanley's Global Credit Services Business, of 20 May 2005, paragraphs 10 and 13 (Commission file pp. 10975-10976). See also Morgan Stanley's presentation for the hearing (Annex 57 to the letter of facts; Commission file pp. 10081-10130) which repeatedly refers to the strategy of establishing an "integrated issuing and acquiring business".

[16] Statement of a Managing Director of Morgan Stanley's UK credit card business (Consumer Banking Group International), of 20 May 2005, paragraph 7 p.4 (Commission file p. 10947).

[17] Statement of a Managing Director of Morgan Stanley's UK credit card business (Consumer Banking Group International), of 20 May 2005, paragraph 6 p.3 (Commission file p. 10946).

[18] The Complaint, p. 1 (Commission file p. 458).

[19] Visa's submission of 3 December 2004, paragraph 101, p.31 (Commission file p. 8471).

[20] With the enlargement of the European Union in May 2004 and January 2007, ten new Member States have been transferred from the Visa CEMEA Region to the Visa EU Region (Malta and Cyprus were already included in the Visa EU Region before their accession to the European Union).

Europe Limited – see next paragraph – has adopted Visa Europe's Operating Regulations and Membership Regulations).

(11) Prior to 1 July 2004 "Visa EU" was a geographical division of Visa International. On 1 July 2004, Visa Europe Limited (hereinafter "Visa Europe")[21] was incorporated. Visa Europe comprises over 4 500 members. Visa Europe wholly owns a subsidiary, Visa Europe Services Inc., an operating company employing all Visa EU Region staff and owning all the Visa EU Region assets.[22]

(12) Before the incorporation of Visa Europe, the Regional Board for the Visa EU Region of Visa International had certain delegated decision making powers from the Board of Directors of Visa International. According to the Regional Board Delegation for the European Union adopted by the Board of Directors of Visa International, the Regional Board for the Visa EU Region had "*authority [ ] <u>under the Visa International By-Laws</u> [to decide on admission as a Visa member] of any organisation headquartered in the [Visa EU] Region ….*"[23]

(13) Therefore, an applicant for Visa membership with its principal place of business in the Visa EU Region had to address its application to the Regional Board for the Visa EU Region. Subject to fulfilment of the membership requirements set out in the Visa International By-Laws which apply uniformly throughout the Visa EU Region, the Regional Board for the Visa EU would grant such applicant Visa membership[24] and authorise it to carry out Visa card related activities in the Member State where the applicant had its principal place of business.

(14) Since the incorporation of Visa Europe on 1 July 2004 the Regional Board of Visa Europe has exclusive authority to regulate matters within the Visa EU Region[25], in particular to decide whether to accept or reject any application for membership of Visa Europe[26], albeit in accordance with the Visa International Bylaws.[27]

(15) Visa International and Visa Europe will hereinafter be referred to together as "Visa", unless otherwise indicated.

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21 Visa's press release of 1 July 2004 (www.visaeurope.com/pressandmedia/press193_pressreleases .html visited in July 2004) (Commission file p. 7204).

22 Visa's submission of 3 December 2004, paragraph 106, p.33 (Commission file p. 8473).

23 Visa International By-Laws and Regional Board Delegations, p. 2-15, Section I (A). The provisions of these documents which are quoted or referred to in the present decision have not changed since the beginning of the infringement in March 2000 (see Commission file p. 12443 for the version as last amended on 27 February 2006).

24 Before the incorporation of Visa Europe, membership in stricto sensu would have been of Visa International.

25 "*The authority to regulate matters within the EU Region resides exclusively with the Board* […]" (Article 89.2 of the Articles of Association of Visa Europe –Commission file p. 7960).

26 "*The Board* [of Visa Europe] *shall decide, in its sole discretion* […] *whether to accept or reject any application for membership of* [Visa Europe]"; "[…] *the Board* [of Visa Europe] *shall be authorised to establish policies and promulgate rules and regulations regarding the administration (including, but not limited to, the* […] *conditions of membership* […] *of any organisation headquartered in the EU Region), operation and development of Visa's International's programmes within the EU Region* […]"(Articles 4.1 – Commission file p. 7938 – and 88 – Commission file p.7959 – of the Articles of Association of Visa Europe).

27 "*Following incorporation, the Board of Visa Europe has the power to determine membership applications in its own right further to its Membership Regulations, albeit in accordance with the Visa International By-Laws*" (Visa's submission of 3 December 2004, paragraph 107, p.33) (Commission file p. 8473).

2. THE SUBJECT MATTER OF THESE PROCEEDINGS

2.1. The Visa membership rule applied to Morgan Stanley

(16) Until 1989 Visa membership enabling banks to issue Visa cards and acquire merchants for acceptance of Visa cards was in principle open to any institution organised under the commercial banking laws of its own country and authorised to accept demand deposits.

(17) However, on 4 December 1989, the Visa International Board of Directors adopted the following rule as an amendment to Section 2.12b of the Visa International By-Laws:[28]

"*… If permitted by applicable law, the Board (including Regional Boards and Group Members) shall not accept for membership any Applicant which is deemed by the Board of Directors to be a competitor of the corporation.*"

(18) The minutes of that Board meeting state that the amendment was made "*in order to maintain and enhance intersystem competition as well as to avoid unfair competition*."[29]

(19) At the same meeting, the Visa International Board established the list of organisations deemed to be competitors of Visa, which included [list of Visa's competitors] and Sears Roebuck.[30] During the Board meeting of 7/8 November 1994, the list of competitors was amended to reflect changes of ownership with, among others, Sears Roebuck being removed from the list and Morgan Stanley Dean Witter included.[31]

(20) On 6 March 2000, a meeting of the Executive Committee of the Board of Directors of Visa International resolved that the Board Minutes of 4 December 1989, as amended by Board Minutes of 7 November 1994, be reaffirmed.[32]

(21) Visa explains that at the time of incorporation of Visa Europe, it was decided to reflect the By-Laws of Visa International (including Section 2.12(b)) in the new Articles of Association and Membership Regulations of Visa Europe. As of October 2004, paragraph 3 of Clause 5 of the Membership Regulations of Visa Europe replicates the text of Section 2.12(b) of Visa International By-Laws (the provision set out both in Section 2.12(b) of Visa International By-Laws and paragraph 3 of Clause 5 of the Membership Regulations of Visa Europe will be referred to as "the Rule").

(22) The Rule, being part of the Visa International By-Laws and the Visa Europe Membership Regulations, applies in all countries of the Visa EU Region. Hence, an applicant refused membership of Visa Europe on the basis of the Rule in one country of that Region is ineligible to issue Visa cards and acquire Visa transactions[33] throughout the whole Region.

[28] Visa's submission of 28 July 2000, p. 1 (Commission file p. 563).
[29] Ibid, p. 1 and 3 (Commission file p. 563 and 565).
[30] Ibid, p. 1 (Commission file p. 563).
[31] Ibid, p. 2 (Commission file p. 564)
[32] Visa's submission of 3 December 2004, paragraph 148, p.43 (Commission file p. 8483).
[33] [details of the terms of the settlement agreement between Visa and Morgan Stanley].

(23) On [date] 2006 the Visa International Board approved "*Criteria for Assessment of risk of disloyal competition*" under the Rule.[34] Visa describes the criteria for assessment as a "*variation of By-Law [number of the rule] for the Visa Europe Region*", and states that the newly varied rule has had effect and has been applied since [date] 2006[35]. According to the information transmitted by Visa to the Commission[36], however, the wording of the Rule itself has not changed, but has been supplemented by the criteria for assessment. The publication of the criteria for assessment in the Visa Europe Membership Regulations is scheduled for [date] 2007.

(24) According to Visa the objectives of the Rule are (i) to enhance and maintain the integrity and effectiveness of Visa as a four-party card payment system, (ii) to prevent disloyal and unfair competition arising from "free-riding" by Morgan Stanley, and (iii) to maintain and enhance competition between systems[37].

(25) The subject matter of these proceedings is not the Rule in itself but its application to Morgan Stanley (that is to say, the Rule as applied to Morgan Stanley).

2.2. Morgan Stanley's requests for membership and Visa's responses

(26) In March 2000, Morgan Stanley asked for membership, which Visa refused to grant[38] until Morgan Stanley Bank became member of Visa Europe on 22 September 2006.

2.3. Morgan Stanley Bank's admission as a Visa Member on 22 September 2006

(27) On 21 September 2006 Morgan Stanley and Visa concluded a settlement agreement according to which Visa granted Morgan Stanley Bank unconditional membership of Visa Europe. [ ] the membership includes, but is not limited to, [ ] the right for Morgan Stanley Bank to participate in [ ] Programme [ ] and according to which Morgan Stanley Bank shall be eligible to issue and acquire Visa cards in all countries within the Visa Europe Region subject to the provisions of the Visa Europe Membership Regulations [ ].[39]

(28) Morgan Stanley agreed to withdraw the complaint filed with the Commission and [details of the settlement agreement].[40]

(29) Furthermore, Morgan Stanley agreed to stay the proceedings commenced against Visa before the High Court of Justice of England and Wales for a period of 3 years. If, within that 3-year period, Visa excluded Morgan Stanley on certain grounds from membership of Visa Europe, the parties agreed that the stay on proceedings would be lifted and Morgan Stanley could continue the action against Visa. [details of the settlement agreement][41]

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34 [details of the obligations contained in the Visa By-laws and Operating Regulations].

35 Letter of 12 December 2006. [Details of Visa International and Visa Europe Board decisions relating to Visa By-laws and Visa Europe Membership Regulations].

36 Letter of 12 December 2006 (Commission file pp. 12421-12432).

37 Visa's submission of 3 December 2004, paragraph 382, p.121 (Commission file p. 8561).

38 [contents of communication between Morgan Stanley and Visa with regard to its membership application].

39 The Settlement Agreement between Visa and Morgan Stanley of 21 September 2006, p. 3 (Commission file p. 12243).

40 The Settlement Agreement between Visa and Morgan Stanley of 21 September 2006, p. 4 (Commission file p. 12244).

41 Ibid.

3. THE PROCEDURE

(30) Morgan Stanley submitted a complaint to the Commission in respect of Visa's conduct[42] on 12 April 2000 and commenced proceedings against Visa before the High Court of Justice of England and Wales on 28 September 2000.[43] [44] Its claim before the High Court of Justice of England and Wales is similar to its complaint submitted to the Commission, save that it also claimed damages from Visa. On 2 May 2001, following Visa's application, the High Court of Justice of England and Wales ordered a stay of proceedings to await the outcome of the Commission's investigation.[45]

(31) A Statement of Objections was sent to Visa International and Visa Europe on 2 August 2004. The addressees of the Statement of Objections had access to the Commission's file[46].

(32) Pursuant to Article 6 (1) of Regulation (EC) No 773/2004, Morgan Stanley was provided with a non-confidential version of the Statement of Objections on 15 October 2004. The complainant submitted written observations on the Statement of Objections on 22 October 2004, to which Visa responded by a written submission of 23 February 2005.

(33) Under Article 27(1) of Regulation (EC) No 1/2003, read in conjunction with Article 10 of Commission Regulation (EC) No 773/2004, Visa International and Visa Europe submitted their written observations on the Statement of Objections on 3 December 2004 and supplementary written observations on 17 January 2005. Morgan Stanley responded to Visa's submissions in its written observations of 25 January and 15 February 2005 respectively, to which Visa replied in its written submission of 20 May 2005.

(34) In its written observations on the SO of 3 December 2004 Visa International and Visa Europe requested the opportunity to express their views at an oral hearing, which was due to take place on 8-9 February 2005. At Visa's request the hearing was postponed until 5-6 April 2005. On 5 April 2005 Visa waived its right to the hearing by referring to Morgan Stanley's plans to spin off its payment card business, announced on 4 April 2005[47], as the reason for such withdrawal.

(35) By letters of 23 December 2004 and 6 July 2006, the Commission services informed Visa how the Commission intended to use certain elements inserted into the Commission file after the access to file referred to in paragraph (31), and gave Visa

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[42] In its complaint to the Commission under Article 81 and 82 of the EC Treaty (p.2 thereof – Commision file p. 459), Morgan Stanley requested the Commission "*to take all necessary steps and to exercise its powers pursuant to Regulation 17/1962 to prevent Visa from maintaining and applying* [the anti-competitive terms of Visa's membership rules in the EEA, as set out in its By-Laws and Operating Regulations] *in such a way as to exclude MSDW from Visa membership, to ensure that Visa applies its membership criteria in a fair, transparent, proportionate and non-discriminatory manner and to enjoin Visa from enacting any new rules which have the object or effect of excluding MSDW from its membership*".

[43] Under both Articles 81 and 82 of the Treaty and the corresponding provisions of the UK Competition Act.

[44] Morgan Stanley's submission of 20 October 2000 (Commission file pp. 909-933).

[45] Minute of Order of the High Court of Justice of England and Wales, dated 2 May 2001 (attached to the letter of Hon. Mr Justice Toulson of 19 July 2001 to the Commission – Commision file pp. 2049-2051).

[46] On 1 and 2 September 2004. Additional access to the file was granted on 19 November and 17 December 2004.

[47] See Morgan Stanley's press release of 1 May 2005 on its website (Commission file pp. 10276-10277): http://www.morganstanley.com/cgi-bin/morganstanley.com/pressroom.cgi?action=load&uid=405

the opportunity to comment. Visa replied by letters dated 14 January 2005 and 22 September 2006 respectively.

(36) As explained in section 2.3 above, on 21 September 2006 Morgan Stanley and Visa entered into an agreement whereby all claims made by Morgan Stanley against Visa in the complaint filed with the Commission are settled and the complaint is withdrawn in consideration of Visa granting Morgan Stanley Bank unconditional membership of Visa Europe, including eligibility to issue and acquire Visa cards in all countries within the Visa Europe Region. Section 7 below explains why the Commission finds it necessary to adopt a decision even if the infringement has been terminated.

(37) On 22 September 2006, Morgan Stanley Bank became a member of Visa Europe[48] and Morgan Stanley withdrew its complaint to the Commission[49].

(38) Additional access to the file took place on 12 January 2007.

4. THE RELEVANT MARKET

4.1. Relevant product market

4.1.1. Network, issuing and acquiring as three separate markets

(39) Payment cards can be used among others to pay a merchant (retailer) for goods or services or to obtain cash from a bank counter or Automated Teller Machine ("ATM"). When a card is used to make a payment, four parties are normally involved: the cardholder, the issuing bank (which has issued a card to the cardholder), the merchant and the acquiring bank (which has acquired the merchant for acceptance of the card of a certain brand). In order to issue cards of a certain brand and acquire merchants for acceptance of cards of that brand, issuing and acquiring banks have to be members of a payment card network promoting the use of cards of that particular brand (for example, Visa or MasterCard).

(40) Market definition is based on the analysis of the services provided within a payment card network. The following distinct groups of services can be identified: (i) services provided by a payment card network to financial institutions (typically members of that network)[50] where competition between different payment card schemes or the so-called 'inter-system' or 'upstream market' competition takes place; (ii) services provided by the issuing banks to cardholders; (iii) services provided by the acquiring banks to merchants, where competition between individual financial institutions for cardholders' and merchants' custom respectively takes place, such competition also being termed 'intra-system' or 'downstream markets' competition.[51]

48 See letter of Visa's lawyers to the Commission of 27 September 2006 (Commission file p. 12190).

49 See letter of Morgan Stanley to the Commission of 22 September 2006 (Commission file p. 12188).

50 Those services include authorisation routing, currency conversion, clearing, risk management and settlement enablement, as well as the creation and maintenance of the network brand and associated marks, the development of products, and the establishment of network rules covering the different aspects of operating the network, including those governing membership of the network.

51 See Commission Decision 2001/782/EC in Case COMP/29.373 Visa International of 9 August 2001, OJ L293, 10.11.2001, p. 24, recital 34, and Commission Decision 2002/914/EC in Case COMP/29.373 Visa International – Multilateral Interchange Fees of 24 July 2002, OJ L 318, 22.11.2002, p. 17, recital 43.

(41) Accordingly, three separate markets can be differentiated: (i) a market for network services, in which card networks (such as Visa or MasterCard) provide services to individual financial institutions; (ii) an “issuing market” in which card issuers compete with each other to issue cards and provide card-related services to individuals; (iii) an “acquiring market” in which acquirers sign merchants for all of the services necessary for the merchant to accept cards.[52]

(42) The Rule can have effects restrictive of competition in the downstream issuing and acquiring markets, for example by preventing potential entrants from issuing cards and/or acquiring merchants. This Decision focuses on the downstream acquiring market only, where the restrictive effects on competition were appreciable (Section 5.3.2. below).

(43) Card issuing and merchant acquiring services represent two separate markets, as issuing and acquiring banks provide services to two distinct customer groups, and those services are very different in nature and not substitutable from the merchants' and cardholders’ points of view.[53]

(44) Issuing banks issue cards to individuals or companies, provide their cardholders with statements on card-related spending, and collect payments for the amounts spent. Acquiring banks recruit merchants to card schemes, provide them with terminals and card readers, process transaction information which is sent to issuers, obtain money from issuers and pay retailers. They are also liable to issuers for outstanding payments, if a merchant goes out of business.

(45) Issuing and acquiring services are also priced differently: the main merchant fee – a ‘merchant service charge’ (or ‘MSC’) – is a per transaction fee, whereas cardholders typically pay lump sum annual fees.

(46) In a four-party network like Visa the issuing and acquiring services are provided by undertakings – in principle members of the network – that are distinct from the network undertaking.

(47) Although the services provided by issuing and acquiring banks are not substitutable, cardholder and merchant demand for issuing and acquiring services respectively is in some way inter-related. Merchants – being dependent on customer preferences – tend to accept payment cards which are widely used by cardholders, and, conversely, cardholders tend to prefer cards which are accepted by most retailers.

4.1.2. Non substitutability of payment card acquiring services with the services for acceptance of cash and cheques

(48) Product characteristics of services provided to merchants for the acceptance of payment cards are different from those for the acceptance of cash and cheques. Cash collectors, for example, could not easily switch to acquiring merchants for card acceptance and vice-versa. Cash collection requires high security transport and

[52] See Commission Decision 2002/914/EC, recital 45.

[53] In its previous decisions relating to various other Visa rules, the Commission referred to the existence of separate downstream issuing and acquiring markets (see Commission Decisions 2001/782/EC and 2002/914/EC, referred to in footnote 51 above). Two banking merger cases also considered issuing and acquiring to be two distinct – albeit economically linked – product markets (Case No COMP/M.23980 – FöreningsSparbanken/SEB and Case No COMP/M.2567 – Nordbanken/Postgirot).

involves the risk of robbery, whereas card acquiring requires sophisticated IT equipment, involves financial risks (such as unrecoverable charge back losses linked to merchant default) and necessitates scale.

(49) From the consumer point of view, with some exceptions, cash and cheques are generally not considered as substitutes to payment cards. Cash can be inconvenient, unwise to carry in large amounts and unsuitable for expensive purchases, which may make it less attractive to use than payment cards for large transactions.[54] Thus, while many cardholders would use cash for small transactions if unable to use their card, the proportion of those willing or able to switch to cash for large transactions is likely to be lower.

(50) Whilst payment cards may often act as good substitutes for cheques, the reverse will be true to a far lesser extent. First, cheques cannot be used to withdraw cash at ATMs. Second, in the area of payments, in an environment where guaranteed payments must be received before releasing or supplying goods or services, low limits per cheque restrict the use by consumers of cheques as an alternative to cards. Merchants who are willing to accept cheques above this limit lose their protection from fraud or the customer's inability to pay. Therefore, particularly for high value purchases, some cardholders may be unable or unwilling to substitute to cheques if the merchant does not accept cards.

(51) Merchants do not view cash and cheques as substitutes for payment cards either. The most common reason identified by merchants for starting to accept card payments is the increased consumer demand to pay with cards.[55] Thus, the more cardholders use payment cards (in view of the inconveniences associated with payment with cash or cheques), the more card acceptance becomes a necessity for retailers. This too indicates that merchants' decision to move away from accepting only cash and cheques to accept cards is taken considering the potential business losses that a persistent refusal to accept a means of payment increasingly demanded by customers would entail.[56]

(52) On the basis of the above analysis it can be concluded that card acquiring services are not substitutable with cash and cheque related services.

4.1.3. Non substitutability of credit or deferred debit/charge cards and debit cards

(53) From a merchant's perspective, credit and deferred debit/charge card[57] acceptance is significantly more expensive than debit card acceptance[58]. However, given that

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54 See Commission Decision 2001/782/EC in Case COMP/29.373 Visa International of 9 August 2001, OJ L293, 10.11.2001, p. 24, recital 38, and Commission Decision 2002/914/EC in Case COMP/29.373 Visa International – Multilateral Interchange Fees of 24 July 2002, OJ L 318, 22.11.2002, p. 17, recital 49.

55 See responses of merchants to questions 6 and 19 of the Commission's questionnaires (of 20.01.03 to large merchants and of 14.03.03 and 15.05.03 to small merchants) (Commission file pp. 3477-5361).

56 See the Commission decision of 24 July 2002, OJ 22.11.2002, L 318/17, recital 48.

57 "Charge cards" and "deferred cards" are synonymous. This point is not contested by Visa (see paragraph 118 (b), p.35 of Visa's submission of 3 December 2004 –Commission file p. 8475).

58 Credit and deferred debit/charge cards on the one hand, and debit cards on the other hand, have different characteristics: while MSCs charged to UK merchants for payments with debit cards are in the form of a fixed fee per transaction – i.e. "x pence per transaction" –, those charged for payments with credit/charge cards are *ad valorem* fees – i.e. "x % of the value of the transaction". Whereas purchases made using a debit card are debited immediately from the cardholder's current account, credit and deferred debit/charge cards possess a deferred payment facility which allows credit card holders to finance their purchases out of

customers value the credit function of credit cards and expect to be able to pay with credit cards or debit cards indifferently, retailers are not sensitive to changes in the levels of debit and credit/charge cards (that is to say, they would not switch from accepting one type of card to the other upon an increase in the respective MSCs[59]) and prefer to have to accept credit cards in addition to debit cards[60] rather than to run the risk of missing a sale[61].

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borrowed funds charged on a separate credit card account. The ability to borrow money by using credit and deferred debit/ charge cards is a key feature which distinguishes them from debit cards and determines their use by cardholders.

Moreover, UK retailers are faced with MSCs for payments with credit or deferred debit/charge cards substantially higher than those for payments (of the same amount) with debit cards:

With regard to large UK merchants, a card transaction in the amount of GBP 36.00 triggers MSCs ranging between 0.12% and 0.36% upon payment with a debit card, and between 1.01% and 1.2% upon payment with Visa or MasterCard credit or deferred debit/charge card. Taking the average MSCs, Visa and MasterCard credit and deferred debit/ charge card acceptance is between approximately 340% and 550% more expensive for merchants than debit card acceptance.

With regard to small UK merchants, for a GBP 36.00 purchase, retailers pay between GBP 0.08 and GBP 0.35 if the purchase is made with a debit card, and between GBP 0.43 and GBP 1.08 if it is paid by a Visa or MasterCard credit or deferred debit/charge card. In percentage terms, these figures are equivalent to a 0.22%-0.97% fee for a debit transaction and a 1.2%-3% fee for a credit transaction.

The price difference becomes even more pronounced for higher transaction values. For large merchants, a Visa and MasterCard credit or deferred debit/charge card transaction of GBP 55.00 was on average 570%-900% more expensive than an equivalent debit card transaction. For small merchants, a GBP 55.00 transaction paid with a credit card cost from GBP 0.66 to GBP 1.65 (on average GBP 0.92), whereas a transaction of the same amount costs from GBP 0.08 to GBP 0.35 (on average GBP 0.24) where it is paid with a debit card. In percentage terms this corresponds to a 0.14%-0.64% (on average 0.43%) fee for a debit card payment versus 1.2%-3% (on average 1.67%) fee for a credit/charge card payment.

(The Commission sent requests for information to representative samples of UK merchants, on 20 January 2003 (large merchants) and on 14 March and 15 May 2003 (small merchants), referring to the 2002 average debit and credit card transaction values in the UK - of GBP 36.00 and GBP 55.00 respectively) (Commission file pp. 3477-5361).

59 No merchant replied that it would cease to accept credit cards if the MSC of all credit card brands was increased by 5-10%. Similarly, all but two merchant respondents stated that they would not cease to accept debit cards if the MSC of all debit cards was increased by 5-10% (see the submission of small Merchant 10 of 27 May 2003 –Commission file pp.5137-5147- and small Merchant 12 of 12 June 2003 –Commission file pp. 5327-5336).

60 All (card accepting) UK merchants contacted by the Commission accept both credit and debit cards. Asked whether they consider accepting only debit cards or only credit cards (in both cases alongside cash and cheques) as a feasible option, all but one merchant answered negatively. The most common explanation given was that customers expect to have the opportunity to pay with both credit and debit cards. Asked to give reasons for accepting debit and credit cards respectively, the majority of respondents in both cases referred to consumer demand to pay with such cards. These findings of the Commission are supported by the Report of Retail Banking Research Ltd. "Payment Cards Western Europe 2006" (hereinafter "RBR Report") (UK section, Figure 25, p.71 –Commission file p. 12148), according to which the number of outlets accepting Visa credit and Visa debit brand Visa Electron for 2004 are identical. According to Visa itself (submission of 10 January 2003 –Commission file pp. 3098-3102), merchant outlets which accept only debit cards account for less than [0-5] percent of the total merchant outlets which accept Visa cards in the UK, and a significantly smaller percentage in terms of turnover.

61 A large [country] retailer which recently decided to start accepting credit cards says: "*There were several reasons why we felt we were compelled to change our policy and to accept generic credit cards [in addition to debit cards which were previously accepted], in particular, the demand by our customers and the impact that the non-acceptance of credit cards was having on our business. The development of our online trading operation was also effectively linked to credit card acceptance. It was felt that the acceptance of credit cards was vital to the ongoing success of our business in an increasingly competitive retail market. … once the decision to accept credit cards was taken, it was recognised that this decision would be very difficult, if not impossible, to reverse.*" [source of the quote].

(54) It can therefore be concluded that debit cards are not effective substitutes for credit and deferred debit/charge cards.[62]

4.1.4. Conclusion on the relevant product market

(55) In this case, it is not necessary to determine whether deferred debit/ charge cards constitute a market of their own or whether they form one market only together with credit cards (as, for instance, credit and charge card transactions are normally subject to the same MSC rates in the United Kingdom). Given that in the United Kingdom the number of deferred debit/ charge cards and their transaction volume and value are minimal compared to those of credit cards, any restriction of competition affecting credit cards that would be appreciable would remain so if it applied to a market comprising both credit and charge cards rather than to credit cards only. Therefore, whether the market is that for credit and deferred debit/ charge cards or that for credit cards only can be left open.

(56) Moreover, in this case, it is not necessary to determine whether the market should be limited to certain credit and deferred debit/charge card brands – such as the Visa and MasterCard brands together, or even the Visa brand only, next to the MasterCard, Amex, Diners Club and JCB brands – as in the context of such narrower markets the Rule, as applied to Morgan Stanley, would be all the more restrictive of competition.

(57) For the above reasons, for the purposes of this Decision the relevant product market is that for the provision of credit and deferred debit/charge card acquiring services to merchants.

(58) Even if the market was broader than the market for the provision of credit and deferred debit/charge card acquiring services and comprised payment card acquiring services also for debit cards, the restriction of competition identified below would still be appreciable in that broader market[63].

4.2. Relevant geographic market

(59) In Commission Decision 202/914/EC in Case No COMP 29.373 - *Visa International – Multilateral Interchange Fee*), the Commission held that the relevant geographic market to be taken into account for the assessment of competition issues relating to payment card schemes is still largely national.[64] As far as the acquiring market is concerned, the facts gathered confirm the existence of national markets.

(60) The conditions of competition in the acquiring markets are not yet sufficiently homogeneous between the different Contracting Parties to the EEA Agreement to conclude that the market would be wider than national. The Report of Retail Banking

[62] Due to substantial differences between EEA Member States in the ways in which their national payment card markets are organised, it is possible that the product market definition in this respect may be different in markets other than the UK.

[63] In the UK, credit and deferred debit/charge cards represent 60% of all payment cards (i.e. 99.3 million out of a total of 166.1 million), 47 % of the total value of card payments (i.e. EUR 196 billion out of a total of EUR 417 billion) and 37% of the total volume of card payments (i.e. 2.2 billion out of a total of 5.9 billion). Nearly all retailers that accept debit cards also accept credit cards. (RBR Report 2006, UK section, notably pp.1, 50, 53, 56 and 71; Commission file pp. 12145, 12148, 12444, 12445 and 12446).

[64] Commission Decision 2002/914/EC in Case COMP/23.373 Visa International - Multilateral Interchange Fees, of 24 July 2002, OJ L 318/17, 22.11.2002, recital 53.

Research Ltd. “Payment Cards Western Europe 2006 (hereinafter “RBR Report”) records great differences in the level of merchant commissions across Europe and attributes such differences, in part, to varying arrangements between merchants and acquirers.[65] In some countries, retailers are obliged to buy or lease point-of-sale (POS) terminals and bear all installation and maintenance costs, while in other countries the acquirers retain ownership of the terminal in most cases and meet all associated costs (MSCs being generally higher in these circumstances).[66] The Report also refers to other factors contributing to the existence of different MSC rates in various Contracting Parties to the EEA Agreement, such as fraud level, the chosen method of handling transactions, the method and occurrence of transaction authorisation, the level of service provided by acquirers, and so on.[67]

(61) The fact that banks active in European acquiring markets differ from Member State to Member State (apart from a few cross-border acquirers mentioned in paragraph (66)) could serve as another illustration of non-uniform conditions across the Community, and of the existence of national acquiring markets.

(62) It should also be examined whether the development of cross-border acquiring has as a consequence that the market for the provision of credit and deferred debit/charge card acquiring services to merchants would have become European rather than national.

(63) Cross-border acquiring is a type of merchant acquiring where an acquirer provides acquiring services to a merchant located in a country other than that of the acquirer’s principal place of business.

(64) Visa’s rules relating to cross-border acquiring within the Visa EU Region have been progressively liberalised over time: at the beginning of the 1990s cross-border acquiring was permitted solely in relation to airline transactions. The rules were subsequently amended to permit cross-border acquiring in relation to travel and entertainment merchants. A later change permitted the rules to apply to all merchant sectors, although with a requirement that the merchant had to be located in two or more countries within Visa’s EU Region. The most recent change involved the relaxation of the “two-country” requirement further to changes implemented from 1 October 2000.[68] Hence, a Visa member bank established in one Member State can currently contract with any merchant in any other Member State without there being an additional requirement for such merchant to have outlets in more than one Member State or in the Member State of the acquirer’s establishment. Cross-border acquiring in its liberalised form is still a rather recent development.

(65) As of March 2004 there were [20-30] Visa Europe members registered on the Visa EU Cross-Border Acquiring (CBA) Programme.[69] The cross border acquirers which carry out this activity from their principal place of business in the United Kingdom are the [BANK A], [BANK B] and [BANK C][70].

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[65] The RBR Report, 2006, International Overview, p. 32 (Commission file p. 12149).
[66] Ibid.
[67] Ibid.
[68] Visa’s submission of 7 February 2003 (Commission file pp. 3161-3163bis).
[69] Visa’s submission of 16 April 2004, p. 6 (Commission file p. 7175).
[70] Ibid.

(66) According to the replies of cross-border acquirers to requests for information from the Commission, in practice cross-border acquiring has so far been targeted mainly at multinational merchants with operations in several Contracting Parties to the EEA Agreement (although, as stated in recital (64), Visa's cross-border acquiring rules permit the acquisition of any merchants, including purely 'domestic' merchants with outlets in only one Member State). [Cross-border acquirer A] confirms that all its merchants acquired under cross-border acquiring programmes in 2004 (342 merchants) are multinational merchants with POS terminals in the United Kingdom and in other Member States.[71] Data received from the largest cross-border acquirers with a principal place of business in Contracting Parties to the EEA Agreement other than the United Kingdom servicing merchants in the United Kingdom point in the same direction. For the United Kingdom, [cross- border acquirer B] reports 485 merchants acquired under Visa's cross-border acquiring programme with point of sale terminals in several Member States and 161 merchants with POS terminals only in the United Kingdom.[72] As part of its cross-border acquiring operations from the Republic of Ireland [cross border acquirer C] reports 81 United Kingdom-headquartered merchants acquired under Visa's cross-border acquiring programme with POS terminals in several Member States and no purely domestic UK merchants.[73]

(67) Typically, merchants acquired under cross-border acquiring programmes are airlines, car rental companies, hotels, travel agencies and other travel related companies, companies in the entertainment sector and mail/catalogue order or telemarketing companies.[74] Also, the growth of cross-border acquiring programmes is to a large extent due to the growth of e-commerce.[75]

(68) Hence, thus so far cross-border acquiring has been a rather niche business with a distinct customer category, different from that in domestic acquiring. This is reflected in the share of cross-border acquirers' business in the United Kingdom which remains rather limited compared to the scale of domestic acquiring. Adding up the merchants acquired by the largest cross-border acquirers servicing merchants in the United Kingdom (see recital (66)) in 2004 one arrives at 950 merchants, an insignificant figure (0.3%) when compared with the more than 365,000 merchants acquired in the United Kingdom[76]. The same is true in terms of value of transactions: merchants headquartered in the United Kingdom and acquired under the Visa cross-border acquiring programme represent a rather small amount of all Visa turnover in the United Kingdom according to the data set out in the APACS[77] Plastic Card Review

71 [ ].
72 [ ].
73 [ ].
74 Banks' replies to the Commission's requests for information to acquiring banks of September 2005 / May-June 2006 (Commission file pp. 5362-5695) and Visa's reply of 16 April 2004 (Commission file pp. 7169-7180). According to Visa's reply, as at end March 2004 (Commission file p. 7175), out of a total of 1163 merchants, the number of merchant applications per merchant sector was as follows: restaurants [ ]; hotels [ ]; direct marketing [ ]; computers [ ]; dpt and fashion stores [ ]; travel agents [ ]; mail orders [ ]; telephones [ ]; car hire [ ]; airlines [ ]; cruise lines [ ]; etc.). The RBR Report 2006 notes that pan-European acquirers cherry pick on the most suitable market segments, such as airlines, international hotel chains, car rental firms and petrol retailers (International Overview section, p. 32; Commission file p.12149)
75 Visa's submission of 16 April 2004 (Commission file pp. 7169-7180)
76 See section 5.3.1.1.3., recital (85) below.
77 Association for Payment Clearing Services, i.e. the UK trade association for payment systems provided to customers by financial institutions.

2005, Table 4B[78].Considering the fact that cross-border acquirers from other Contracting Parties to the EEA Agreement to a large extent do not compete with domestic UK acquirers for the business of UK merchants and that their business in the United Kingdom is marginal compared to the scale of UK domestic acquiring, the activities of cross-border acquirers in the United Kingdom do not affect the definition of the relevant geographic market in merchant acquiring as national.

(69) Accordingly, for the purposes of this Decision, it is concluded that the relevant geographic market for the provision of credit and deferred debit/charge card acquiring services to merchants is national, that is to say, limited to the territory of the United Kingdom.

5. APPLICATION OF ARTICLE 81 (1) OF THE EC TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT

5.1. Relationship between the EC Treaty and the EEA Agreement - Jurisdiction

(70) As set out in Section 1.2. above, the Rule applies in all Contracting Parties to the EEA Agreement, that is to say, all the present Member States and the EFTA States parties to the EEA Agreement (Norway, Liechtenstein and Iceland).

(71) Insofar as the Rule, as applied to Morgan Stanley, prevents, restricts or distorts competition in the common market and affects trade between Member States, Article 81 of the EC Treaty is applicable.

(72) Similarly, insofar as the Rule, as applied to Morgan Stanley, prevented, restricted or distorted competition within the territory covered by the EEA Agreement and had an effect on trade between the Community and EFTA States, Article 53 of the EEA Agreement is applicable.

(73) In this case, the Commission is the competent authority to apply both Article 81 of the EC Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement as both trade between Member States and between Member States and EFTA States was affected (see recitals (307) and (308) below).

5.2. Agreement between undertakings/decision of an association of undertakings

(74) Both Visa International and Visa Europe (the latter from 1 July 2004[79]) and their respective members, whether credit institutions or entities owned by credit institutions, engage in an economic activity and, hence, are undertakings within the meaning of Article 81(1) of the EC Treaty/Article 53(1) of the EEA Agreement. In addition, both of those companies are membership organisations whose decisions are taken by the Boards consisting of representatives appointed by the member banks.

(75) Thus, the rules and regulations setting out the framework for the functioning of the Visa system (including the Visa International By-Laws and Membership Regulations of Visa Europe which contain the Rule) adopted by the Board of Directors of Visa

[78] Annex 42 to the letter of facts of 6 July 2006 (Commission file p. 12150).

[79] Prior to the incorporation of Visa Europe, its predecessor, Visa EU Region, was a geographical division of Visa International and hence part of that company.

International or Visa Europe, and the decision to apply those rules to an undertaking, can be regarded either as decisions of an association of undertakings, or as agreements between undertakings.[80]

5.3. Restriction of competition

(76) The following Sections establish that:

(i) the Rule as applied to Morgan Stanley prevented Morgan Stanley from entering the UK credit and deferred debit/charge card acquiring market (Section 5.3.1.);

(ii) such behaviour of Visa had potential anticompetitive effects in that market (Section 5.3.2.);

(iii) Visa's conduct falls within the scope of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement (Section 5.3.3.)

5.3.1. Morgan Stanley was prevented from competing in the UK credit and deferred debit/charge card acquiring market

(77) The effects of the Rule, as it was applied to Morgan Stanley, are not confined to preventing Morgan Stanley from competing in acquiring Visa credit and deferred debit/charge card transactions alone (Section 5.3.1.1.), as being excluded from Visa membership means being prevented from acquiring credit and deferred debit/ charge card transactions in the UK market altogether (Section 5.3.1.2.). This is due to the fact that merchants' contracts for card acceptance should be offered as a package of both Visa and MasterCard cards due to merchants' demand.

(78) Moreover, the claim that Morgan Stanley would not be prevented from entering the relevant market as it could enter into a so-called "fronting arrangement" does not stand scrutiny (Section 5.3.1.3.).

5.3.1.1. Morgan Stanley was prevented from competing in the relevant market

(79) As shown in this section, as a result of the application of the Rule, Morgan Stanley was excluded from Visa acquiring.

(80) Visa has market power as the Visa brand is by far the most popular credit card brand in the United Kingdom in terms of:

(i) number of cards (Section 5.3.1.1.1.),

(ii) value of transactions (Section 5.3.1.1.2.),

(iii) number of merchants accepting the brand (Section 5.3.1.1.3.),

[80] Commission Decision 2002/914/EC in Case COMP/29.373 Visa International – Multilateral Interchange Fees of 24 July 2002, OJ L 318, 22.11.2002, p. 17, recital 55, and Commission Decision 2001/782/EC in Case COMP/29.373 Visa International of 9 August 2001, OJ L293, 10.11.2001, p. 24, recital 53. The Commission's conclusion is supported by the judgement of the United States Court of Appeal, which has found Visa USA to be a consortium of competitors which agrees to abide by certain restrictive provisions (see the Judgment of the United States Court of Appeals for the Second Circuit in case United States of America v. Visa USA Inc, Visa International Corp and MasterCard International Incorporated of 8 May 2003, p. 20).

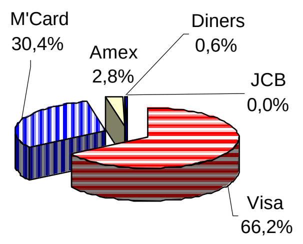
Furthermore, it has consolidated its position, exhibiting strong growth in the past years (Section 5.3.1.1.4.).

(81) Merchants, large or small, tend to consider Visa as the most important credit card brand, which they would choose if they had to decide on accepting only one credit card brand[81].

5.3.1.1.1. Number of cards issued

(82) There are almost twice as many Visa cardholders in the United Kingdom as MasterCard cardholders. In 2004, Visa (with 44.5 million cards) accounted for 60% of all credit and deferred debit/charge cards issued in the United Kingdom. If the number of Visa and MasterCard credit and deferred debit/charge cards is cumulated, Visa and MasterCard hold over 97% of the UK market in terms of number of cards in circulation.

Table 1. Number of credit and deferred debit/charge cards in circulation in the United Kingdom (2004)



Network	Number of Cards* ('000)	% of total	Cumulative Share (%)
Visa	44,455	59.8%	59.8%
MasterCard	27,735	37.3%	97.1%
Amex	1,821	2.5%	99.6%
Diners	300	0.4%	100.0%
JCB	6	0.00%	100.0%
TOTAL	**74,317**	**100%**	

Source: RBR Report 2006, United Kingdom, Figure 15 on p. 53.

(83) Naturally, merchants are most interested in accepting the most widely spread card brand and least interested in accepting cards held by only a few cardholders.

5.3.1.1.2 Value of transactions

(84) Visa's market power is also evidenced by the fact that it is the most popular brand in the United Kingdom in terms of value of transactions, with a share of 60%, that is to say, nearly twice as much as MasterCard (34%). If the value of Visa and MasterCard credit and deferred debit/charge transactions is cumulated, Visa and MasterCard hold over 94% of the UK market in terms of value[82].

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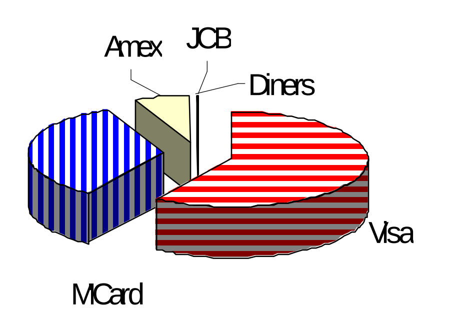
81 See replies to the Commission's request for information to merchants (Commission file pp. 3477-5361).

82 Given that the exact data on the three smaller networks in Table 2 is confidential, publicly available figures on Amex and Diners Club shares in terms of transactions by value in the UK can be provided using the data of the Western European Plastic Cards Databook (Table 229, p.213; Commission file p. 12448) according to which, in 2002, Diners Club and Amex transactions amounted to EUR 1,429 million and EUR 9,062 million respectively, while Visa's were at EUR 74,096 million and MasterCard's at EUR 36,678 million. On the basis of these figures, the respective shares of the four networks in the UK were 1.2% for Diners Club, 7.5% for Amex, 30.2% for MasterCard and 61.1% for Visa. The cumulative Visa and MasterCard

Table 2. Relative market shares: total transactions by value in the United Kingdom (2002-2003)



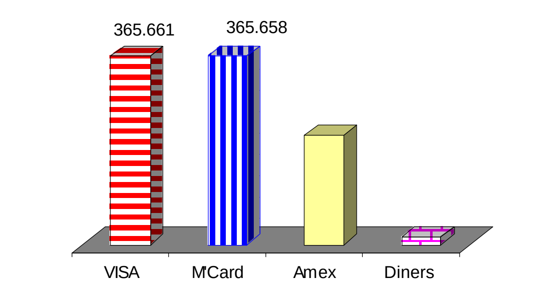
Network	Purchases (£ m)*	% of total	Cumulative Share (%)
Visa	65,388	60%	60%
MasterCard	37,096	34%	94%
Amex		[CONFIDENTIAL]	
Diners		[CONFIDENTIAL]	
JCB		[CONFIDENTIAL]	
TOTAL	**109,550**	**100%**	**100%**

Source: for Visa and MasterCard: Commission requests for information to acquiring banks of March 2004 (2003 data); for Amex: Amex' submission of 19 March 2004 (2003 data; USD figure converted into GBP at the exchange rate of USD 1=GBP 0.5397); for Diners Club: Citigroup's submission of 5 March 2004 (2002 data) and for JCB: JCB's submission of 26 March 2004 (2003 data).

5.3.1.1.3 Number of merchants accepting the brand

(85) The Visa and MasterCard networks are substantially bigger than those of Amex and Diners Club in terms of merchant acceptance: based on data supplied by the UK acquiring banks as part of the Commission's requests for information of March 2004, as of 31 December 2003 the total number of UK merchants which accepted Visa cards stood at 365 661 merchants and the total number of UK merchants which accepted MasterCard cards was 365 658. As for the remaining card brands, it can be seen from the graph on the left hand side of Table 3 that Amex cards were accepted by roughly half the number of merchants accepting Visa and MasterCard cards, while Diners Club cards could be used at significantly fewer merchants[83]. Such outcome is not surprising bearing in mind the size of Visa and MasterCard cardholder base (Section 5.3.1.1.1. above).

Table 3. Relative market shares: number of merchants in the United Kingdom (2003)



Network	Number of Merchants
Visa	365,661
MasterCard	365,658
Amex	[CONFIDENTIAL]
Diners (2002)	[CONFIDENTIAL]

share in 2002 stood at 91.3%, which is roughly in line with the cumulative Visa and MasterCard share of 94% presented in Table 2.

83 Data on JCB card acceptance gathered from several different sources could not be reconciled and is therefore excluded from the analysis in this Section.

Source: for Visa and MasterCard: Commission requests for information to acquiring banks of March 2004; for Amex: Amex' submission of 26 March 2004; for Diners Club: Citigroup's submission of 5 March 2004.

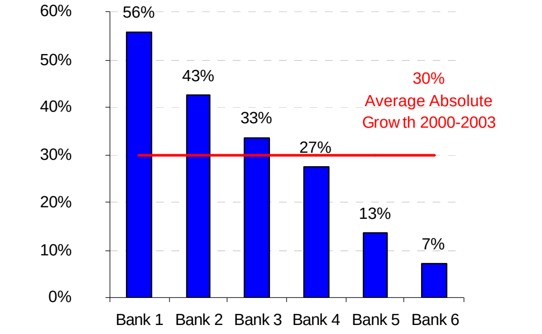
(86) The virtually identical number of merchants accepting Visa (365 661 merchants) and MasterCard cards (365 658) is due to the fact that acquiring banks offer to acquire both card brands together as a package in order to meet merchants' demand for such a package[84]. It is noteworthy that only five merchants out of the total of 365,662 UK merchants which accepted Visa and/or MasterCard cards in 2003, accepted one of these two brands and not the other, representing 0.001% of the total UK Visa/MasterCard merchant population.

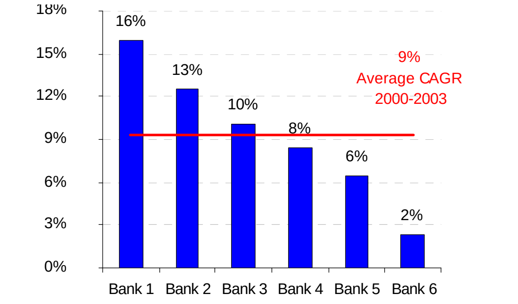
5.3.1.1.4. Visa exhibits strong growth in terms of merchant client base

(87) The analysis of the size of Visa and MasterCard merchant base in the United Kingdom from 2000 to 2003 (based on the numbers of merchant clients supplied by the UK acquiring banks in reply to the Commission's requests for information of March 2004) has shown that both Visa and MasterCard networks have seen significant growth during that four-year period. As illustrated in Table 4, the number of merchants acquired by Bank 1 has increased by 56% and Bank's 2 merchant base grew by 43%, which corresponds to compounded average annual growth of 16% and 13% respectively (Table 5). As for the total number of merchants accepting Visa and MasterCard cards in the United Kingdom, it has gone up by a significant 30% in the period 2000-2003 (Table 4) at a strong growth rate of around 9% per year (Table 5).

(88) All of the above figures are indicative of the strength of the two brands and the growing market pressure on merchants to accept them. They also point to the fact that the merchant acquiring business for those brands in the United Kingdom has potential for expansion.

Table 4 (left). Absolute growth of Visa and MasterCard UK client base (2000-2003)
Table 5 (right). Average annual growth of the Visa and MasterCard UK client base (2000-2003)





Source: Commission requests for information to acquiring banks of March 2004. For Bank 5 only 2001-2003 data was available, while two out of the total of eight acquirers are excluded from comparison due to unavailability of historic data.

[84] For more details, see Section 5.3.1.2. below.

(89) In addition to the growth analysis of the Visa and MasterCard networks on the basis of the data gathered by the Commission, the development of the Visa and the MasterCard networks as compared to that of the Amex and Diners Club networks over a certain period of time was analysed using the publicly available sources.

(90) The analysis of the data on card growth per scheme during the eleven-year period between 1994 and 2004 provided in the RBR Report[85] indicates that the number of credit and deferred debit/charge cards issued on the Visa, MasterCard, Amex and Diners Club networks has increased on average by 10.7%, 10%, 5.9% and 0.24% per annum respectively. These figures translate into Visa and MasterCard cards constituting 95.3% of the total number of cards issued under all four brands in 1994 and 97.1% in 2004. Making the same comparison for Amex and Diners Club cards, the corresponding figures would be 3.7% in 1994 and 2.5% in 2004 for Amex and 1.0% and 0.4% for Diners Club.

(91) In terms of transaction numbers, analysis of the data contained in the Western European Plastic Cards Databook[86] for the five-year period from 1998 to 2002 indicates that the number of transactions made with Diners Club cards decreased on average by 0.9% per annum compared to a growth of 4.7% for Amex, 5.6% for MasterCard and 10.3% for Visa. Similarly to the trend outlined in the preceding paragraph, Visa and MasterCard's share in the total number of credit and deferred debit/charge card transactions made using the cards of the four brands remained stable over the five-year period, amounting to 95.0% in 1998 and 95.8% in 2002. Making the same comparison for Amex and Diners Club networks, the figures correspond to 4.1% in 1998 and 3.6% in 2002 for Amex and 0.8% and 0.6% for Diners Club.

(92) Finally, in terms of the value of transactions by scheme during the period from 1998 to 2002, while in 1998 57% of the total value of credit and deferred debit/charge card transactions made using the cards of the four brands was generated through purchases with the Visa card, in 2002 Visa's share grew to 61.1%.[87] For Amex, its market share remained virtually unchanged, with 7.49% in 1998 and 7.47% in 2002, and for Diner's it decreased slightly from 1.5% in 1998 to 1.2% in 2002. The combined Visa and MasterCard share was 91.0% in 1998 and 91.3% in 2002. Five-year compounded average growth rates for each of the four brands were 6.5% for Diners, 12.6% for Amex, 9.6% for MasterCard and 14.5% for Visa.

(93) On the basis of the above figures it can be concluded that Visa has consolidated its market power in the upstream card network services market and its brand is equally strong in the downstream markets in the United Kingdom (credit and deferred/charge card acquiring market and card issuing market), exhibiting strong growth in the past. In comparison to Visa and MasterCard, the relative market shares of both Amex and Diners have decreased.

5.3.1.2. Morgan Stanley was prevented from competing in the UK acquiring market altogether

(94) Due to the fact that acquiring services for acceptance of Visa and MasterCard should be provided as a package - that is to say, merchants wish to contract for acceptance of

[85] The RBR Report, 2006, United Kingdom, Figure 16 on p. 55; Commission file p.12445.
[86] Western European Plastic Cards Databook, 2003, table 228 on p. 213; Commission file p. 12448.
[87] Ibid, Table 229 on p. 213; Commission file p. 12448.

both Visa and MasterCard cards with one and the same acquiring bank[88] -, exclusion of an undertaking from Visa membership means that it is prevented from competing in the credit and deferred debit/charge cards UK acquiring market altogether, not from competing in Visa acquiring alone.

(95) Through the replies to its requests for information to acquiring banks of March 2004 the Commission has learnt that there are a mere five merchants in the United Kingdom (or 0.001% of the total Visa and/or MasterCard merchant base of 365,662 merchants as of 31 December 2003) which accept only Visa or only MasterCard cards. The banks have confirmed that, apart from these exceptional few 'single brand customers', all of the clients for whom they act as an acquirer wish to be provided with acquiring services for both Visa and MasterCard.

(96) This is confirmed by the economic consultant firm "Lexecon", in a document annexed to Visa's submission of 11 December 2000 "*Merchant customers de facto require that a merchant acquirer process all cards the merchant accepts*"[89].

(97) Moreover, there does not seem to be a single merchant in the United Kingdom which has one acquirer for processing of Visa transactions and another for MasterCard[90].

(98) The fact that there were so few single brand customers in the United Kingdom in 2003 is not a one-year phenomenon. The data for 2000-2002 provided by the UK acquiring banks shows that there were six single brand acquiring contracts signed in 2000, seven in 2001 and six in 2002.[91]

(99) Respondents to the Commission's requests for information to UK acquiring banks of March 2003 pointed to the following reasons for merchants' predisposition to sign up for contracts where Visa and MasterCard acquiring services are provided in a package by the same bank: merchants want a single acquiring relationship (one credit to their bank account) and/or benefit from volume-related discounts (in the form of lower MSCs) by putting all their acquiring business with the single supplier.[92]

(100) In their replies to requests for information from the Commission in March 2003, UK acquiring banks have expressed scepticism as to the commercial practicability of single brand acquiring. Asked whether it would be commercially viable to acquire only for one payment card network, [ ] stated that single brand acquiring would lead to a reduction in the volume of processed transactions and an increase of the merchant charges to an unacceptable level.[93] [ ] expressed the view that, by acquiring for only

[88] Retailers may sometimes have different acquirers for different types of card (e.g. credit and debit cards) or different branches of their business (e.g. retail stores and petrol stations), but they do not split their credit/charge card acquiring business among several banks by card scheme.

[89] "Barriers to Entry into Credit Card Payment Networks in the EEA" by Lexecon Ltd, 11 December 2000, paragraph33, p. 11 thereof, Annex 3 to Morgan Stanley's observations of 11 December 2000 on Visa's comments of 18 August 2000 on the complaint, and on Visa's reply of 28 July 2000 to the Commission's request for information of 7 June 2000 (Commission file pp. 1426-1440).

[90] The five merchants mentioned above accept cards of one of the two brands only.

[91] Replies to the Commission's requests for information to acquiring banks of March 2004 (Commission file pp. 6296-6837).

[92] [ ].

[93] [ ].

one card scheme, an acquirer is excluded from servicing a significant share of the card payment market and would "*experience diminished commercial viability*."[94]

(101) Non-bank third-party providers engaged in merchant acquiring through various arrangements with banks share the same view. One of such companies, First Data, confirms that, firstly, merchants most often demand acquiring services for both Visa and MasterCard, and, secondly, that acquiring as such presupposes a certain level of economies of scale to be profitable. On that basis it argues that it does not make commercial sense for an acquirer to be a MasterCard acquirer only. [95]

(102) According to the replies of cross-border acquirers active in the United Kingdom[96] to requests for information from the Commission in March 2004, all but five merchant clients operating in the United Kingdom contracted for acceptance of both Visa and MasterCard cards with the same bank. It is not surprising that acquiring for Visa and MasterCard in a package is common practice in cross-border acquiring as the "one-stop-shop" nature of the merchant/acquirer relationship is of primary importance for merchants who contract with cross-border acquirers and is key to the service offered by cross-border acquirers.

(103) The permanence over time of acquiring for Visa and MasterCard in a package indicates the existence of an established pattern of demand and supply in credit card acquiring in the United Kingdom. No market entry has taken place on the basis of acquiring for Visa or MasterCard alone since 1989[97], when the exclusive Visa and MasterCard acquiring arrangements were abolished and acquiring for both Visa and MasterCard networks was opened to banks. All banks that have entered the UK acquiring market since then have started Visa and MasterCard acquiring operations simultaneously and their acquiring portfolios consist of Visa and MasterCard transactions with merchants. The third party providers which have recently taken over the acquiring portfolios of several banks continue servicing merchants for both Visa and MasterCard card acceptance[98].

(104) It is also interesting to note that, as a general practice, merchants pay the same MSC to their acquirer offering Visa and MasterCard services in a package regardless of whether the transaction is a Visa or a MasterCard transaction.[99] In merchant acquirer's terminology this trend is known as "blending", that is to say, a merchant is charged one 'blended' rate for both Visa and MasterCard transactions.

(105) It should be added that, from an acquiring bank's perspective, other credit card brands such as Amex or Diners Club cannot constitute a viable basis for entering the UK market for credit and deferred debit/ charge card acquiring. In the first place, this is due to the fact that Amex and Diners Club are so-called "proprietary" card payment systems, within which acquiring is carried out by the owners of the network and not

94 [ ].

95 Application to the Court of First Instance of the European Communities for annulment of the decision by the Commission of the European Communities of 9 August 2001 (Case No COMP/29.373 – Visa International) under Article 230EC by First Data Corporation, FDR Limited and First Data Merchant Services Corporation, recitals 70-71 on p. 27 (Court case T-28/02) (Commission file p. 12678).

96 [ ].

97 See replies to the Commission's request for information to UK acquiring banks of March 2004 (Commission file pp. 6296-6837).

98 For more details, see Section 5.3.1.3. below.

99 Responses of large and small merchants approached by the Commission (Commission file pp. 3477-5361).

by the banks[100]. Furthermore, even if acquiring for these proprietary brands were open to UK banks, the market share of these brands would be too small to serve as a basis for any significant acquiring business. A bank joining the proprietary acquirers of Amex or Diners Club in acquiring for these networks would be limited to capturing only part of the already small turnover of these networks. In contrast, Visa and MasterCard are the two most widely used credit card brands in the United Kingdom with 94% share of credit and deferred debit/ charge card transactions by value in 2003 and further growth potential. It is such volumes that can provide a sound business proposition to new acquirers.

(106) On the basis of the above findings, it can be concluded that there is no demand for and supply of single brand (Visa only or MasterCard only) acquiring in the United Kingdom.

(107) On the basis of the above it appears that it is not possible in practice for Morgan Stanley to offer acquiring contracts for MasterCard only as there is no demand for acquiring services of MasterCard transactions only and this would not be commercially practicable.

(108) As explained below (see Section 5.3.2.1. "Interbrand competition"), Morgan Stanley has no realistic possibilities to enter the card system services market (that is to say, the network market) to acquire transactions within its own network. Given the absence of realistic possibilities of interbrand competition, exclusion from Visa membership effectively prevented Morgan Stanley Bank from entering the UK credit and deferred/charge card acquiring market altogether.

5.3.1.3. 'Fronting arrangements'

(109) Under Visa's Operating Regulations Visa members may engage companies that are not eligible for Visa membership in order to provide services related to their (that is to say, such Visa members') card programmes. [A third party provider must comply with Visa's rules and regulations in its operations on the Visa network]. [101]

(110) Typically, acquiring banks which have arrangements with third-party providers outsource certain elements of the acquiring service (usually related to transaction processing) to such third-party providers. However, there are several cases where banks have effectively withdrawn from the merchant acquiring business and act as a mere interface (or a 'front') between Visa and MasterCard and a third-party provider. In such cases it is the third-party provider who takes responsibility for virtually all elements of an acquiring service and bears the risk with respect to the merchant's revenue stream. In order to comply with the scheme rules, the merchant contracts are generally tri-partite between the merchant, the third-party provider and the member bank. Such arrangements between a Visa/MasterCard member bank and a non-bank third-party provider are sometimes referred to as 'fronting arrangements'.

[100] Unlike Visa and MasterCard, which are sometimes referred to as "four-party system" to point out the fact that acquiring and issuing is not done by the card system itself but by the banks, members of the system.

[101] Chapter 2.10 of Visa Europe Regional Operating Regulations. [details relating to the Visa Operating Regulations] (see Commission file p. 12443 for the version as last amended on February 2006).

(111) Visa suggests[102] that Morgan Stanley could carry out acquiring operations under a fronting arrangement with a Visa member (that is to say, without being a Visa member itself). However, 'fronting' is not an efficient means for a large international bank like Morgan Stanley of entering the market for the provision of credit and deferred debit/charge card acquiring services to merchants in the United Kingdom.

(112) To start with, it should be noted that fronting arrangements have primarily been used by companies which are not financial institutions and which therefore are not eligible for Visa membership (for example, EuroConex, First Data). For such companies 'fronting' is the only way to get involved in acquiring and that is why they are prepared to accept the more complex arrangements of a 'fronting' agreement (compared to acquiring in its own name as a Visa member)[103]. Large international banks like Morgan Stanley, on the other hand, are financial institutions, and if not for Visa's Rule, Morgan Stanley would be a Visa member and would have the possibility to acquire in its own name. Providing acquiring services for other Visa member banks as do all the acquirers in the existing fronting arrangements does not solve the problem of a bank wishing to acquire its own Visa card transactions (that is to say, payments made with cards it has issued and which bear its own bank brand next to the Visa network brand), which is not possible without membership of Visa. Such is the case of Morgan Stanley, which wishes to pursue a strategy based on the integration of issuing and acquiring[104].

(113) In addition, as explained in Section 5.3.1.3.1. below, it is difficult to find a fronting partner (Section 5.3.1.3.1.), and fronting is more complex than acquiring under a bank's own name (Section 5.3.1.3.2.).

5.3.1.3.1. Difficulty to find a fronting partner

(114) The 'fronting' arrangement by definition involves a Visa member bank which acts as an intermediary between Visa and a company which carries out merchant acquiring (a Visa member bank acts as a "front" to that company vis-à-vis the Visa network). Therefore, for a company to start acquiring via a 'fronting' arrangement it would have to find a Visa member bank willing to enter into such an arrangement. In principle, it could either be a bank currently acquiring in the United Kingdom and willing to sell its acquiring portfolio, or a bank issuing Visa cards in the United Kingdom and willing to sponsor such a company for Visa acquiring activities.

(115) To date, the first scenario has been prevalent: nearly all[105] 'fronting' arrangements involved acquiring banks selling or entrusting for joint or sole management their

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102 Paragraphs 326 to 331 (pages.103 to 105) of Visa's written submission of 3 December 2004 in reply to the Statement of Objections (Commission file pp. 8543-8545).; paragraph 22, p.6 and paragraphs 121 to 128, pages 47 to 49 of Visa's supplementary submission of 20 May 2005 in reply to Morgan Stanley's observations of 25 January and 15 February 2005 (Commission file p. 10172 and pp. 10213-10215).

103 [ ].

104 See for instance, the witness statement of a Managing Director of Morgan Stanley's UK credit card business (Consumer Banking Group International), dated 20 May 2005 (paragraph 5, p.3 - Commission file p. 10946) :
"*…we have a market leading rewards programme, where we currently offer up to 2% Cashback on all purchases.* […][business strategy of Morgan Stanley].

105 [ ].

acquiring portfolios[106]. As regards possibilities for such fronting arrangements in the United Kingdom in the future, four acquiring banks [ ] already have arrangements with third-party providers[107]. Among the four remaining acquirers operating in the United Kingdom[108] are the three largest UK acquirers [ ]. Considering the recent trend for consolidation of the acquiring market described in Section 5.3.2.2.3. below, such banks as the biggest players, are the ones most likely to continue their merchant acquiring business rather than leave the market, which leaves any company looking for a fronting partner among the current UK acquirers with a limited choice.

5.3.1.3.2. The complexities (additional work and costs) entailed by fronting arrangements

(116) Even if a large international bank like Morgan Stanley could find a suitable and available Visa member fronting partner (which the Commission doubts, in particular for a bank to which Visa refused membership), the complexities and costs intrinsic to fronting arrangements are additional burdens that do not bear on banks that – being Visa members – are able to acquire in their own name, and such additional burdens are unrelated with the Morgan Stanley's purpose of acquiring its own card transactions.

(117) As regards marketing materials, [ ] all marketing materials bearing Visa-owned Marks include the name of the Visa member, [ ][109] and [ ] third-party providers [ ] prominently identified on the marketing materials as mere agents or representatives of the Visa member bank. In order to comply with scheme rules, merchant contracts are generally tri-partite (the parties to the contract being the merchant, the member bank and the third party-provider). Therefore, for a large international bank like Morgan Stanley with plans to launch a merchant acquiring business, a fronting arrangement is not an attractive means of building its name and reputation as an acquirer. In any case it is less attractive in that respect than acquiring in one's own name, as under a fronting arrangement the name and reputation of the third party-provider comes after that of the Visa member.

(118) Fronting arrangements also involve administration, monitoring and reporting obligations imposed by the Visa rules. [There are a number of requirements in relation to third party providers].[110] [ ] [111] [Visa Members ensure that third-party providers comply with the requirements set out in the Visa-By-Laws and the Operating Regulations] [112].

(119) Fronting also results in the third-party provider paying fees to the Visa member bank. As regards fees payable in case of purchase by a third party provider of a Visa member bank's acquiring portfolio, an article provided by Visa explains that *"a*

[106] In such case, while acquiring under a bank's (such as Morgan Stanley's) own name would introduce competition in the market, in case of fronting one market participant (Morgan Stanley, assuming it could become a third-party processor) would simply replace another (the acquiring bank).

[107] [ ].

[108] There are 8 acquirers in the UK. See recital (161) below.

[109] [Chapter number] of Visa Europe Regional Operating Regulations (Commission file p. 12443). The A&L/EuroConex example confirms that this Visa rule is implemented in practice: according to an article by Regulatory News Service of 30 April 2004 ("Alliance and Leicester sells its merchant acquisition business to Nova Information Systems"), after the sale of A&L's acquiring business to EuroConex the acquiring services continue to be marketed under A&L's brand.

[110] Chapter 2.10 of Visa Europe Regional Operating Regulations (Commission file p. 12443).

[111] Ibid.

[112] Ibid.

substantial upfront payment is often made to 'buy the exclusive rights to the asset' and exploit the bank's brand. Variations include revenue sharing and phased payments of tranches of capital when milestones are reached."[113]

(120) Considering that Morgan Stanley is already a member of MasterCard, running the Visa side of its package of Visa and MasterCard acquiring services by way of a fronting arrangement with another financial institution admitted as a Visa member while at the same time running the MasterCard side of its acquiring services in its own name, as a MasterCard member, would result in further inefficiencies. The inefficiencies consist in Morgan Stanley, rather than simply running an acquiring business on a stand-alone basis for both MasterCard and Visa transactions, having to dedicate additional resources to fronting and having to manage a relationship with a sponsoring Visa member who would remain a competitor (i) as regards MasterCard acquiring (as Morgan Stanley would continue to acquire MasterCard transactions in its own name), and (ii) as regards retail banking services to merchants and/or cardholders.

(121) On the basis of the above analysis, it can be concluded that, although in theory companies considering entry into the credit and deferred debit/ charge card merchant acquiring market could carry out such acquiring activities by way of a fronting arrangement, such an arrangement does not, in practice, ensure efficient market entry for a bank like Morgan Stanley, and does not constitute a substitute for acquiring in its own name.

5.3.2. Restrictive effects of preventing Morgan Stanley from competing in the relevant market

(122) According to the "Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty" [114] published on 27 April 2004 (hereinafter "the Commission Guidelines on the application of Article 81 (3)"), for an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability. As regards in particular a restriction of potential competition (usually at stake in cases like this where a potential entrant is prevented from competing in the market), it needs to be ascertained whether, in the light of the structure of the market and the economic and legal context within which it functions, there are real concrete possibilities for a new competitor to penetrate the relevant market and compete with the undertakings already established.[115]

(123) According to the Commission Guidelines on the application of Article 81 (3)[116], in making the assessment of whether an agreement is restrictive of competition it is necessary to take account of the impact of the agreement both on inter-brand and on intra-brand competition.

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113 "Processors from Mars, Bankers from Venus" by the Director of Payment Systems Europe Ltd, dated 15 September 2004, provided as part of Visa's submission of 3 December 2004 (Annex 11 - Commission file pp. 8820-8826).

114 OJ C101, 27.04.2004 pp. 97-118, recital 24.

115 Joined cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services* v. Commission, [1998] ECR II p.3141, recital 137.

116 Recitals 17-18 thereof.

(124) As will be shown in Section 5.3.2.1. below, as far as inter-brand competition is concerned, due to high entry barriers and the weakness of the Discover system in the USA, Morgan Stanley has no realistic possibilities to compete with Visa Europe by establishing a competing system in the EEA.

(125) According to the last paragraph of recital 24 of the "Commission Notice - Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements"[117] published on 6 January 2001 (hereinafter "the guidelines on horizontal agreements"), even cooperation between companies that does in principle not fall under Article 81(1) of the Treaty can nevertheless fall under that provision when it involves firms with significant market power and is likely to cause foreclosure problems vis-à-vis third parties[118].

(126) The application of the Rule to Morgan Stanley fulfils the condition of the guidelines on horizontal agreements for falling within the scope of Article 81 (1) of the Treaty, as:

(i) it had the effect of foreclosing Morgan Stanley from the relevant market; and

(ii) Visa has significant market power, due both to (a) its share of 60% in the number of credit and deferred debit/charge cards in the United Kingdom and in the value of transactions done with such cards and (b) the practice of meeting merchants' demand for contracts for card acceptance as a package for both Visa and MasterCard (Sections 5.3.1.1. and 5.3.1.2.).

(127) Section 5.3.2.2. contains an analysis of the structure of the UK acquiring market and the conditions under which banks provide acquiring services to merchants. It concludes that (i) the UK credit and deferred debit/charge cards acquiring market could benefit from more competition; (ii) certain market characteristics can facilitate new entry; (iii) new entry can have a positive impact both on the price and quality of acquiring services.

(128) Section 5.3.2.3. considers the specific capabilities of Morgan Stanley and concludes that it is an efficient potential acquirer whose entry (considering both the features of the UK acquiring market and Morgan Stanley's qualifications) would be reasonably expected to have positive effects on prices, output, innovation or the variety and quality of acquiring services.

5.3.2.1. Interbrand competition

(129) This section examines whether Morgan Stanley qualified as a potential entrant into the card networks market in the EEA at any moment between its request for Visa

[117] OJ C 3, 6.1.2001, pp. 2-30.

[118] In *Eirpage*, the Commission considered that a joint venture in Ireland to establish a nationwide paging system between Bord Telecom Eiremann, the national postal and telecommunications company, and Motorola, one of the world's leading manufacturers of mobile telephone equipment, could have a deterrent effect on potential market entrants and thereby restrict competition (Commission Decision 91/562/EEC in Case IV/32.737 - Eirpage, of 18 October 1991, OJ L306, 07.11.1991, p.22). In *Screensport/EBU Members* the Commission considered that a joint venture to establish a transnational satellite sports channel covering most of Western Europe infringed Article 81 (1) partly because of its foreclosure effects on third parties (Commission Decision 91/130/EEC in Case IV/32.524 Screensport/EBU Members, of 19 February 1991, OJ L63, 09.03.1991, p.32).

membership in March 2000 and its admission as a Visa member in September 2006[119]. To answer this question the Commission takes into account that:

(i) there are very high barriers to entry into the card networks market in the EEA (Section 5.3.2.1.1.);

(ii) from [year], judging that it was not a viable commercial proposition, Morgan Stanley excluded expanding its Discover network to the EEA (Section 5.3.2.1.2.);

(iii) Visa's claim that Morgan Stanley considered entering the EEA as a card network does not stand up to scrutiny (5.3.2.1.3.).

5.3.2.1.1. There are very high barriers to entry into the card networks market in the EEA

(130) Card networks are characterised by important network effects. This implies (i) that important sunk costs - constituting barriers to entry - should be incurred before any new card network is able to compete viably against existing ones and (ii) that, as demonstrated in paragraphs (90) to (92), large card systems (that is to say, the two four-party card systems Visa and MasterCard) have much higher growth rates than small ones (namely the "proprietary", three-party card systems Amex and Diners) and increasing market shares.

(131) The importance of network effects and of critical mass is confirmed, inter alia, by the "Cruickshank report", an independent report on banking services in the United Kingdom prepared for the UK Treasury, according to which:

"*Payment schemes demonstrate the benefit that each user gains from the addition of further users; these are called network effects.*[120] […] *card holders gain value as more retail outlets join their particular scheme, as do retailers in relation to growing numbers of customers holding cards belonging to the scheme.* […]

Network effects also have profound implications for competition, efficiency and innovation in markets where they arise. Establishing critical mass is the first hurdle, as the benefits to customers and businesses of a network arise only gradually with increasing use. It is possible to imagine a world in which electronic cash is widely held and used, for example, but much harder to see how to get there.

Once a network is well established, it can be extremely difficult to create a new network in direct competition. […] *Where network effects are strong, the number of competing networks is likely to be small and the entry barriers facing new networks will be high*" [121]

119 The existence of potential interbrand competition has a bearing on the analysis of Morgan Stanley's exclusion from competing in the market (see paragraphs (108) and (123) above).

120 At the end of this sentence the Cruickshank report refers in a footnote to "Two surveys of the importance of network externalities in payment systems [i.e.] James Andrews 'Network Issues and Payment Systems', Federal Reserve Bank of Philadelphia Business Review, Nov/Dec 1997, and Gabriela Guibourg 'Efficiency in the payment system – a network perspective', Sverige Riksbank Working Paper, 1998" (Commission file p. 1218).

121 "Competition in UK banking – A report to the Chancellor of the Exchequer – Don Cruickshank – March 2000", published by The Stationary Office (Commission file pp. 1206-1282) and available on the internet at the following address: http://www.hm-treasury.gov.uk/documents/financial_services/banking/bankreview/fin_bank_reviewfinal.cfm See Chapter 3, recitals 3.44 and 3.45, p.65, thereof.

(132) The economic consultants' firm “Lexecon” - in its report on “Barriers to Entry into Credit Card Payment Networks in the EEA” of 11 December 2000 - examines “natural” barriers to entry (network effects, sunk costs and time needed to enter), and “strategic” barriers to entry. Among the reasons used to conclude that the risks of entry are prohibitively high, Lexecon cites :

“… [E]*ntry into the networks market involves a very formidable co-ordination problem – tens of thousands of agreements must be entered into with merchants and users; and the network systems for processing payment, for authorising transactions, and for collecting bills from customers, all must be set up. These in their turn require large fixed costs before even the first transaction is entered into. It necessarily follows that the industry is characterised by large sunk costs;* […] [T]*he costs incurred by Discover during the first few years of their attempts to enter in the US are measured in billions of dollars.* […] *The costs of attracting millions of consumers to using a card are themselves formidable.* […] *It is clear that creating a new card network necessarily takes considerable time* […] *The need to provide Europe-wide market acceptance de novo is an enormous barrier both organisationally and in terms of cost.*”[122]

(133) Professor John Kay[123] also points out the existence of high barriers to entry to the card network business, resulting from important network effects which favour larger incumbent networks:

“*Visa is a provider of services. There are special advantages to size in network provision: other things equal, connection to a larger network is preferable to connection to a smaller one. Visa, as the largest world-wide payment network, enjoys a competitive advantage from this source in all the markets it serves. On a global basis, its market share accounts for about 60% on the basis of cards issued and transaction value. This takes on particular significance because network markets have the well recognised characteristic of ‘tipping’ towards the firm with largest market share.*”

(134) Professor Kay concludes that such high barriers to entry make it difficult for Morgan Stanley to extend the Discover network to Europe in a way that is commercially viable:

“*The prospect that entry* [of Discover in European network services markets] *would be commercially successful is* […] *low. The Discover network is the only attempt since the emergence of Visa and MasterCard to establish a proprietary network in the United States directly competitive to these organisations. Discover was established in 1985 with the backing of Sears, then the largest and best known retailer in the United States.* […]

American Express is the largest network competitor to Visa and MasterCard in Europe. In my view, if American Express cards did not already exist (and they existed before the introduction of credit cards anywhere), it would be impossible to establish them in the market place. Merchants would not accept a card with higher acquisition charges than its established competitors without the assurance that the card issuer had access to a loyal and high spending customer base. But that loyal and high

[122] See footnote 89 above.

[123] Prof. John Kay’s Report “The Economic Effects of VISA’s Exclusion of MSDW” of 4 July 2001, submitted to the European Commission”, paragraph 3.3.3., p.13 (Commission file p. 7744); Presentation of 19 July 2001 on the report of 4 July 2001 (Commission file p. 2015)

spending customer base could not be established unless widespread merchant acceptance was already secured. The conditions in which American Express achieved this in the past were ones in which there was no alternative plastic payment systems. The situation today is very different. Indeed the market share of American Express had been in steady decline until the company succeeded in arresting it by offering a series of additional cards exploiting the existence of its established proprietary network. Diners has also declined in recent years.

In the light of this analysis I do not believe that the development by [Morgan Stanley] *of a competitive proprietary network in Europe comparable to that of Discover in the US could be successful or profitable in any realistic time frame.* […] *It is evident from this that the success of Discover in the United States is the result of the quality of its customer service and the efficiency of its processing capabilities, attributes which are more relevant to its position as a potential competitor in the card issuance and merchant acquisition market than in the network services network. [details of business rationale/strategy]*[124]

(135) Visa never disputed, in any of its submissions, that there are high barriers to entry into the networks market in the EEA. In particular, Visa did not dispute the Cruickshank, Lexecon and John Kay reports in this respect.

(136) The existence of such high barriers to entry into the networks market is, however, determinant to establish whether Morgan Stanley was a potential entrant at any moment between its request for Visa membership in March 2000 and its admission as a Visa member in September 2006. As the Court of First Instance ruled in *European Night Services*, determining whether potential competition is possible must be done in the light of the structure of the market and the economic and legal context within which it functions. Unless there are "*real concrete possibilities"* for a new competitor to compete with the undertakings already established, potential competition will not exist; mere hypothetical entry unsupported by any analysis of the structures of the relevant market does not suffice to establish potential entry.[125]

5.3.2.1.2. Given high entry barriers, Morgan Stanley excluded expanding its Discover network to the EEA

(137) The Commission does not contest that Morgan Stanley had initially hoped to enter the EEA as a network operator by expanding the Discover operations from the USA to Europe (as well as to other parts of the world). Several documents dating back to [date] which Morgan Stanley provided to the Commission indicate that the expansion of the Discover network had been considered,[126] and entry of Discover to Europe was foreseen for [date].[127]

(138) Based on the evidence in the Commission's possession, it appears that the international expansion of Discover was part of a wider discussion [business strategy documents].

[124] Above mentioned Pr John Kay's Report of 4 July 2001, paragraphs 3.1.1. and 4.3.2. to 4.3.4., pp.11 and 18-19 (Commission file p. 7742 and 7749-7750).

[125] Joined cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services* v. Commission, [1998] ECR II-3141. (See notably recitals 137, 142 and 144)

[126] [business strategy document].

[127] [business strategy document].

(139) An internal memorandum of 4 November 1996 [name of the document] prepared by the Chairman and CEO of Morgan Stanley, assesses Discover's situation at the time. The memorandum states that [business strategy], the network's market share was declining to around 6% [business strategy]. It mentions [business strategy] and economies of scale necessary to operate a payment cards network) as [business strategy] weaknesses of Discover, and proposes "*a serious strategic review* [business strategy].

(140) The memorandum lists several alternatives for the future and groups them [business strategy].

(141) [Morgan Stanley's business strategy].

(142) Although the above mentioned options address the issue of Discover's international coverage to a different degree, the memorandum separately discusses "International strategies", which include issuing cards in selected international markets on Visa or MasterCard networks and working with franchisees or through joint ventures.

(143) In summary, the memorandum of the Chairman and CEO of Morgan Stanley [business strategy] proposes to consider partnering with various other players in payment cards[128], or [business strategy].

(144) As suggested in the memorandum, Dean Witter, Discover and Co. indeed explored partnering opportunities. [business strategy][129]. It appears, however, that no satisfactory partnering arrangement was found.[130]

(145) [business strategy] Morgan Stanley started considering entry to the European payment card markets by way of operations on the networks which were already present in Europe[131]. [business strategy] [132] [business strategy].

(146) According to the document entitled [title of the document] [133] the strategy for entering Europe was, at that time, to begin with issuing credit cards using existing networks [business strategy].[134] The presentation [Morgan Stanley representative] June 1999 confirms the plan to issue cards on existing networks outside North America[135], which culminated in the launch of Morgan Stanley's MasterCard issuing business in the United Kingdom in August 1999[136].

(147) From 2002, Morgan Stanley refined and developed a strategic plan and an implementation plan to establish an *integrated* issuing and acquiring business in the United Kingdom and other Member States[137], which required membership of both

128 [business strategy document].
129 [business strategy document].
130 [business strategy document].
131 [business strategy document].
132 [business strategy document].
133 [business strategy document].
134 [business strategy document].
135 [business strategy document].
136 [business strategy document].
137 [business strategy document].

Visa and MasterCard as single branding is not a viable option with regard to acquiring[138].

(148) Morgan Stanley's conclusion that it could not expand as a network into the EEA was based on the finding that there are "*extremely high*"[139] barriers to entry: "*the cost of creating a new network in the EEA are very significant and the scale of those costs and the very severe difficulties which* [Morgan Stanley] *envisaged in creating consumer interest in the EU in a card network where cards were not accepted by many merchants led* [Morgan Stanley] *to the conclusion that it was not viable for it to launch successfully the* [Discover] *network in the EEA. In addition,* [Morgan Stanley] *concluded that a proprietary network could not be established within a reasonable time frame.*"[140]

(149) Morgan Stanley explains that it took account of its experience in entering the network services market in the USA to conclude that it could not reasonably overcome the existing barriers to entry in order to establish a new commercially viable network. In reaching the conclusion that "*extending the* [Discover] *network to the EEA* […] *was not a viable commercial proposition, given the very substantial barriers to establishing a new general purpose card network in the EEA, even for an undertaking with* [Morgan Stanley's] *resources*"[141], Morgan Stanley gave consideration to the following elements:

(i) in the two years following its introduction of the Discover network in the USA in 1985, Sears reported after tax start-up losses of GBP [150-300] million[142];

(ii) incurring such losses only allowed it to achieve a minor market share of about [4-10%][143];

(iii) Morgan Stanley has no equivalent in Europe to Sears, which – as parent of Dean Witter, Discover and Co. – provided a critical contribution to the launch of the system in the USA[144]; Sears, the largest USA retailer and "*the nation's largest single provider of revolving credit*" through its 28 million store card customers at the time of the launch of Discover in 1985, had knowledge of the USA credit card business and, most importantly, a potential existing cardholder base on which to build[145];

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138 [business strategy document].

139 See Morgan Stanley's letter of 20 February 2002 to the Commission, paragraph 1.5., p. 3 (Commission file p. 3044) referring to paragraph 6.8 of the complaint (Commission file p. 506).

140 Complaint, paragraph 2.4, p.4 (Commission file p.461). See also the reply of Morgan Stanley of 20 January 2003 to the Commission request for information of 4 December 2002 - reply to question 7, p. 6; Commission file p.3144)

141 Complaint, paragraph 2.3, p.3 (Commission file p. 460).

142 Complaint, paragraph 2.3, p.3 (Commission file p. 460), and Morgan Stanley's submission of 20 January 2003, p. 5 (Commission file p. 3144).

143 [business strategy].

144 Complaint, paragraph2.3, p.4 (Commission file p. 461). Also, in reply to the question of whether it has considered its Discover card network to the EEA by approaching large retail chains, Morgan Stanley replied that it: "*does not believe that there is any possibility of expanding its Discover network to the UK.* […] *In addition, the current barriers to entry into the EEA look even more daunting then they appeared in the US in 1985; and <u>dealing with third parties adds additional difficulties not present with Sears</u>*" (Commission emphasis; Reply of Morgan Stanley of 20 January 2003 to the Commission request for information of 4 December 2002 - reply to question 7, p.6; Commission file p.3144).

145 "*The real ace up Sears' sleeve is its data base on more than 28 million active Sears cardholders. Over the next 17 months, Sears plans to mail pre-approved Discover applications to 26 million USA households,*

(iv) the use of Visa and MasterCard was much more widespread in Europe in 2000 (when Morgan Stanley requested membership) than it was in 1985 when Discover was launched in the USA[146];

(v) the diversity of legal, cultural and economic issues throughout Europe in relation to the creation of a general purpose card network is greater than throughout the USA[147].

(150) In his testimony before the USA Senate Banking, Housing and Urban Affairs Sub-Committee on Financial Institutions on 25 May 2000, the Chairman and CEO of Morgan Stanley notes that "[t]*he network business is very much a business of scale economies, with heavy infrastructure and little marginal expenses for each transaction. Thus the larger our scale, the greater our ability to compete on the network side*. […] *Given our experience in the United States with the Discover network, we have determined that it is not economically sensible to attempt to expand the Discover network outside the United States.*"[148] "[The Discover network] *has never been able to achieve anywhere close to the scale that we had hoped or that we need in order to achieve long term success.*"[149] "[Morgan Stanley] *simply cannot afford to make comparable network investments overseas* [i.e. "*investments of several billion dollars*"] […] *Accordingly, there will be no Discover global network* […][150].

(151) To summarise, as stated in recitals (137) and (138), Morgan Stanley considered Discover's expansion to the EEA as part of its overall strategy. However, without a feasible plan to expand the Discover network in the USA and facing barriers to network entry in the EEA, Morgan Stanley concluded by the end of [year] that it had no possible commercial rationale for making a large and risky network investment in the EEA given the very high barriers to entry into the EEA card networks market, and that it should rather expand its business by issuing cards on the existing MasterCard and Visa networks[151].

5.3.2.1.3 Visa's claim that Morgan Stanley still considered entering into the EEA as a card network do not stand up to scrutiny

(152) On the basis of five articles in the press[152], and the fact that Morgan Stanley has registered an internet domain named www.discover-card.co.uk and a Discover

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primarily holders of its store card. Although most of the credit lines it will offer will range from $1,400 to $2,200 per household, they would add up to a staggering $35 billion in new revolving credit if everyone accepts the card and uses it to the hilt." ("Mighty Sears tests its clout in credit cards", article of 2 September 1985 in "Business Week"; Commission file p. 3125).

146 See Morgan Stanley's submission of 20 January 2003, p. 4 (Commission file p. 3142)

147 Complaint, p. 4 (Commission file p. 461).

148 Testimony before the USA Senate Banking, Housing and Urban Affairs Sub-Committee on Financial Institutions of the Chairman and CEO of Morgan Stanley, on 25 May 2000, pp. 10-12., Annex 55 to the letter of facts of 6 July 2006 (Commission file pp. 12103-12105).

149 Ibid, p.13 (Commission file pp. 12106).

150 Ibid, p. 12 (Commission file p. 12105). This section of the testimony is also included in paragraph 2.3 and footnote 3, p.2, of Morgan Stanley's Summary of Issues to the Commission of 26 November 2003 (Commission file p.6193).

151 Morgan Stanley's submissions of 20 January 2003 (Commission file pp. 3137-3157) and of 25 January 2005 (Commission file pp. 9444-9623).

152 An article of 26 April 1999 in "Fortune 500" (Commission file pp. 2288 to 2295), an article of 2 January 2001 in "American Banker" with quotes from an interview of 26 December 2001 (Commission file pp. 8712 to 8717); two short "cardline" articles of 2003 (Commission file pp. 8718 to 8719), and an article in

Community trademark for insurance, financial and monetary affairs, Visa claims that, by [year], Morgan Stanley had not excluded expansion of the Discover network in the EEA.

(153) It should be recalled at the outset that in accordance with the case law of the Community courts, the assessment of whether an undertaking is a potential entrant in a market at the material time of the suspected infringement (in this case, at any moment between Morgan Stanley's request for Visa membership in March 2000 and its admission as a Visa member in September 2006) should not be based on hypotheses unsupported by any analysis of the structure of the market but, on the contrary, as explained in recital (136) of this Decision, on the real concrete possibilities for that undertaking to penetrate the relevant market and compete with the undertakings already established[153] .

(154) Visa's argument does not relate to the structure of the market or to the manner in which Morgan Stanley could actually overcome barriers to entry. Rather, (as explained in the next recital) Visa relies on journalists' understanding of Morgan Stanley's intentions and on unfounded inferences regarding the registration of a domain name and a trademark, which does not serve the purpose of establishing, in the light of the case law, that Morgan Stanley has real and concrete possibilities of entering the networks market in the EEA.

(155) For the sake of completeness, the Commission has nevertheless analysed Visa's argument. In particular, the Commission notes the following:

(i) Either the articles mentioned by Visa do not contain actual quotes of Morgan Stanley representatives (they rather reflect the journalist's understanding of developments), or they refer to Morgan Stanley launching "a credit card business" - which does not mean that the Discover network would expand to the EEA, but that Morgan Stanley has plans to issue Morgan Stanley-branded cards on the Visa and MasterCard networks. If reference is made to the launch of a Discover card, it is made in a context that shows that the journalist does not establish a distinction (as he could not have been expected to) between entering a market as a network or as an issuer or acquirer on another network.[154] Other articles not invoked by Visa

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the Financial Times of 29 October 2003 (Commission file pp. 8720); see Section 4 of Visa's submission of 3 December 2004, paragraphs 170 to 174, pp. 48 to 50 (Commission file pp. 8488-8490).

153 Joined cases T-374/94, T-375/94, T-384/94 and T-388/94, [1998] ECR II-3141 *European Night Services v. Commission*, recitals 137, 142 and 144.

154 More specifically:

- The article from Fortune 500 (Commission file pp. 2288-2294), dated 26 April 1999, does not contain statements of Morgan Stanley's representatives that Discover will expand its network to Europe. It refers to the Morgan Stanley and Dean Witter's CEOs wish to "*take* […] *their credit card overseas*" (quote of p. 2 of the article -not of the CEOs' declarations-, Commission file p. 2289). The article reports that "*Morgan Stanley's plan, now, therefore, is to take the Discover card abroad*", but does not provide any statement of Morgan Stanley's representatives to this effect.

- The paragraph from the article in the "American Banker" (of 2 January 2002) on which Visa relies ("*We have slowed down international expansion a bit because we really wanted to focus on growing the United Kingdom and focus on the economic challenges at home with credit quality* […] *we certainly intend to go into additional countries, but not in the next few months*", Commission file p. 8715) does not contain any reference to the Discover network. It follows a paragraph on the growth of Morgan Stanley-branded card issuance in the UK using the existing MasterCard network. Therefore, the expansion into additional countries referred to should be understood as a continuation of the current growth of Morgan Stanley card business in the UK, which relies on networks such as MasterCard's;

show that when journalists refer to Discover expanding internationally, they do not actually report on the expansion of the Discover *network*, but on the issuing of Morgan Stanley cards on other networks, such as MasterCard's.[155]

(ii) There is no press release of Morgan Stanley announcing entry as a network in the EEA. If Morgan Stanley had wanted to convey such entry to the press, this

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- The first "Cardline" article (of 2003, Commission file p.8718) does not refer to any statement of Morgan Stanley, cautiously beginning instead with the words "*According to "Cardline"* […]". It also contains indications that expansion of the Discover network to Europe is doubtful: "*it may take a while for Discover to truly expand globally*"; "*Ironically, Morgan Stanley actually decided to issue a MasterCard product in the UK* […] *rather than investing in the Discover brand and developing its own acceptance network*";

- The second "Cardline" article (also of 2003, Commission file p.8719) does not refer to the expansion of the Discover network into Europe but to the launch of "*a credit card business*" in Europe and Asia. In this context, the CEO of Morgan Stanley is quoted as saying: *"…when we do expand from the UK (United Kingdom) to other countries…"*, which at the time could only refer to an expansion of Morgan Stanley's business on other networks, as Morgan Stanley only operated in the UK issuing MasterCard.

- The Article in the Financial Times of 29 October 2003 (Commission file p. 6147) is imprecise and contradictory. The report in the article that "*Asia could be next in line after the launch of a Discover card in a European country"* (quote from the article, not from the CEO of Morgan Stanley) follows a statement that Morgan Stanley is looking at expanding "*from the UK*" and that Morgan Stanley has been encouraged by the experience in the UK. As in the second Cardline article, Morgan Stanley's activity in the UK consists in a MasterCard activity of issuing Morgan-Stanley branded cards on the MasterCard network: it is expansion of this activity that one should reasonably understand by "*expansion from the UK*". Also, the same article states at the end that the CEO of Morgan Stanley "*had been encouraged by the experience in the UK, where Morgan Stanley's card has gained 1m customers since its launch four years ago"*. Again, this Morgan Stanley card is a MasterCard.

155 For example:

- according to an article of 2 May 2001 in "Credit card management", reporting on declarations of Mr. Scott - the President of Morgan Stanley USA - and of Mr. Nelms - the President and COO of Discover Financial Services Inc. (a subsidiary of Morgan Stanley USA) - ("A year of growth for Discover"; Commission file pp.12679-12680):

"[…] *Discover launched its first international card in September 1999 in the United Kingdom. The U.K. card is issued under the Morgan Stanley name and employs the Europay/MasterCard network for merchant acceptance.*

Discover is going forward with overseas expansion but it may be "stretched out over a slightly longer period of time," Scott says. Discover is "still focused on entering a number of additional markets in Europe as well as potentially several in Asia," he adds.

Nelms says that Discover's growth in the U.K. is "within our expectations," but won't give details. "We're continuing to look at some other markets as well, but primarily the international focus has been in the U.K. because it's the largest merchant both in volume and loans," he says. […] ".

It is clear from the above that the declaration that "*Discover is going forward with overseas expansion*" does not actually refer to the expansion of Discover *as a network*, but rather to "*going forward*" with Morgan Stanley's business of issuing cards using other networks such as MasterCard, as was already the case in the UK at the time of the article. Even the reference of Mr. Nelms to "*Discover's growth in the UK*" does not refer to Discover proper, which was not present in the UK;

- according to an article of 22 March 2001 in "CardFAX", reporting on a declaration of Mr. Scott ("Discover card looking to Asia"; Commission file p.12681):

"[…] *Speaking to analysts yesterday about Morgan Stanley's first-quarter earnings, Scott said that Discover is "still focused on entering a number of additional markets in Europe as well as potentially several in Asia." He did not elaborate. Discover launched its first international card in September 1999 in the United Kingdom. The U.K. card is issued under the Morgan Stanley name and employs the Europay/MasterCard/Visa network for merchant acceptance. Discover is going forward with overseas expansion even though the economic slowdown in the U.S. may mean that the expansion may be "stretched out over a slightly longer period of time," Scott says.* […]".

Again, there can be no doubt that the references to Discover do not actually refer to the expansion of Discover *as a network*. Even the report that "*Discover launched its first international card in September 1999 in the United Kingdom*" clearly demonstrates this point as in the UK Morgan Stanley issues cards using the MasterCard network.

would have been the standard way of proceeding. The absence of a press release helps place the articles mentioned by Visa in their proper context.

(iii) Such articles are of little weight compared to the strategic documents prepared by independent experts for purposes strictly internal to Morgan Stanley – namely the presentations of [date] and [date], and the strategic and implementation plans of [date] – on which the Commission relies to conclude that Morgan Stanley excluded expansion of Discover into the EEA. The internal and strategic nature of such documents of Morgan Stanley is fundamentally different from the press articles invoked by Visa; these documents, based on the findings of independent experts and approved by Morgan Stanley, accurately reflect Morgan Stanley's fundamental strategic decisions. In contrast, journalists' understanding of what Morgan Stanley representatives have said has little probative value in a context where, based on the use in public of confusing expressions such as "expansion of Morgan Stanley's credit card business", the intended issuing and acquiring of Morgan Stanley-branded card in the Visa and MasterCard networks is often misunderstood as meaning expansion of the Discover brand.

(iv) Visa itself points out (a) that, when Morgan Stanley refers to extension of its credit card business in the EEA it refers to the Morgan Stanley-branded card, not to its Discover system [156] and (b) that the press articles which it invokes are contradicted by direct and official declarations of Morgan Stanley[157].

(v) The articles (the first of which dates from 1999 and the last of which from October 2003) are contradicted not only by the statement referred to in paragraph

[156] "[Morgan Stanley] *constantly elides any distinction between cards issued by* [Morgan Stanley] *and those issued by Discover. In its annual report*, [Morgan Stanley] *clearly considers the MSDW* [i.e. the Morgan Stanley-branded MasterCard] *card as an extension of its credit card business in the US.*" (Commission file p. 8490).

[157] See Visa's submission of 3 December 2004, paragraphs 171 to 173, pp. 48 and 49 (Commission file pp. 8488-8489), which refers to:

(i) Morgan Stanley's complaint to the Commission (Commission file pp. 460 and onward);

(ii) Morgan Stanley's observations of 11 December 2000 on Visa's comments of 18 August 2000 on the complaint, and on Visa's reply of 28 July 2000 to the Commission's request for information of 7 June 2000 (Commission file pp. 1558-1620);

(iii) Morgan Stanley's reply to the Commission's request for information of 4 December 2002 (Commission file pp. 3137-3157); and

(iv) Morgan Stanley's summary of issues to the Commission, of 26 November 2003 (Commission file p. 6193).

Visa quotes the above mentioned documents (i), (iii) and (iv):

- "*As the Commission is aware, prior to entering the EEA market* [Morgan Stanley] *gave consideration to the possibility of extending the Novus network to the EEA but concluded that this was not a viable commercial proposition, given the very substantial entry barriers to establish a new general purpose card network in the EEA, even for an undertaking with* [Morgan Stanley's] *resources.*" (Document (i) above);
- "[Morgan Stanley] *does not believe that there is any possibility of expanding its Discover network to the UK or elsewhere in the EEA in the same manner as it has set up the network in the US. In addition, the current barriers to entry into the EEA look even more daunting than they appeared in the US in 1985; and dealing with third parties adds additional difficulties not present with Sears. Accordingly, drawing an analogy with the Sears-Discover co-operation in 1985 is unrealistic, since no such equivalent opportunity exists or is ever likely to exist in the EEA. Further, as explained in the Introduction, replicating what* [Morgan Stanley] *has accomplished with the Discover network in the US would not be an attractive commercial opportunity.*" (Document (iii) above);
- "[Morgan Stanley] *has no plans to expand the Discover network to the EEA since there is currently no possible commercial rationale for making a large and risky network investment in the EEA.*" (Document (iv) above).

(150) of this Decision of the Chairman and CEO of Morgan Stanley before the USA Senate in May 2000, but also by material dating from 26 November 2003 according to which Morgan Stanley "*has no plans to expand the Discover network to the EEA"*[158]. This was again re-stated in 2005[159].

(vi) The reservation of a Discover internet domain and trademark do not indicate that Morgan Stanley is likely to expand its Discover network into the EEA, as it is common practice among large companies to reserve internet websites and trademarks for precautionary purposes (that is to say, to protect their brand names against internet domain "squatting" or registrations by other companies of a given brand name in another territory). The domain www.discover-card.co.uk re-directs to the USA site and does not list any Contracting Party to the EEA Agreement among those countries where the card can be used (and there is no announcement that this would be possible in the future).

(156) In the *BaByliss v. Commission* merger case, the Court of First Instance examined whether BaByliss was a potential entrant in the market for small electrical household appliances affected by the concentration, which was an oligopolistic market characterised by substantial barriers to entry arising from strong brand loyalty and by the difficulty of access to retail trading. Before concluding that BaByliss could be described as a potential entrant in view of its position in the neighbouring market for personal care appliances and of the experience of its parent company “Conair”, the Court took account of the following evidence, which shows that, in early 2001, BaByliss effectively began to implement its strategy of entering the European market for small electrical household appliances:

(i) a first study of the market;

(ii) a technical study on adaptation of the voltage of BaByliss’ products to be launched in Europe;

(iii) a three-year partnership agreement with a European company;

(iv) a finalisation of the strategy and the 2002 budget for launching the products in Europe;

(v) a negotiation with the main French customers;

(vi) announcement of the official launch in the French press;

(vii) announcement of the official date for the launch of the products in France in the presence of fifty invited guests.

(157) In addition, the Court noted that even before BaByliss’ products were actually put on sale in the markets, BaByliss found itself in direct competition with the incumbent SEB-Moulinex for the listing of its products by the main distributors[160].

(158) In contrast, in this case, there is no evidence that Morgan Stanley had effectively begun to implement any strategy of entering the card networks market in the EEA. There was no announcement of launch, no technical studies on the practical

[158] See paragraph 2.3 and footnote 3, p.2, of Morgan Stanley’s Summary of Issues to the Commission of 26 November 2003 (Commission file p.6193).

[159] See Morgan Stanley's observations on Visa's reply to the Statement of Objections, paragraphs 1.7 and 3.3.5 to 3.3.10 (Commission file, pp. 9450 and 9482-9484).

[160] Case T-114/02 *BaByliss v. Commission*, [2003] ECR II, p.1279, recitals 100-103.

implications of entering the card networks market, no negotiations with customers, etc.

(159) For the above reasons, it is concluded that neither the press articles mentioned by Visa nor the registration of a "Discover" trademark and an internet domain in the United Kingdom are sufficient proof to attribute to Morgan Stanley the status of potential entrant into the card networks market in the EEA.

5.3.2.1.4 Conclusion on the possibility of interbrand competition by Morgan Stanley

(160) In view of the very high entry barriers into the card networks market in the EEA – which Visa has not contested – and of Morgan Stanley's lack of real and concrete possibilities to overcome those barriers in a commercially viable manner (in particular taking account of the fact that Morgan Stanley cannot make the heavy investments required, or reach the indispensable minimum scale for successfully introducing a new viable card system in the EEA), Morgan Stanley could not be qualified as a potential entrant into the networks market at any moment between its request for Visa membership in March 2000 and its admission as a Visa member in September 2006.

5.3.2.2. Structure of the UK acquiring market

5.3.2.2.1. Specific market features: market players

(161) Presently there are eight banks in the United Kingdom which in one form or another are engaged in merchant acquiring: [ ][161]. Some of them acquire in their own name while others use third party providers. All of them are members of both Visa and MasterCard and all of them acquire (or enable third party providers to acquire) merchants for acceptance of Visa and MasterCard cards.

(162) Consolidation is a trend in the UK acquiring market. The biggest transaction in recent years was the acquisition of National Westminster Bank plc, the leading UK acquirer at the time, by the Royal Bank of Scotland Group, completed in March 2000. The acquiring operations of the two banks were consolidated in the form of one provider, Streamline Merchant Services. Further concentration took place in 2002 when Streamline took over the acquiring operations of National Australia Group Europe Limited (hereinafter "NAG"), which used to offer merchant acquiring activities through its subsidiaries [ ].[162] The last bank to enter as a domestic UK acquirer was Alliance & Leicester in 1996; EuroConex bought Alliance & Leicester's acquiring business and concluded a fronting arrangement with it in 2004.

(163) Another trend in UK domestic merchant acquiring has been the participation of non-bank third-party providers in the merchant acquiring business.

(164) The arrangements that [banks and third party providers] call for several observations on the participation of third-party providers in the UK credit and deferred debit/ charge card acquiring market. On the one hand, the involvement of third-party providers in the provision of acquiring services may contribute to improvement of acquiring services and bring cost savings, as argued by Visa. On the other hand, in all

[161] Commission's requests for information to UK acquiring banks of March 2004 (Commission file pp. 6296-6837).

[162] [ ].

of the above mentioned cases, the third party providers' acquiring activities have replaced their fronting partners' – that is to say, the Visa member banks' – acquiring activities and as such have not increased the number of acquirers active on the market. Moreover, the entries of [two third party providers] have to a certain extent led to further consolidation of the UK acquiring market, as each of those companies have purchased/entered into arrangements with two acquiring banks. For example, [a third party acquirer] is effectively running the acquiring businesses of both A&L and BOI, previously two competing acquirers.

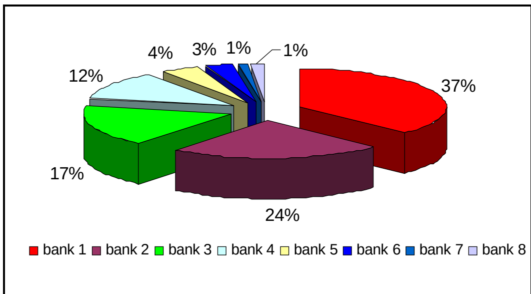
(165) With respect to banks from other Contracting Parties to the EEA Agreement, as outlined in Section 4.2., paragraphs (66) and (67), their acquiring activity under Visa's cross-border acquiring programme has so far been mainly targeted at a particular segment of the market and is fairly small in scale compared to that of domestic acquiring.

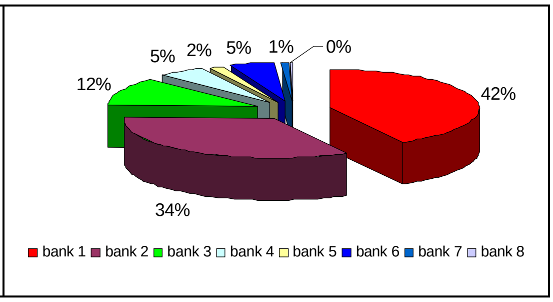
5.3.2.2.2. Specific market features: concentration

(166) According to the data received in reply to the Commission's requests for information to acquiring banks of March 2004, in 2003 the two-firm concentration ratio CR2[163] measured in terms of the merchant client base of the acquiring banks stood at 61%, while the four largest acquirers accounted for 90% of the market in terms of merchant client base (the CR4 being 90%) (see Table 6 below). The remaining four acquirers provided services for a mere 10% of the UK merchants, and each of them had a market share of less than 5%.

(167) Calculated using the market shares of the eight acquiring banks determined on the basis of their merchant client base (see Table 6 below), the Herfindahl-Hirshman Index ("HHI") stood at 2,405, which characterises the market as highly concentrated.[164]

Table 6 (left). Bank's client base as % of total merchants accepting Visa and MasterCard cards (2003)
Table 7 (right). Banks' combined Visa and MasterCard turnover as % of total UK Visa and MasterCard turnover (2003)





Source: Commission requests for information to acquiring banks of March 2004

163 According to *the Guidelines on the Applicability of Article 81 of the EC Treaty to horizontal cooperation*, 'the leading firm concentration ratio' which sums up the individual market shares of the leading competitors can be used as an indicator in measuring market concentration. Another indicator referred in the Guidelines is the Herfindahl-Hirshman Index, which sums up the squares of the individual market shares of all competitors (recital 29).

164 Ibid, recital 29.

(168) In terms of Visa and MasterCard transactions by value, a total of GBP 102 thousand million was spent using Visa and MasterCard cards at UK point-of-sale terminals in 2003 (Section 5.3.1.1.2.). The HHI calculated on the basis of the acquirers' share in the total value of Visa and MasterCard transactions stood at 3,119 which, similarly to the HHI based on the acquirers' share in UK total merchant client base, points to a high market concentration (see Table 7 above). The CR2 and CR4 measured in terms of Visa and MasterCard transactions by value stood at 76% and 93% respectively.

5.3.2.2.3. Specific market features: potential competition

(169) It is apparent from the evolution of the UK acquiring market during the last few years that there is a trend of large acquirers and third party processors beginning to dominate the market. There are several examples of smaller acquirers either selling their business to large banks or third-party providers or entrusting the latter to fully manage the business under other long-term arrangements. Those examples are the sale of [bank A] acquiring portfolio to RBS, EuroConex' takeover of [bank B] and [bank C] acquiring business and First Data's arrangement with [bank D] to fully manage the latter's acquiring business. The trend is also confirmed by the example of [bank E], which has decided against developing its own acquiring business and instead has a strategic alliance with RBS Streamline, which provides acquiring services to [bank E] small business clients.[165]

(170) This trend can be explained by the fact that, in order to run an acquiring business, undertakings require large volumes and significant economies of scale in order to be profitable. In the press release announcing the sale of its Norwegian merchant acquiring business to Nova/EuroConnex, SEB (Skandinaviska Enskilda Banken), a large Swedish banking group, explains that the sale is due to the current competitive environment in Europe which requires large volumes and economies of scale in order to obtain sufficient profitability in the acquiring business.[166]

(171) Large transaction turnover is important in the credit card acquiring business as the main revenue of acquirers - the merchant service charge (MSC) - is calculated as a percentage of the value of transactions paid with cards. The more card payment transactions an acquirer processes, the better it leverages the fixed costs incurred in running its acquiring business. The better an acquirer can exploit its fixed costs, the easier it is for it to lower the MSCs charged to merchants while preserving the existing level of its acquirer revenue, which in turn further increases the number of transactions brought by merchants and, hence, the acquirer's revenue. The less sizeable card transaction turnover of smaller acquirers puts them at a competitive disadvantage compared to large players.

(172) Considering this characteristic of the acquiring business, it appears that the current players in the UK acquiring market face potential competition from large international banks or data processors who have the capability to achieve scale to become competitors of the incumbents. Morgan Stanley is one of such large international banks with capability to achieve scale.

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[165] [ ].

[166] Press release of 19 August 2004 "SEB sells Norwegian merchant acquiring business to Nova" (Commission file p. 8106). [ ].

(173) Visa's list of potential acquirers[167] besides Morgan Stanley includes several other large banks like Capital One, Citigroup, JP Morgan Chase and MBNA. All of these banks issue payment cards, and Citibank and JP Morgan Chase (through its joint ventures with First Data) also provide acquiring services.[168]

(174) The Commission asked all the banks in Visa's list of potential acquirers (with the exception of NAG, as it had decided in 2002 to withdraw from the market and to sell its UK merchants acquiring activities [ ][169]) whether they had considered entering the UK acquiring market. [Bank A] and [bank B] explained that they had considered such entry but decided against it[170] and all the remaining banks answered that they had never considered it[171]. Therefore, within the rather narrow circle of potential entrants, the Commission has no evidence of any banks other than Morgan Stanley having contemplated entry to the UK acquiring market.

5.3.2.2.4 Specific market features: nature of services

(175) Price is an important competitive variable in the provision of acquiring services. 11 out of 13 large merchants and 10 out of 21 small merchants approached by the Commission mentioned the level of the MSC as a factor which they took into account in their decision to contract with their acquiring bank.[172]

(176) However, price is not the only significant variable in the competition for acquiring merchants. Firstly, acquiring services rely heavily on technology and innovation, which provide scope for continuous improvement in various components of the acquiring service. Secondly, besides technological developments, acquirers can differentiate themselves in the level of the acquiring service (for example, quality of sales and relationship management).

(177) Asked which elements other than price constitute competitive variables in the acquiring business, all UK acquirers responded by listing a range of variables which they considered relevant in their business.[173] If grouped into product-based variables and variables relating to service levels, the most commonly mentioned non-price variables are listed in Table 8.

Table 8. Non-price variables of competition

Product-based variables	**Variables relating to service levels**
• Availability and format of analytical reports (management reporting). • Quality of hardware and software provided by the acquirer (for example,	• Quality of sales and relationship management (for example, relationship managers). • Processing quality (for example, error

167 Potential acquirers according to Visa are Abbey National, Capital One, Citigroup, Co-operative Bank, JP Morgan Chase, MBNA, National Australia Group, Nationwide and Standard Chartered (See Frontier Report – i.e. Annex 9 to Visa's written observations of 3 December 2004 on the Statement of Objections –, paragraph 46, p. 13 (Commission file p. 8782), and Annex 3 (p.44) thereto - Commission file p. 8663).
168 [ ].
169 [ ].
170 [ ].
171 [ ].
172 Responses of large and small UK merchants to the Commission's requests for information of 2003 (Commission file pp. 3477-5361).
173 [ ].

terminals). • Settlement and value dates. • Provision of additional functionality such as multi-currency acquiring, cross-border acquiring, secure e-payment card acceptance environment, mobile telephone top-up service.	rates). • Quality of after-sales back-up (for example, call and transaction processing centres, query handling, chargeback advice).

(178) [Bank A] acquiring bank to enter the UK market in 1996, confirms that it competed on both price and quality of service in trying to win merchants for its newly launched acquiring business.[174]

(179) [Bank A] business plan was built on two fronts: the offering [10-20%][175] of lower MSCs than those charged by the incumbents, and quality of service. As regards quality of service, [bank A] tried to differentiate itself from the incumbent players by developing more sophisticated software to deal with charge-backs more efficiently, offering to provide additional (more detailed/more extensive) information to merchants, advising customers on technology to be used, offering integrated relationship management and daily settlement per card scheme.[176]

(180) [Bank A] explains that the incumbent banks knew about [its] planned entry about 18 months before its planned date because [it] had to become a Switch and MasterCard member well in advance of the launch of the acquiring operations.[177] According to [bank A], during this period of 'advance notice' the incumbents were extending the duration of the acquiring contracts with their customers to prevent them from switching to [bank A].[178]

(181) To retain customers after [bank A] entry the incumbents lowered their prices.[179] According to a manager of [bank A] in charge of strategic projects for the commercial bank, the acquiring market was experiencing some decline in prices at the time and [bank A] entry accelerated that decline.[180] [Bank A] notes that most of the value-added in terms of the quality of service was technology-based and was eventually replicated by others after about four years.[181]

(182) It can be concluded that, given the nature of the acquiring service, and in particular the scope for technological development and innovation in the acquiring business, acquiring banks have an opportunity to compete on a wide range of aspects of the acquiring service in addition to price. As competition can be improved on a wide range of quality or price parameters, merchants will switch acquirers where improvement occurs. Consequently, the possibility to compete either on price or quality of service is valuable from the point of view of a new entrant, as demonstrated by [bank A] example (see following section on switching).

174 [ ].
175 [ ].
176 Ibid.
177 Ibid.
178 Ibid.
179 Ibid.
180 Ibid.
181 Ibid.

5.3.2.2.5. Specific market features: switching

(183) Some merchants change acquiring bank.

(184) On the one hand, this could indicate that there is competition between the acquiring banks: merchants would switch acquirer because other acquirers would make better offers. Accordingly, a low merchant switching rate would mean that there is little competition in the market.

(185) On the other hand being aware of the low level of switching costs and that switching procedures are simple and short, acquiring banks may be choosing to constantly improve their offers in order to keep their customers satisfied and thereby dissuade them from switching to another acquirer. In that scenario, a low switching rate would not mean that there is little competition in the market.

(186) Low switching costs and simple switching procedures - just as the possibility to compete on multiple aspects of the acquiring service discussed in the preceding Section - are conducive to the success of new entry. [Bank A] entry to the UK acquiring market demonstrates how these features, if used in combination with a more advantageous offer with respect to service quality or price, could be used to gain market share and establish a significant presence on the market. To recruit clients for its newly launched merchant acquiring business, [bank A] targeted merchants to which it already provided money transmission services and which, until the launch of [bank A] acquiring business, contracted with other banks for payment card acceptance services.[182] By 2003 [bank A] had a 7% market share, and 99% of its acquiring clients were merchants which switched to [bank A] from other acquirers.[183]

5.3.2.2.6. The structure of the UK acquiring market: conclusion

(187) The analysis of several characteristics of the UK acquiring market (namely, the range of market players, concentration, potential competitors, competitive variables in provision of acquiring services and switching) demonstrates that there is scope for further competition in that market.

(188) The main players in the market are eight UK domestic acquiring banks, four of which are using two third-party processors to which the banks have delegated acquiring. The activities of cross-border acquirers from Contracting Parties to the EEA Agreement in the United Kingdom are marginal. The market has been consolidating, as smaller acquirers have been exiting the market and selling their acquiring portfolios. The market is concentrated as the four largest acquirers hold around 90% of the market. Considering the general trend for consolidation of the acquiring business, none of the few large international banks (other Morgan Stanley) that could in principle be efficient potential entrants can be realistically expected to enter the market.

(189) [Bank A] entry to the UK acquiring market indicates that low switching costs and simple switching procedures, as well as the possibility to compete on both price and non-price aspects of the acquiring service, are conducive to new entry.

182 [ ].
183 Ibid.

5.3.2.3. Morgan Stanley as a potential entrant to the European acquiring markets

(190) Morgan Stanley has been engaged in payment card business since 1985, when the Discover network was launched.[184] Morgan Stanley discussed the expansion of its payment card business beyond the USA (where Discover operates), and Europe had always been included in the expansion plans. As explained in more detail in Section 5.3.2.1.above, Morgan Stanley decided against the expansion by way of extending the operations of the Discover network and instead decided to launch payment card operations on the networks already operating in Europe, namely Visa and MasterCard. Morgan Stanley has been issuing MasterCard cards in the United Kingdom since 1999.

(191) With respect to merchant acquiring (which, due to the practice of providing Visa and MasterCard acquiring services as a package described in Section 5.3.1.2. above, Morgan Stanley cannot launch until it is granted Visa membership), Morgan Stanley prepared in [date] a strategic business plan for European merchant acquiring market entry. The plan was prepared by a leading business consulting firm working with Morgan Stanley's internal task force, made up of senior management from Morgan Stanley's card business.[185] The business plan contemplates entry into several European acquiring markets, including the United Kingdom, which is described as the largest card market in Europe with substantial further growth potential. Morgan Stanley also has an implementation plan for this strategy for the United Kingdom, which it claims to be ready to launch after it is granted a Visa license.[186]

(192) This demonstrates Morgan Stanley's continued intention to enter the acquiring market. Conversely, Visa's claim that Morgan Stanley "*never had any desire or intention*" to conduct any acquiring activity[187] is not supported by any evidence. The fact that, when it was finally admitted to apply for membership, Morgan Stanley [information provided by Morgan Stanley when it applied for membership of Visa Europe][188] does not demonstrate that Morgan Stanley never intended in the past and will never effectively conduct in the future any acquiring activity. The submission of [information provided by Morgan Stanley when it applied for membership of Visa Europe] occurred more than six years after Morgan Stanley first started to request membership of Visa and more than [number of years] after its Strategic Plan for European merchant acquiring market entry. In addition, according to Visa [members of Visa are entitled to issue and acquire cards] [189].

(193) With respect to Morgan Stanley's qualifications as a potential acquirer, the most valuable asset of Morgan Stanley is its long-standing experience, as it has been engaged in merchant acquiring since the launch of the Discover network. In contrast,

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184 The network was operated by Dean Witter, Discover and Co. till 1997 when this company merged with Morgan Stanley Group Inc.

185 Statement of the head of Morgan Stanley's Global Credit Services Business, of 20 May 2005, paragraph 12 (Commission file p. 10976).

186 Statement of a Managing Director of Morgan Stanley's UK credit card business (Consumer Banking Group International), of 20 May 2005, paragraph 8 (Commission file p. 10947).

187 Letter of Visa of 15 February 2007, p.2; Commission file p. 12557.

188 Letter of Visa of 24 April 2007 [information provided by Morgan Stanley when it applied for membership of Visa Europe]; Commission file pp. 12627 to 12649.

189 See for instance [article number] of the Settlement Agreement between Visa and Morgan Stanley of 21 September 2006 (Commission file p. 12243): [details of the terms of the settlement agreement between Visa and Morgan Stanley].

only two other banks among the companies to which Visa refers as potential effective acquirers (JP Morgan and Citibank) have got merchant acquiring experience, and, as already noted (see recital (174) above), these banks are not considering entry to the UK merchant acquiring market.

(194) In addition, Morgan Stanley also has experience of membership in a four-party network through its MasterCard issuing activities in the United Kingdom. In the process of those activities Morgan Stanley has acquired knowledge of the rules and procedures specific to a four-party network such as chargeback rules and arbitration procedures for dispute resolution within a four-party system. With respect to data processing specificities within a four-party network, Morgan Stanley could rely on its extensive processing experience in the USA, where it has been acting both as a processor and an acquiring bank; Morgan Stanley could also outsource processing activities to, or partner with, a third-party service provider.

(195) As a distinctive attribute of a four-party network Visa also identifies the lack of exclusive control over various aspects of the card business and the need to compete with the other members within the system[190]. However, it does not explain how these attributes disadvantage Morgan Stanley as a potential Visa acquirer. It suffices to say that Morgan Stanley was aware of these aspects of a four-party network when making a decision to enter European payment card markets through operations on the Visa and MasterCard networks, and that it has been able to pursue issuing activities on the MasterCard network.

(196) By issuing cards on the MasterCard network, Morgan Stanley has familiarised itself with Chip and PIN technology used in the United Kingdom. Also, Morgan Stanley owns the Pulse PIN debit network in the USA, which relies upon PIN technology at ATMs and points of sale in retail locations.[191]

(197) Hence, both Morgan Stanley's acquiring and processing experience in the USA and its issuing experience on the MasterCard network in the United Kingdom, give Morgan Stanley a solid basis to start acquiring activities on the Visa and MasterCard networks in Europe.

(198) Also, in the context of consolidation of the acquiring markets discussed in Section 5.3.2.2.3. above, Morgan Stanley is one of the few large international banks that could be considered potential efficient pan-European acquirers.[192] It is interested in entering the UK market and domestic acquiring markets of Contracting Parties to the EEA Agreement[193] and in cross-border acquiring,[194] which it was also prevented from doing in the absence of a Visa license.[195]

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[190] See Visa's supplementary observations of 3 December 2004, paragraphs 131 and 132, page 39 (Commission file p. 8479).

[191] Morgan Stanley's submission of 25 January 2005, paragraph 3.3.38 p. 49 (Commission file p. 9494).

[192] As already noted in Section 5.3.2.2.3., recital (174), none of the other large international banks identified by Visa as potential acquirers seem to be considering entry to the UK acquiring market.

[193] [business strategy].

[194] [business strategy].

[195] See Section 5.3.1.2.

(199) Visa claims[196] that the exclusion of Morgan Stanley from Visa membership could not qualify as a restriction of competition since competition in the relevant market is currently highly effective, as demonstrated, in particular, by a dramatic fall in MSCs.

(200) The Commission does not claim that competition is currently ineffective in the relevant market. However, competition is a dynamic process and there is scope for further competition in the market as regards both price and quality[197]. The fact that the market was deprived of the competition that an efficient, large and experienced acquirer such as Morgan Stanley could have helped bring about had appreciable restrictive effects.

5.3.2.4. Restrictive effects of preventing Morgan Stanley from competing in the market: conclusion

(201) It can therefore be concluded that, considering both the features of the UK acquiring market and Morgan Stanley's experience and qualifications, Morgan Stanley's entry into the UK acquiring market could be reasonably expected to contribute towards more efficient intra-brand competition in the United Kingdom, and have positive effects on prices and the quality of acquiring services. Its exclusion therefore had appreciable restrictive effects on competition.

5.3.3. Visa's conduct falls within the scope of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement

(202) Having concluded that the Rule, as applied to Morgan Stanley, has appreciable restrictive effects in the relevant market, the Commission has assessed Visa's arguments which aim to demonstrate that refusal to admit Morgan Stanley was objectively justified and did not fall within the scope of Article 81(1) of the Treaty/Article 53(1) of the EEA Agreement.

(203) Visa argues that the Rule aims at preventing free-riding by competing card payment networks and serves to maintain and enhance inter-system competition.[198]

(204) In the case of Morgan Stanley, Visa claims[199] that Morgan Stanley, as the owner of Discover, is an actual competitor to Visa at the system level in the USA and a potential competitor in the Community/EEA. It refers to free-riding concerns that it has vis-à-vis Morgan Stanley and argues that the Rule, which aims at addressing these concerns, ultimately contributes towards more competition between payment card systems.

[196] See Visa's submission of 3 December 2004, paragraph 230 onward, p.69 onward (Commission file p. 8509).

[197] See Sections 5.3.2.2.4. to 5.3.2.2.6, paragraphs (175) to (189) above.

[198] The minutes of the Visa International Board meeting of 4 December 1989 (Commission file p. 582) state that the Rule was adopted *"in order to maintain and enhance intersystem competition as well as to avoid unfair competition".* According to Visa, the objective of the Rule is *"to protect the independence and integrity of the Visa system itself and to promote inter-system competition on a fair and sustained basis"* (memorandum annexed to Visa's submission of 21 February 2003, section 3.3 –Commission file p. 3195). Visa submits that the Rule *"is designed to prevent competition-distorting free-riding in the interests not only of Visa but also of the public and the economy at large"* (Visa's submission of 18 August 2000, Section V, p. 16 – Commission file p. 635).

[199] See Visa's supplementary observations of 3 December 2004, paragraphs 388 to 391, pp. 124 to 126.

(205) In particular, prior to accepting Morgan Stanley as a Visa member on 22 September 2006, Visa claimed to be concerned that Morgan Stanley, if granted Visa membership, would have access to confidential information which it could then use for the benefit of its Discover payment network. Visa identified certain categories of such confidential information.[200] According to Visa, the concern of misuse of confidential information is particularly prevalent in the case of would-be members that belong to closed proprietary systems like Discover because of the absence of a "filter" between the member of Visa and the operator of the competing system.[201]

(206) In addition, Visa claimed that Morgan Stanley could use merchant and cardholder contacts and transaction data acquired through its operations on the Visa network as a "springboard" for launching its Discover network in Europe.

(207) According to Visa, measures less restrictive than the Rule such as "Chinese walls" or provisions to control the use of confidential information would not be adequate to prevent Morgan Stanley from misusing Visa's confidential information[202]. Visa also submits that, since the risk that merchant and cardholder contacts and transaction data are used as a "springboard" would be inherent in admission of a competitor to the Visa system, there is no measure short of the Rule which could properly protect against those risks[203]. Moreover, Visa argues that it could not treat Morgan Stanley differently from its other members in order to account for the particularities of its situation, "*as the cohesion of the joint venture depends upon equality*."[204]

(208) Visa acknowledges that it had admitted Citigroup, which is the owner and the operator of the Diners Club network, and several shareholders of JCB Co. Ltd. (hereinafter "JCB") which owns the JCB card network, as members. However, Visa argues that there are material differences between Discover and Diners Club or JCB. In Visa's view, those differences explain why, unlike Citigroup and JCB which were granted membership of Visa Europe, Morgan Stanley was refused such membership. In Visa's own words, "*situations involving the admission of an established head-to-head competitor to the organisation are not comparable with the situation of members that present a comparatively minor competitive threat*."

(209) Visa adds that situations involving the admission of a new applicant to the organisation are not comparable with the situation of existing members that have invested in the Visa system for over a decade and, accordingly, Visa was not required to treat Morgan Stanley in the same way as its existing members.

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[200] See Visa's submission of 21 February 2003, p. 5-7. (Commission file pp. 3175-3177) where it identified the following main categories of confidential information communicated to its members:
[details of the main categories of confidential information communicated to Visa's members]
See also Visa's written observations on the Statement of Objections of 3 December 2004, paragraph 398(a), page.128 (Commission file p. 8568), where it submits that "*MSDW will obtain unlimited access to* […] *Visa's confidential know-how* [which] *extends to its By-Laws and Operating Regulations and supplementary documentation which are a complete blue-print of the Visa system and include details of its latest technological initiatives such as Chip & PIN, e-commerce and fraud prevention technologies. Moreover, members are given advance notification of new commercial strategies, technical advice, risk management manuals and access to the Visa web-site*".

[201] Visa's observations on the SO of 3 December 2004, paragraph 397, pp.127-128 (Commission file pp. 8567-8568).

[202] Ibid., para 404 (Commission file p. 8572).

[203] Ibid., para 404 (Commission file p. 8572).

[204] Ibid., para 405 (Commission file p. 8572).

(210) In view of the case law of the Community courts (Section 5.3.3.1.), Visa's contention in this respect does not stand up to scrutiny: as explained above (Sections 5.3.1.1 and 5.3.1.2.) Visa has significant market power, and Visa's practice in applying the Rule to other members (Section 5.3.3.2.) shows that its conduct vis-à-vis Morgan Stanley was discriminatory and unjustified.

(211) In particular, Visa's behaviour was not necessary to prevent any free-riding from Morgan Stanley (Section 5.3.3.3.).

(212) Moreover, the admission of Morgan Stanley in September 2006 without reference to any change regarding the causes of concern invoked by Visa during more than six years of refusal to admit Morgan Stanley (Section 5.3.3.4.) underlines that those concerns were unfounded.

5.3.3.1. Case law of the Community courts[205]

(213) Visa considers that the application of the Rule to Morgan Stanley does not fall within Article 81(1) of the Treaty on the basis of such cases as *Gøttrup-Klim*[206], *Metropole Television*[207], and the *Elopak/Metalbox-Odin* decision[208 209].

(214) According to the Court of First Instance in *Metropole Television*, for a restriction to fall outside the prohibition of Article 81(1) it has to be directly related to and necessary for the implementation of the main operation[210].

(215) In *Gøttrup-Klim*, a case concerning a provision in the statutes of a cooperative purchasing association forbidding its members from participating in other forms of organised cooperation which were in direct competition with it, the Court held that such a provision would not be caught by Article 81(1) if it was restricted to what was necessary to ensure that the cooperative could function properly and maintain its contractual power in relation to the suppliers with which it had to deal. The *Elopak/Metalbox-Odin* decision analyses various provisions of the joint venture agreement related to protection against the use of confidential know-how by the parents' or joint venture's competitors and concludes that those provisions are necessary to avoid compromising or undermining the joint venture's purpose and

205 The case law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. See recitals No 4 and 15 as well as Article 6 of the EEA Agreement, and Article 3(2) of the EEA Surveillance and Court Agreement. References in this decision to Article 81 of the EC Treaty therefore apply also to Article 53 of the EEA Agreement.

206 Case C-250/92, *Gøttrup-Klim v. Dansk Landbrugs Grovvareselskab*, [1994] ECR I-5641, paragraph 45. The *Gøttrup Klim* case - unlike *Metro*– did not raise the issues of what could at least potentially be discriminatory application of membership rules in question and therefore did not necessitate the assessment of clarity and transparency of those rules.

207 Case T-112/99, *Metropole Television*, [2001] ECR II-02459.

208 Commission Decision 90/410/EEC, in Case IV/32.009 Elopak/Metalbox-Odin of 13 July 1990, OJ L209, 08.08.1990, p.15.

209 Visa submission of 18 August 2000, pp. 22 and 23 (Commission file pp. 643-642); Visa's submission of 3 December 2004, Section VIII, paragraphs 333 to 453, pp. 107-147(Commission file pp. 8547-8587); Visa's supplementary observations of 20 May 2005, Section 5 (C), paragraphs 155 to 235, pp. 64-94 (Commission file pp. 10260-10320). In particular, reference to *Métropole Télévision* and *Elopak/metalbox-Odin* is made in Visa's submission of 3 December 2004, at paragraph 350, page 111 and paragraph357, page 114, respectively (Commission file pp. 8551 and 8554).

210 Paragraph 104 of the Judgement.

existence, and as such do not fall under Article 81(1). In *Metro*[211], the Court of Justice ruled that restrictive provisions contained in a selective distribution system may fall outside Article 81(1) of the Treaty where they satisfy objective, qualitative criteria and are applied in a non-discriminatory manner.

(216) While Visa admits that "*in general the same applies to admission to membership of an open trade association*"[212], it contends that this case constitutes an exception and *Metro* is not applicable: Visa argues that in applying a rule the purpose of which is to exclude competitors which pose "*an unacceptable free-rider risk*", Visa's assessment "*necessarily include*[s] *some element of subjective judgement*", which implies the inapplicability of the *Metro* jurisprudence[213].

(217) While neither the cases invoked by Visa (*Gøttrup-Klim*, *Metropole Television* and the *Elopak/Metalbox-Odin* decision), nor *Metro* correspond exactly to the facts of this case, the Commission considers that case law can be applied by analogy. *Metro* concerns a situation similar to that of this case. In *Metro* admission to a vertical distribution system was refused on the basis of certain criteria which were claimed to be necessary for the effective operation of the system, which is similar to this case, where only the members of Visa can acquire Visa transactions at merchants' points of sale and thereby contribute to interbrand competition.

(218) With respect to the *Metro* requirement that membership criteria are not applied in a discriminatory fashion, the fact that the application of the Visa Rule implies an assessment of whether the applicant satisfies the membership criteria and their purposes does not distinguish this case from that of *Metro*.

(219) Moreover, contrary to Visa's claims, the purpose of the Rule would not be impaired by the requirement that the Rule is applied without discrimination[214]. In this respect, the assessment of whether an applicant for Visa membership is a competitor of Visa which poses a risk of free-riding cannot be impaired by the requirement that such assessment is conducted in a non discriminatory way, as applying a rule in a non-discriminatory way does not prevent Visa from taking into account the specificities of each case.

(220) In the light of the above case law, the application of the Rule to Morgan Stanley would not fall under Article 81(1) of the Treaty/Article 53(1) of the EEA Agreement, if it was directly related to and necessary (proportionate and non discriminatory) for the proper functioning of Visa's four-party payment card network[215].

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211 Case 26/76, *Metro SB-Großmärkte*, [1977] ECR 01875, paragraph 20.

212 Visa's submission of 3 December 2004, paragraph 367, p.117 (Commission file p. 8557).

213 Visa's submission of 3 December 2004, paragraphs 368-369, pp.117-118 (Commission file pp. 8557-8558).

214 Ibid.

215 Visa's contention (observations of 3 December 2004 on the SO, paragraph365 p.107 –Commission file p. 8547) that case law such as *Pronuptia* or *Nungesser* differ from *Metropole Television* in that they would not require the restriction to be directly related and necessary for 'the whole of the main operation' which in itself does not fall within the ambit of 81(1) but rather for 'a legitimate purpose' (an arguably lower threshold compared to that set out in Metropole Television) does not stand:
The purpose of a franchise agreement is to enable the franchisor to derive financial benefit from its expertise without investing its own capital and to allow the franchisee with no expertise in the field to get access to methods which they could not have learnt without considerable effort and to benefit from the franchisor's reputation: in *Pronuptia* the Court held that without the provisions which were necessary (i) to ensure that the know-how and assistance provided by the franchisor does not benefit competitors and (ii) to

(221) The following sections of this decision (Sections 5.3.3.2.2. to 5.3.3.5.) undertake such an analysis of whether the application of the Rule to Morgan Stanley was directly related to and necessary for the functioning of Visa. This analysis is undertaken in order to assess whether - because of Visa's free-riding concerns on confidential information and others - the application of the Rule to Morgan Stanley falls outside the scope of Article 81(1) (that is to say, whether application of the Rule to Morgan Stanley is directly related to and necessary (proportionate and not discriminatory) for the proper functioning of the system in the sense that, without such application, Morgan Stanley would have "free-ridden" and thereby prevented the Visa system from functioning), and concludes (Section 5.3.4.) that it does not.

5.3.3.2. Visa's practice in applying the Rule

(222) The analysis of Visa's practice in applying the Rule has shown that the owners or shareholders of other payment networks - namely Citigroup (Section 5.3.3.2.1.) and JCB (Section 5.3.3.2.2.) - have been admitted as Visa members. The admission of these companies to the Visa scheme puts into question the legitimacy of Visa's concerns about the damage to Visa's network that could arise from Morgan Stanley's admission as a Visa member and thereby indicates that its conduct vis-à-vis Morgan Stanley is discriminatory and unnecessary.

5.3.3.2.1. Citigroup

(223) Citigroup, the operator of the proprietary Diners Club network, is a member of Visa.[216] Citigroup's Visa membership precedes its acquisition of Diners Club business in 1981.[217] As Visa explains, "By-Law 2.12(b) was not in existence [in 1981] and therefore no issue arose."[218] The Rule was introduced in 1989, but "Visa did not seek to apply the rule to Citicorp but to "grandfather" its position."[219] Although Visa claims to have assessed the risk of disloyal competition from Citigroup at the time of the introduction of the Rule,[220] the minutes of the Board meeting which adopted the Rule do not record any discussion of the status of Citibank[221], and Visa has not provided any other contemporaneous evidence of such risk assessment.

(224) However, it is clear from Visa's submissions that Citigroup's status as a Visa member at the time when the Rule was adopted and its investment in the operations on the Visa network to that date played a role in Visa's decision to "grandfather" Citigroup's

maintain the identity and reputation of the network identified by the common name or symbol, the franchise agreement would not have been concluded.
The purpose of a technology licensing agreement is to disseminate new technology which would compete with the existing products on the market: in *Nungesser* the Court was of the opinion that without an exclusive license the licensee might be deterred from accepting the risk of cultivating and marketing the new product and such a result would be damaging to the dissemination of a new technology and would prejudice competition in the Community between the new product and similar existing products.

216 Numerous legal entities within Citigroup (which itself is a holding company) have licenses to operate on the Visa network (see Citigroup's submission of 18 April 2003, p. 1 –Commission file p. 3433, and Visa's submission of 28 July 2000, p. 15-16 –Commission file pp. 577-578-). For reasons of simplicity the references are made to "*Citigroup's Visa membership*".

217 Visa's submission of 28 July 2000, p. 17 (Commission file p. 579).

218 Visa's submission of 21 February 2003, p. 4 (Commission file p. 3174).

219 Visa's submission of 21 February 2003, p. 4 (Commission file p. 3174)

220 Visa's submission of 20 May 2005, paragraph 221 p. 90 (Commission file p. 10256), Visa's observations on the SO of 3 December 2004, paragraph 416(a) p. 135 (Commission file p. 8575).

221 Visa's submission of 28 July 2000, p. 17 (Commission file p. 579).

position. The testimony of the General Counsel of Visa International and Visa USA in the MountainWest proceedings is a good illustration on this point: "*...Personally I thought it would be unfair at this juncture after someone had come in and had been a Visa member and had invested millions and millions of dollars in the Visa system when we knew already that they were in Diners and Carte Blanche and now to ask them to divest themselves of something five, six, maybe eight years after we ha[d] already let them spend millions of dollars in Visa would be totally unfair*."[222]

(225) Indeed, Visa argues that Citigroup differs from the situation of a new applicant like Morgan Stanley since it had invested in the Visa system prior to the adoption of the Rule and therefore had a legitimate expectation that it would be entitled to recover the return from its investment and that other Visa members would not be allowed to profit unfairly from its input.[223]

(226) Such an argument could be used to prevent admission of any new member to the Visa system: if a potential new Visa member could only be admitted if, like Citibank, it had already invested in Visa prior to the adoption of the Rule, no new member could ever be admitted in Visa after the adoption the Rule. In addition, it does not in any way address the potential risks of Citigroup's or Morgan Stanley's membership in Visa, since Visa's statement that "*it is not likely that* […] *MSDW will not unduly and unfairly profit from the years of investment from other members*"[224] - as opposed to Citigroup's "*track record of establishing its own system through its independent efforts*" and "*clear loyalty*" demonstrated worldwide[225] - is not supported by any concrete evidence. The only conclusion that can be drawn from this argument for the purposes of this case is that if it is possible to "grandfather" membership of a competitor that existed before the Rule in question was introduced, the necessity of that Rule for attaining the claimed benefits of ensuring the proper functioning of the Visa system by preventing free-riding appears doubtful.

(227) Further analysis will address the other two arguments that Visa develops in its submissions in order to distinguish the position of Diners Club from that of Morgan Stanley.

(228) As part of the first of these arguments Visa distinguishes Diners Club from Discover on the basis of the 'overall relative strength and scope' of those networks.

(229) When the Rule was adopted in 1989, Citigroup's position was "grandfathered" and as a result Citigroup was not excluded from Visa membership. In 1989 (like today) the Diners Club network was a global network operating in around 200 countries, including Europe, while Discover was a regional network with cards being issued only in the USA and accepted mainly in the USA and to a limited degree in Canada, Mexico and some Puerto Rican and Caribbean islands.

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222 Visa's observations on the SO of 3 December 2004, paragraph 419 p. 137 (Commission file p. 8577). Another Visa's submission contains a similar statement: "*Given the length of time Citibank had been a member of Visa, and the length of item it had owned a part of Diners Club franchise, it is quite possible that a decision was made to "grandfather" Citibank's position*." (Visa's submission of 28 July 2000, p. 17 –Commission file p. 579).

223 Visa's observations on the SO of 3 December 2004, paragraph 419 p. 137 (Commission file p. 8577).

224 Ibid.

225 Ibid., paragraph 422 (Commission file p. 8578).

(230) While the number of Diners Club cards in circulation was lower than the number of Discover cards, significantly more merchants accepted Diners Club cards than Discover cards, and, contrary to Discover's regional reach, Diners Club card was accepted worldwide.

(231) Already on the basis of these facts it is questionable why Citigroup's access to, or hypothetical misuse, of Visa's confidential information would raise no concern to Visa, while Discover's membership would be discarded as risky to the functioning of the Visa system. Such conclusion appears even more doubtful considering that Diners Club card brand is backed by Citigroup, both then and now a leading global financial services organisation[226].

(232) In the card network business where only five card brands compete on a global scale (and Discover is not among them), Diners Club with its unparalleled financial strength through Citigroup can by no means be discarded as not being a competitor brand to Visa. An example from Visa's current commercial business practice vis-à-vis Diners Club network confirms this, as Diners Club is listed among Visa's competitors in Visa's agreement with [identity of a party to an agreement with Visa] whereby Visa is granted [status] within the framework of the [information relating to Visa's agreement with a third party].[227]

(233) Even if it were true that, as Visa suggests,[228] Citigroup has not "pushed" Diners in the last years, such 'assurance' was not and could not have been at Visa's disposal at the time of the introduction of the Rule. This and other *ex post facto* rationalisations put forward by Visa on the development of the Diners Club network during recent years (including a recent co-branding arrangement between MasterCard and Diners Club in the USA) are irrelevant in the assessment of the risk potentially posed by Citigroup's membership in Visa at the time when the Rule was adopted.

(234) Likewise, Visa's justification of Citigroup's membership based on the fact that Diners Club specialises in business/corporate cards and has traditionally been geared towards the travel and entertainment sector is questionable, considering that [name of a party considered by Visa to be a competitor of Visa] - is considered by Visa as a "competitor" to be excluded from Visa membership.

(235) The second argument of Visa is that Citigroup's organisational structure allows for a "filter" between its participation in Visa and its Diners activities, and such filter is represented by those Diners Club franchisees which are not owned by Citigroup.[229]

(236) In response to this argument it should firstly be noted that Diners Club is a closed proprietary system like Discover, and if Visa claims to be particularly vulnerable vis-à-vis closed systems such as Discover because the information flows solely in one direction (from open systems like Visa's to closed systems), it should in principle be equally concerned about information flows from Visa to Citigroup as a Visa member.

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226 With some 200 million customers accounts in more than 100 countries, more than 275,000 employees and a total net income of USD 21,538 million in 2006 (see Citigroup's internet website: http://www.citigroup.com/citigroup/about/index.htm; Commission file pp. 12675-12677).

227 [information relating to Visa's agreement with a third party].

228 Visa's observations on the Statement of Objections of 3 December 2004, paragraph 416(c) (Commission file p. 8576).

229 Visa's observations on the Statement of Objections of 3 December 2004, paragraph 423 p. 138 (Commission file p. 8578).

(237) Secondly, the following considerations (recitals (238) to (240)) on the organisational structure of the Diners Club network and the division of responsibilities between the owner of the brand and the franchisees are helpful to identify the level within the Diners Club structure at which Visa's confidentiality concerns might be pertinent. It is at that level that the "filter" Visa refers to in order to prevent any potential flow of proprietary information should normally be placed.

(238) The Diners Club brand is owned by Diners Club International Ltd., a subsidiary of Citigroup (via Citibank, New York State).[230] Diners Club network consists of [number] franchisees, sub-franchisees and agencies worldwide, [part of the number] of which are wholly or partially owned by Citigroup. Citigroup owns the USA Diners Club franchise and in Europe it has repurchased and now owns franchisees in the United Kingdom, Belgium, France, Greece, Germany, Ireland, Italy, Luxembourg and the Netherlands.[231] Each franchisee operates under a licence from Diners Club International.

(239) The comparative analysis of the responsibilities of Diners Club International and its franchisees has demonstrated that the owner of the brand is in charge of expanding the Diners Club brand, developing new products, promoting brand awareness and acceptance and establishing network operating standards, policies and procedures, while the franchisees merely implement the new products and rules that the owner of the brand introduces.[232]

(240) Given this division of responsibilities, it is clear that Visa's confidentiality concerns would potentially be most pertinent at the level of the owner of the brand, Diners Club International, and not at the level of franchisees. Therefore, the fact that some franchisees are not owned by Citigroup is of little relevance as far as control of flows of Visa's proprietary information for the benefit of the Diners Club network is concerned.

(241) As mentioned (recital (238)), the owner of the Diners Club brand, Diners Club International, is a subsidiary of Citigroup. Citigroup also owns numerous companies that are members of Visa. Hence, if Visa had a legitimate concern about Morgan Stanley free-riding on its proprietary information, it is not clear why those concerns would not exist as regards Diners Club.

5.3.3.2.2. JCB

(242) JCB Co. Ltd. ("JCB") is a Japanese credit card company offering an international brand, JCB. The JCB card is issued in a total of 19 countries, including several Member States (including the United Kingdom[233]), and accepted in 190[234]. By the end of 2004, 53.6 million JCB cards had been issued and they were accepted at 12.2 million merchant outlets worldwide[235]. The JCB brand is the second largest in the

[230] Citigroup's submission of 18 April 2003, p. 1 (Commission file p. 3433).
[231] E-mail from Citigroup of 27 July 2004 in reply to the Commission's e-mail of the same date (Annex 56 to the letter of facts of 6 July 2006, Commission file p. 6474).
[232] Citigroup's submission of 18 April 2003, p. 2 (Commission file p. 3434).
[233] JCB cards are also issued in Austria, France, Germany, Greece, Italy and Spain.
[234] RBR Report 2006, International Card Organisations, JCB (Japan Card Bureau), p. 50; Commission file p.12447.
[235] Ibid.

Japanese market with just over 26% of the total value of transactions in 2001, following Visa, the leader of the Japanese credit card market, with over 48% of the total value of transactions in the same year.[236]

(243) If one considers JCB solely in its position as a major player on the Japanese credit card market, the company appears to be as much of a competitor to Visa in Japan as Morgan Stanley is in the USA: both JCB and Morgan Stanley own card brands and operate payment card networks which compete with Visa network in certain regional markets. Moreover, JCB is also Visa's competitor in Europe while Morgan Stanley is not.

(244) The fact is, however, that several shareholders of JCB are members of Visa.

(245) Resona Bank, UFJ Bank Ltd and Sumitomo Mitsui Banking Corporation are the largest JCB shareholders.[237] Together they hold 22% of the company's share capital, the rest of the capital being split among the remaining 121 shareholders.[238] Unlike any of the other remaining shareholders, each of the three main shareholders has representatives on the management board of JCB

(246) At the same time, those three companies are members of Visa, [information regarding the membership of Visa of the owners of JCB].[239] For example, Sumitomo Mitsui Card Co. Ltd., which is an affiliate of Sumitomo Mitsui Banking Corporation and a Visa Principal Member, is also represented in the Board of Directors of Visa International.[240] It was the first company to introduce Visa to the Japanese market and is currently the largest issuer of Visa cards, not only in Japan but also in Asia.[241]

(247) In addition, besides the three largest shareholders of JCB, several other shareholders are also members of Visa, [information regarding the membership of Visa of the owners of JCB].[242]

(248) The fact that several shareholders of JCB [information regarding the membership of Visa of the owners of JCB] are members of Visa, directly or through their affiliates, would create, if Visa's stance was correct, multiple opportunities to 'channel' Visa's proprietary information to JCB which owns and operates the JCB network. However, it is a fact that concerns about the proprietary information have not prevented the shareholders of the JCB network from becoming Visa members, whilst Visa argues that they did prevent Morgan Stanley from becoming a member. This inconsistency in

236 Annex 2 to Morgan Stanley's submission "Note on JCB Shareholders" of 10 October 2003, p. 1 (Commission file p. 6027). For information on JCB, see RBR Report 2006, International Card Organisations, JCB International (Japan Card Bureau), pp. 50 and 53.

237 Business Information Report by Dun & Bradstreet on JCB Co Ltd of 19 July 2004, p. 4 (Commission file p. 7234).

238 Business Information Report by Dun & Bradstreet on JCB Co Ltd of 19 July 2004, p. 4 (Commission file p. 7234).

239 Visa's observations on the SO of 3 December 2004, paragraph 430, p. 140 (Commission file p. 8580). For historical regulatory reasons, financial institutions with credit card businesses in Japan often operated their credit card divisions through separate legal entities that were controlled by those financial institutions. The regulations which were the reason for such arrangements were abolished in April 2004.

240 Business Information Report of 20 July 2004 by Dun & Bradstreet on Visa International Service Association of 20 July 2004, p. 6.

241 Annex 2 to Morgan Stanley's submission "Note on JCB Shareholders" of 10 October 2003, p. 3 (Commission file p. 6027).

242 Visa's submission of 30 October 2003 (Commission file pp. 6143-6147).

Visa's practice, like in the case of Citigroup, illustrates the indeterminate and discretionary manner in which the Rule was applied to Morgan Stanley.

(249) Visa argues that JCB shareholders which are Visa members have no incentive to use Visa information for the benefit of the JCB system because any such benefits would be shared with all the other shareholders.[243] It is hard to reconcile this argument with Visa's purported concern about protection of the proprietary information. If such concern was genuine, Visa would be expected to rely on mechanisms to prevent the unwanted transmission of proprietary information rather than a member's incentives (or the absence thereof) to misuse such information.

5.3.3.2.3. Visa's practice in applying the Rule: conclusion

(250) The analysis of the application of the Rule to Morgan Stanley as compared to other companies demonstrates that the Rule has been applied in an incoherent manner. Visa does not refer to the same criteria to justify why it treated Morgan Stanley's application in a different manner as it did Citigroup's and JCB shareholders', and, in addition, each criterion is interpreted in a contradictory way (for example, in the case of Morgan Stanley Visa argues that it is particularly vulnerable vis-à-vis closed systems, but this criterion does not appear to be given any importance in the assessment of Citigroup's case).

(251) It remains unclear why the risk of misuse of Visa's proprietary information has not prevented shareholders of Citigroup or JCB from becoming members of Visa while it has blocked Morgan Stanley's acceptance to the network for over six years. This inconsistent practice casts doubt on the legitimacy of the free-riding risk argued by Visa in justification of the Rule.

(252) Moreover, the admission of Morgan Stanley on 22 September 2006 constitutes additional evidence that the arguments used by Visa to justify the non acceptance of Morgan Stanley as a member were not valid (Section 5.3.3.4.).

5.3.3.3. Concerns of free-riding cannot justify application of the Rule to Morgan Stanley

(253) As demonstrated by the analysis of Sections 5.3.3.3.1 to 5.3.3.3.3 below, the risks to the proper functioning of the Visa system of disclosure to Morgan Stanley of what Visa claims to be confidential information cannot be established (Section 5.3.3.3.1.), particularly since Discover is not a likely entrant to the market in Europe (Section 5.3.2.1. above). The risk of Morgan Stanley using the accumulated cardholder/merchant and transaction data as a "springboard" to launch the Discover network in Europe is also unfounded (Section 5.3.3.3.2.). Even if such risks were justified, they could be addressed by less restrictive means than an outright refusal of Visa membership (Section 5.3.3.3.3.).

5.3.3.3.1. Access to confidential information

(254) This section analyses Visa's claim that it would have been adversely affected by the necessity to make available to Morgan Stanley certain categories of information, which Visa claims to be confidential.

243 Visa's submission of 20 May 2005, paragraph 227(c) p. 92 (Commission file p. 10258).

(255) It should be indicated at the outset that the disclosure to Morgan Stanley of Visa information which is specific to Visa's European Region[244] is unlikely to distort competition between Visa and Discover as it would be irrelevant for Discover's operations in the USA. Visa itself made a similar point when it contested Morgan Stanley's qualifications as a potential efficient acquirer in the United Kingdom arguing that "*experience from the US is not necessarily transferable to the UK where there are different trade practices and customary preferences*."[245]

(256) The following paragraphs address the specific categories of information which Visa claims could not be disclosed to Morgan Stanley because of the risk of free-riding. As the analysis will show, such information (1) would in any case be accessible to Morgan Stanley if it were acquiring under a fronting arrangement (to which Visa claims to have no objection), (2) is specific to the Visa EU Region and therefore not relevant for Discover in the USA, or (3) has become industry standard. To the extent that information on Visa's new products or commercial strategies in the development in Europe were of any relevance to Discover in the USA (considering geographic and business model differences), it appears that, in any case, not all Visa members have access to such information and Visa could ensure confidentiality of such information vis-à-vis Morgan Stanley by less restrictive means than refusal of membership, as it finally did when it admitted Morgan Stanley as a member on 22 September 2006. On the basis of these findings Visa's contention that it was vulnerable to disclosure to Morgan Stanley of certain categories of information that Visa claims to be confidential does not stand scrutiny.

(i) By-Laws and Operating Regulations

(257) According to Visa, its By-Laws and Operating Regulations constitute the blue-print for the Visa system,[246] as they set out the detailed mechanics and technical operating requirements for members. Visa explains that the Operating Regulations represent over thirty years of accumulated knowledge and experience achieved by past investments and activities of Visa and its past and existing members.[247] This know-how is regularly updated and improved and recent developments are circulated to members through [details of the methods by which updated information is circulated to Visa members].[248] Visa claims that if Morgan Stanley obtained Visa membership, as it finally did, it would have access to the ultimate blue print for the Visa system and its tried and tested operating methods.

(258) However, [independent sales organisations must comply with Visa's By-laws and Operating Regulations] as, according to Chapter 2.10 of the Visa Europe Regional Operating Regulations :

[details of the obligations contained in Visa's By-laws and Operating Regulations] [249]

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[244] E.g., information related to multi-currency and multi-lingual transactions (Visa's submission of 20 May 2005, paragraph 193 p. 77 –Commission file p. 10243).

[245] Visa's submission of 3 December 2004, paragraph 312 (e), p. 98 (Commission file p. 8538).

[246] Visa's submission of 20 May 2005, paragraph 188 p. 75 (Commission file p. 10241).

[247] Ibid. paragraph 192 p. 77 (Commission file p. 10243).

[248] Ibid.

[249] Visa Europe Regional Operating Regulations, Chapter 2.10.A.1a (Commission file p. 12443).

(259) This obligation on 'independent sales organisations' to comply with all Visa By-Laws and Operating Regulations implies that independent sales organisations are aware of the content of all of such By-Laws and Regulations.

(260) The need for the imposition of an obligation on independent sales organisations to comply with all Visa By-Laws and Operating Regulations is understandable: as organisations such as EuroConex or First Data run an acquiring business by themselves with virtually no involvement of the Visa member bank with which they have concluded a fronting arrangement[250], they should comply with the Visa rules and regulations necessary for the running of the acquiring side of the Visa system.

(261) Visa contends that third party processors and other fronting partners would not qualify as independent sales organisations ("ISOs"). [details of the obligations contained in Visa's By-laws and Operating Regulations].

(262) However, the criteria laid down in the definition of independent sales organisations in the Visa Europe Regional Operating Regulations do not in any way exclude third party acquirers acting under a fronting arrangement:

[details of the obligations contained in Visa's By-laws and Operating Regulations]

(263) [Independent sales organisations provide information to Visa as to the other card related support services that they intend to provide][251].

(264) Finally, practice confirms that third-party providers receive the Visa By-Laws and Operating Regulations from the Visa members. Visa itself admits in its reply of 22 September 2006 to the Commission letter of facts of 6 July 2006, quoting a manager of Alliance & Leicester in charge of strategic projects for the commercial bank, that*: "A&L is a mere interface between the networks and EuroConex and its duty is to inform EuroConex of all the network rules and procedures necessary to run the acquiring business".*

(265) Consequently, even if Morgan Stanley were to enter into a fronting arrangement as a third party provider (to which Visa claims it would have had no objection), it would have to know the content of the Visa By-Laws and Operation Regulations.

(ii) Chip & PIN

(266) In 2005 Visa admitted that Chip & PIN has been agreed as a desired industry practice and therefore, apart from the information related to 'the specific implementation' of Chip & PIN technologies which has been left to the individual card systems, Chip & PIN information is not confidential to Visa.[252]

(267) With respect to the implementation information, Visa explains that it has adopted a number of rules for the European Region and that those rules are set out in Visa Europe Regional Operating Regulations.[253] As already mentioned under (i) above, Morgan Stanley would also have to know such Regulations in order to be able to

250 [ ].
251 Appendix A-3 of the Visa Europe Regional Operating Regulations (Commission file p. 12443).
252 Visa's submission of 20 May 2005, paragraph 197 p. 79 (Commission file p. 10245).
253 Chapters 3.2A to 3.2G and 4.3D of Visa Europe Regional Operating Regulations (Commission file p. 12443).

comply with them if it ran an acquiring business as a third party provider under a fronting arrangement.

(268) Visa also emphasises the commercial value of the information concerning the interoperability of Chip & PIN in a pan European context.[254] However, considering that Discover does not operate in Europe and is unlikely to enter the European market, such information would be of limited relevance to Morgan Stanley, except as a Visa member that would expand the Visa business.

(iii) E-commerce technology

(269) Visa admits that its e-commerce technology which provides for secure payment on-line is based on what is now the industry standard known as [details of Visa's e-commerce technology].[255]

(iv) Fraud prevention technologies

(270) Visa argues[256] that there are aspects of fraud detection and prevention which are not a matter of industry standardisation and that those aspects are competitive features which differentiate competing card systems. Visa explains that it collects fraud data [details of Visa's fraud prevention technologies] from members using a reporting system known as [details of Visa's fraud prevention technologies]. The information stored is used to inform members of the [details of Visa's fraud prevention technologies], to further develop Visa's fraud prevention measures and to assist members in their specific fraud control. Visa also notes that the data stored enabled Visa to develop two Visa-specific fraud management programmes, namely [details of Visa's fraud prevention technologies], details of which are contained in the Visa Europe Regional Operating Regulations.

(271) It should be noted that although some specific aspects of fraud prevention can be card system specific, payment card fraud is an industry-wide concern requiring industry-wide solutions.

(272) With respect to the Visa-specific fraud prevention elements, Morgan Stanley would have to comply with these measures if it were acquiring under a fronting arrangement[257]. Moreover, the fraud data collected by Visa cover the Visa EU Region. Hence, for Discover - which does not operate and is unlikely to start operating in Europe - such data is of limited value, as are Visa's Europe-specific fraud prevention measures developed on the basis of such data. Moreover, these measures are set out in the Visa Europe Regional Operating Regulations with which Morgan Stanley would have to comply, and which it would therefore have to know, if it were acquiring under a fronting arrangement.

(v) New commercial strategies at the development stage

(273) The information on Visa's By-Laws and Operating Regulations, on Chip & PIN, on Visa's e-commerce and fraud prevention technologies (recitals (257) to (272) above)

[254] Ibid.
[255] Ibid. paragraph 199.
[256] Paragraph 200 (page 80) of Visa's submission of 20 May 2005 (Commission file p. 10246).
[257] See paragraph (118) [details of the obligations contained in Visa's By-laws and Operating Regulations].

to a large extent refers to the established Visa rules and standards. Besides those established rules, Visa refers to another category of information - information about the new products or commercial strategies being developed by Visa -, the disclosure of which to Morgan Stanley would be prejudicial to Visa. In particular, Visa claimed that access by Morgan Stanley to such information would have reduced Visa's incentive to innovate.

(274) According to Visa, specific strategic initiatives are tested through a process of [information about specific Visa strategic initiatives].[258] From this explanation it appears that Visa could preclude Morgan Stanley from having access to this information by simply excluding Morgan Stanley from the various [information about specific Visa strategic initiatives]. While member banks need to know the established Visa rules in order to observe and implement them in their operations, information about products or commercial strategies under development is not indispensable for members' issuing and/or acquiring operations. On that basis, to the extent the information relating to ongoing innovation was relevant to the Discover network (considering the geographic and business model differences) it cannot justify Morgan Stanley's exclusion from Visa on confidentiality/free-riding grounds as argued by Visa, because Visa could have made arrangements to preclude Morgan Stanley from having access to such information, as it finally did pursuant to the Settlement Agreement of 21 September 2006.

(vi) Conclusion

(275) Visa's contention regarding the alleged danger that Morgan Stanley could access information confidential to Visa is not acceptable.

(276) The analysis of different categories of information which Visa claims Morgan Stanley could use for the benefit of the Discover system shows that:

(i) (a) either such information would be accessible to Morgan Stanley if it were acquiring under a fronting arrangement, or (b) it is specific to the Visa EU Region and therefore not relevant for Discover in the USA, or (c) it has become industry standard;

(ii) to the extent that information on Visa's new products or commercial strategies under development in Europe were of any relevance to Discover in the USA (considering geographic and business model differences), arrangements to restrict Morgan Stanley's access to such information could have been used to safeguard Visa's concerns; and

(iii) Morgan Stanley's admission as a Visa member disproves Visa's contention, as such arrangements were indeed put in place[259].

5.3.3.3.2. Other benefits (transaction data, merchant and cardholder data)

(277) Visa argues that Morgan Stanley might use transaction data and cardholder and merchant contacts gained in its capacity as a member of Visa as a "springboard" for launching Discover in the Community, in particular by "siphoning" Visa card-holders and merchants across to the Discover system. In support of its argument Visa refers to

[258] Visa's submission of 20 May 2005, paragraph 194 p. 78 (Commission file p. 10244).
[259] Ibid.

proceedings before the United States Department of Justice (USA DoJ), where, according to Visa, Morgan Stanley argued that "*it could expand acceptance of Discover through its Visa acquiring business*".[260]

(278) As has already been established in Section 5.3.2.1. "Interbrand competition", Morgan Stanley is unlikely to expand the Discover network into Europe. Morgan Stanley's payment card strategy for Europe is to operate on Visa and MasterCard networks instead. Hence, already on this basis, Visa's claim is unfounded.

(279) In addition, even if Morgan Stanley were going to expand the Discover network into Europe, considering that Visa is the number one credit card brand in the United Kingdom cardholders and merchants would be unlikely to switch from Visa to Discover, hence making a "siphoning" possibility only theoretical[261].

(280) As regards Morgan Stanley's submissions in the USA DoJ proceedings that "*it could expand acceptance of Discover through its* [that is to say, Morgan Stanley's] *Visa acquiring business*", they refers to the fact that in the USA (like in the United Kingdom) merchants prefer to contract with a bank which can offer an acquiring package including all major card brands – most of all Visa and MasterCard together – as opposed to only one card like Discover. Therefore, in the USA, by being able to offer Visa and MasterCard acceptance, Morgan Stanley could acquire more merchants. According to the referenced source, it is in that context that Morgan Stanley claims Visa membership to be helpful in the USA. Discover's Amicus Curiae brief does not contain any reference to "siphoning" of Visa cardholders to the Discover network.

(281) Finally, merchant and cardholder contacts that Morgan Stanley would acquire through its operations on the Visa network are not information that is proprietary to Visa. Rather, this is information concerning the banks' relationships with their customers, and Visa has been quoted as confirming that it has no interest in the banks' relationships with their customers.[262] Visa has no rules concerning member banks' use of member banks' own card-issuing or merchant acquiring relationships and data.

5.3.3.3.3. Proportionality – Contrast in the approach of Visa and MasterCard to Morgan Stanley's admission

(282) Although the alleged risks of Morgan Stanley's admission as a Visa member to the proper functioning of the Visa system have not been established, this Section analyses whether, if such risks had been substantiated, there would have been no less restrictive means to address them.

(283) The confidentiality of Visa information to which Morgan Stanley would have had access as a Visa member could have been ensured by way of Morgan Stanley's confidentiality undertakings. Such practice seems to be customary with Visa

260 Visa's submission of 3 December 2004, paragraph 31 2(e), p. 98 (Commission file p. 8538).

261 The issue here is whether cardholders and merchants would switch card brands (i.e. whether merchants would refuse Visa cards if they began accepting Discover cards: they would not). This is a different issue from that in Section 5.3.2.2.5., paragraphs (183) and (186) above, of merchants switching acquiring banks, while still accepting the same card brand from their clients.

262 Before the USA DoJ, Mr. or Ms. Beindorff of Visa U.S.A. stated (Dep. at 263-65) that "*cardholder relationship belongs to banks, not Visa*".

members, [details of the obligations contained in Visa's By-laws and Operating Regulations].[263]

(284) It is not clear why this traditional commercial approach to confidentiality concerns would not have been sufficient in the case of Morgan Stanley, [information relating to Morgan Stanley's membership of Visa].

(285) Morgan Stanley became a MasterCard member in the United Kingdom in 1999. Like any other MasterCard member, Morgan Stanley became subject to confidentiality obligations set out in MasterCard’s rules and a standard confidentiality agreement which all MasterCard members must sign. MasterCard confirms that it has [ ].” [264]

(286) The recitals below[265] provide information on the circumstances of Morgan Stanley’s admission as a MasterCard member in the United Kingdom and demonstrate that, even if Visa had legitimate concerns about Morgan Stanley’s membership (which has not been established), those concerns could have been addressed in a less restrictive way than a blank refusal of Visa membership.

(287) Visa and MasterCard, both being open four-party systems organised in a very similar way, should in principle have similar concerns about the protection of proprietary information. Visa confirms this by saying that “*Visa, like MasterCard, is a non-profit making organisation, whose members have a common interest (…) in protecting and exploiting the system which they have built up through their investment, contribution and activities (in issuing cards, signing up merchants and contributing to product developments and the like). They have no incentive to put that asset at risk by disclosing their proprietary know-how and competitive strategy to a competitor. There is a common acceptance among members of a system that they need to protect the joint venture of which they are a member.*”[266]

(288) Under MasterCard rules [ ]. Morgan Stanley explains that it also has internal procedures aimed at safeguarding the protection of confidential information. [information about confidentiality obligations] [267]

(289) Being comparable in their concern about the protection of proprietary information, the Visa and MasterCard networks addressed the issue of Morgan Stanley’s application for membership in the United Kingdom differently. Whereas Visa flatly refused Morgan Stanley’s application, arguing that such refusal was the only means to protect the proprietary information, MasterCard admitted Morgan Stanley as a member[268] [ ].

(290) Discussions within MasterCard at the time of Morgan Stanley's application for a MasterCard license in the United Kingdom seem to have been mainly focused [ ]. [ ].[269] [ ].[270]

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263 Visa’s submission of 20 May 2005, paragraph 205 p. 84 (Commission file p. 10250).

264 MasterCard’s submissions of 5 September 2005 (Commission file pp. 11064-11070) and 4 November 2005 (Commission file pp. 11077-11081).

265 Recitals (288) to (290).

266 Visa’s submission of 21 February 2003, page 4 (Commission file p. 3174).

267 Statement of a Managing Director Morgan Stanley’s UK credit card business (Consumer Banking Group International), of 20 May 2005, paragraph 21 (Commission file p. 10951).

268 MasterCard explains [ ]. (See MasterCard’s submission of 4 November 2005, Answer to Question 4 – Commission file p. 11079)

269 MasterCard’s submission of 5 September 2005 (Commission file pp. 11064-11070).

(291) There is no indication that Morgan Stanley's membership in MasterCard has in any way impaired the effective implementation of the MasterCard network. On the contrary, as shown in Section 5.3.1.1.4., MasterCard's share of the UK credit card market has been steadily increasing.

(292) Visa made reference to the fact that Morgan Stanley was refused access to the MasterCard network in the USA.[271] As far as the USA market is concerned, MasterCard explained that [ ][272] . As mentioned above[273], MasterCard has [ ]. [274]

(293) Therefore, although there may be legitimate reasons for MasterCard's refusal of a licence to Morgan Stanley in the USA and Canada (such matter being beyond the scope of this decision), Morgan Stanley's MasterCard license for the United Kingdom demonstrates that there are less restrictive means to address the confidentiality concerns argued (but not proven) by Visa than an outright refusal of membership.

(294) Visa claims to be particularly vulnerable to the competition of closed proprietary networks like Discover. It alleges that the head of Morgan Stanley's global credit services business comprising Discover operations in the USA and MasterCard card issuing in the United Kingdom, could have been used as a channel to pass the information related to the Visa network from the UK division of Morgan Stanley's credit services to Morgan Stanley's credit services USA division which operates the Discover network.

(295) Morgan Stanley explains that its USA and UK credit businesses have separate management structures.[275] Day-to-day decisions relating to the UK card business are taken by the UK management team, and the UK management team only reports to the head of Morgan Stanley's Global Credit Services Business in relation to the overall strategic direction of the business.[276] As regards Morgan Stanley's membership in MasterCard, MasterCard confirms that [ ].[277]

(296) On the basis of the above analysis it can be concluded that less restrictive means than the outright refusal of membership would have been available to safeguard the claimed objectives of application of the Rule to Morgan Stanley (which have not been established).

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270 Ibid.

271 Visa's submission of 3 December 2004, paragraph 451, pp.145-146 (Commission file pp. 8585-8586).

272 MasterCard's reply to the Commission's request for information of 28 July, 17 August and 13 September 2005 (non confidential version, answer to question 6) (Commission file pp. 11067-11068).

273 Recital (285).

274 MasterCard's submissions of 5 September 2005 (Commission file pp. 11064-11070) and 4 November 2005 (Commission file pp. 11077-11081).

275 Statement of the head of Morgan Stanley's Global Credit Services Business, of 20 May 2005, paragraph 6 (Commission file p. 10973).

276 Statement of a Managing Director of Morgan Stanley's UK credit card business (Consumer Banking Group International), of 20 May 2005, paragraph 3 (Commission file p. 10945).

277 MasterCard submission of 5 September 2005 (Commission file pp. 11064-11070).

5.3.3.4. Admission of Morgan Stanley without reference to any change regarding the causes of concern invoked by Visa during its six and a half years of refusal to admit Morgan Stanley.

(297) On 22 September 2006, after more than six and a half years of refusal[278], Visa accepted Morgan Stanley Bank as a member of Visa Europe[279].

(298) However, nothing in the Commission's file shows any change regarding the causes of concern Visa had invoked throughout the procedure in order to justify its refusal to admit Morgan Stanley as a member of Visa Europe, and in particular the alleged free-riding (that is to say, the concern about possible misuse of confidential information of Visa for the benefit of Morgan Stanley's Discover network and the concern that Morgan Stanley could use merchant and cardholder contacts and transaction data acquired through its operations on the Visa network as a "springboard" for launching its Discover network in Europe).

(299) In particular, while Visa had argued that no confidentiality undertaking could address the possible misuse of confidential information, and that it was therefore justified not to admit Morgan Stanley as a member of Visa, the Settlement Agreement of 21 September 2006 lays down provisions regarding confidentiality[280]. This demonstrates that - contrary to Visa’s contentions[281], less restrictive measures than the outright exclusion of Morgan Stanley can adequately address Visa’s concerns about free-riding by misuse of Visa confidential information.

5.3.3.5. The Rule was applied to Morgan Stanley until its admission as a member of Visa on 22 September 2006

(300) As mentioned above[282], on [date] 2006 the Visa International Board approved "*Criteria for Assessment of risk of disloyal competition*" under the Rule.

(301) While Visa describes the criteria for assessment as a "*variation of By-Law [number of the rule]*", according to the information transmitted by Visa to the Commission, the wording of the Rule itself has not changed, but has merely been supplemented by the criteria for assessment[283]. [details of the obligations contained in Visa's By-laws and Operating Regulations] [284].

(302) However, there is no indication that from [date] until 22 September 2006, when Morgan Stanley was admitted as a Visa member, the so-called “Criteria for Assessment” were taken into account as regards Morgan Stanley. In particular, the wording of the Settlement Agreement of 21 September 2006 pursuant to which Morgan Stanley was admitted as a Visa member shows that Morgan Stanley's six

278 As regards the duration of the infringement, see section 8.2.1.2. below.

279 See letter of Visa to the Commission of 27 September 2006 (Commission file p. 12190), and letter of Morgan Stanley to the Commission of 22 September 2006 (Commission file p. 12188).

280 [details of the terms of the settlement agreement between Visa and Morgan Stanley].

281 See Visa’s submissions of 3 December 2004 in reply to the Statement of Objections, paragraph 404, p.132 (Commission file p. 8572).

282 See paragraph (23) above.

283 Letter of 12 December 2006 (Commission file p. 12421).

284 Letter of 12 December 2006 (Commission file p. 12421). [details of Visa International and Visa Europe Board decisions relating to Visa By-laws and Visa Europe Membership Regulations].

year-old application for membership [details of the terms of the settlement agreement between Visa and Morgan Stanley] under the new criteria for assessment. [details of the terms of the settlement agreement between Visa and Morgan Stanley].

(303) Therefore, the Rule was applied throughout the duration of the infringement, that is to say, until Morgan Stanley was finally admitted as a member of Visa Europe on 22 September 2006.

(304) Finally, Visa raised a number of arguments which are irrelevant to this case and therefore do not call for any particular reply from the Commission. Visa points out that the Commission does not deal with issuing, that it does not make a case of infringement in respect of acquiring in other member States and Contracting Parties to the EEA Agreement other than the United Kingdom and that it has not considered the position of Amex. The Commission's duty to ensure that the Treaty and the EEA Agreement are not infringed, in particular as regards Article 81 of the Treaty and Article 53 of the EEA Agreement, does not imply that it should also demonstrate that those provisions are not infringed in product and/or geographic markets other than that/those where the infringement occurred or with regard to other undertakings which were not involved in the infringement.

5.3.4. Compatibility of Visa's application of the Rule to Morgan Stanley under Article 81(1) of the Treaty/Article 53(1) of the EEA Agreement: conclusion

(305) In summary of the findings presented in Section 5.3 and taking into account the case law of the Community courts, it is concluded that the application of the Rule to Morgan Stanley infringes Article 81(1) of the Treaty/Article 53(1) of the EEA Agreement.

5.4. Effect on trade between Member States and between Contracting Parties to the EEA Agreement

(306) The Court has consistently held that, in order for an agreement or a practice to affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.[285] The effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive.[286]

(307) The application of the Rule:

(i) prevented Morgan Stanley – a bank incorporated and established in the United Kingdom – from acquiring Visa payment transactions in other Contracting parties to the EEA Agreement which it had considered entering[287], as Visa International By-Laws and the Membership Regulations of Visa Europe are applicable, inter alia, throughout the EEA;

(ii) prevented Morgan Stanley from acquiring transactions made at UK merchants not only with Visa and MasterCard cards issued in the United

[285] See e.g. Case 42/84, *Remia*, [1985] ECR 2545, recital 22.
[286] See e.g. Case 250/92, *Gøttrup-Klim v. Dansk Landbrugs Grovvareselskab*, [1994] ECR I-5641, recital 54.
[287] Footnote 193 above.

Kingdom (since, due to the practice in the United Kingdom of providing Visa and MasterCard acquiring services as a package[288], it was effectively prevented from both Visa and MasterCard acquiring) but also with Visa and MasterCard cards issued in other EU and EFTA Member States; and

(iii) prevented Morgan Stanley Bank from cross-border acquiring from the United Kingdom of Visa transactions at merchants' established in other EU and EFTA Member States. As explained in Section 4.2., paragraph (64), Visa rules permit acquirers with a principal base in one state within the Visa EU Region to provide acquiring services to merchants operating in other states in that Region, and Morgan Stanley's business plan contemplated such cross-border acquiring activities.

(308) In view of the foregoing, the application of the Rule to Morgan Stanley is capable of affecting trade within the EEA (including between EU and EFTA Member States, see paragraph (73) above). In the UK court proceedings related to this case,[289] Visa has accepted that "*its rules affect trade between Member States and thus fall within the jurisdiction of the EC competition rules*."[290]

6. APPLICATION OF ARTICLE 81(3) OF THE TREATY AND ARTICLE 53(3) OF THE EEA AGREEMENT

(309) Agreements between undertakings or decisions of associations of undertakings that are caught by Article 81(1) of the Treaty/Article 53(1) of the EEA Agreement may benefit from an exemption if they satisfy the four cumulative conditions set out in Article 81(3) of the Treaty/Article 53(3) of the EEA Agreement. The two positive conditions require that the agreement (i) contributes to improving the production or distribution of goods or to promoting technical or economic progress (ii) while allowing consumers a fair share of the resulting benefits, and the two negative conditions require that the agreement (iii) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and (iv) does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(310) According to Article 2 of Regulation (EC) No 1/2003, Visa bears the burden of proving that the conditions of Article 81 (3) of the Treaty are fulfilled.

6.1. First condition: No efficiency gains

(311) According to the Treaty[291], it is the restrictive agreement or decision of an association of undertakings that should contribute to improving the production and distribution of goods or to promoting technical and economic progress.

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[288] Section 5.3.1.2. above.

[289] See Section 3, recital (30), above.

[290] Witness statement of the Executive Vice President, General Counsel & Regulatory Affairs of Visa Europe, before the High Court of Justice of England and Wales, dated November 2000, p. 23, paragraph 87 (Commission file p. 1341).

[291] And according to "Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty", OJ C101, 27.04.2004, p. 97-118 (see Section 3.3. thereof).

(312) While the Commission does not dispute that Visa, as a system, reasonably generates efficiencies, the agreement/decision of an association of undertakings at stake in this decision is not the Visa system itself, but the Rule as it was applied to Morgan Stanley. That is, the issue is whether the provision set out both in Section 2.12(b) of Visa International By-Laws and paragraph 3 of Clause 5 of the Membership Regulations of Visa Europe Limited, as it was applied to Morgan Stanley, generates efficiencies which outweigh the anti-competitive effects.

(313) Visa should identify and determine the specific nature of the efficiencies generated by the Rule as applied to Morgan Stanley (that is to say, it should demonstrate a causal link between the application of the Rule and the efficiencies), and demonstrate how and when each claimed efficiency would have been achieved. In order to establish that the efficiencies generated outweigh their anticompetitive effects, it should establish the likelihood and magnitude of such efficiencies[292].

(314) Therefore, Visa's arguments concluding that Visa (as a system and as a whole) generates efficiencies[293] do not show that the first condition of Article 81(3) of the Treaty is fulfilled.

(315) The Commission has not found any indication that the Rule as it was applied to Morgan Stanley generated pro-competitive effects. The negative effects on the offer of acquiring services to merchants, innovation in the relevant market, and on Morgan Stanley itself, are therefore not outweighed by efficiencies.

(316) Visa considers that there are objective justifications for the exclusion of Morgan Stanley under Article 81 (1) of the Treaty. The main reason why, according to Visa, the Rule and its application to exclude Morgan Stanley were necessary is to prevent disloyal and unfair competition arising from free-riding by Morgan Stanley and others.

(317) Although this submission was not made by Visa in support of an argument under Article 81 (3) of the Treaty that exclusion of Morgan Stanley was necessary to generate efficiencies that outweigh and thereby justify the restriction of competition caused by such exclusion, the Commission considers that such an argument should be taken into account.

(318) In its argument that the Rule and its application to exclude Morgan Stanley were necessary, Visa mainly points to the risk of free-riding that would discourage existing Visa member banks from investing in the system and thereby frustrate innovation and efficiencies.

(319) This argument cannot be upheld. As the analysis set out in Section 5.3.3.3. above shows, there is no risk of free-riding. This is so, in particular, because the proprietary Visa information which Visa is concerned could be disclosed would either be of no relevance for Morgan Stanley's Discover network (either because of geographical specificity or the differences between three-party and four-party networks), or would, in any case, be made available to Morgan Stanley as a third-party service provider under a fronting arrangement (to which Visa claims to have no objections). As there is

[292] See paragraph 51 of the Guidelines on the application of Article 81 (3) EC.

[293] Paragraph 465, p.151, of Visa's submission of 3 December 2004 (Commission file p. 8591) and paragraph 247 p. 99 of Visa's submission of 20 May 2005 (Commission file p. 10265).

no risk of free-riding, there can be no efficiency gains generated by the agreement that would consist in preventing an alleged risk of free-riding detrimental to Visa.

(320) Therefore, it is concluded that the first condition of Article 81 (3) of the Treaty is not fulfilled.

6.2. Second condition: No fair share of efficiencies for consumers

(321) Since it is concluded that the first condition of Article 81 (3) of the Treaty is not fulfilled, the second condition of that paragraph Article cannot be fulfilled either: there are no efficiency gains a fair share of which could be passed-on to consumers.

6.3. Third condition: No indispensability

(322) According to the Commission Guidelines on the application of Article 81 (3) of the Treaty, for the third condition of Article 81 (3) to be met:

(i) the restrictive agreement must be reasonably necessary in order to achieve the efficiencies[294];

(ii) the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies[295]; and

(iii) the restrictive agreement and individual restrictions of competition must allow for more efficiencies to be generated than would likely have been the case in their absence[296].

(323) As mentioned above, the agreement/decision of an association of undertakings at stake in this decision is not Visa itself as a system but the Rule as it was applied to Morgan Stanley.

(324) The third condition of Article 81 (3) is not fulfilled for at least three reasons:

(i) First, "*a restriction is indispensable if its absence would eliminate or reduce the efficiencies that follow from the agreement*"[297]. As mentioned above[298], the efficiencies claimed by Visa are – according to Visa itself – generated by the Visa system in general and as a whole[299]. As there are no efficiencies that are specific[300] to the Rule as applied to Morgan Stanley, the Rule as applied to Morgan Stanley did not generate specific efficiencies. In simpler terms, as there are no efficiencies, the restriction is not indispensable to achieve efficiencies.

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294 Paragraph 73 of the Guidelines.

295 Idem.

296 Paragraph 74 of the Guidelines.

297 Paragraph 79 of the Guidelines (emphasis added).

298 See recital (314) above.

299 In addition to Visa's submission quoted in footnote 293 above, Visa submitted in a section of its observations of 3 December 2004 paragraph 465, p.151 (Commission file p. 8596) on the Statement of Objections entitled "(c) Third condition : indispensability", that:
"*Applying the first part of the two-fold test, regarding the indispensability of the agreement, there can be no doubt that:*
(a) the Visa system as a whole is reasonably necessary to achieve the efficiencies of the Visa network […]
(b) moreover, as the Visa system as a whole, by its very nature, produces substantial positive externalities, it should benefit from a presumption that it is reasonably necessary to attain them".

300 Paragraph 75 of the Guidelines: "*the first test in the third condition of Article 81 (3) requires that the efficiencies be specific to the agreement in question*"

(ii) Second, Visa finally admitted Morgan Stanley as a member on 22 September 2006, and there is no indication that the absence of the restriction since 22 September 2006 eliminated or significantly reduced any efficiency, or made it significantly less likely that it would materialise.

(iii) Third, as the analysis set out in Section 5.3.3.3.3. shows, even if Visa had been threatened by Morgan Stanley's admission as a Visa member (which is not the case as Morgan Stanley cannot compete with Visa Europe at the interbrand level of competition, as is set out in Section 5.3.2.1. above), there are less restrictive courses of action than a refusal of membership, namely confidentiality undertakings. Such approach was first adopted and successfully implemented by MasterCard. As explained in paragraph (299) above, Visa also decided to accept confidentiality undertakings when it finally accepted Morgan Stanley as a member.

(325) Moreover, Visa considers that the indispensability test should be applied leniently to the individual restriction because such restriction is only minor. The outright exclusion of a potential entrant as Morgan Stanley is not "*at most, a relatively minor restriction*", as Visa submits to support its claim that the indispensability rule should be applied leniently, but an appreciable restriction of competition, as demonstrated in Section 5.3.2. above.

6.4. Conclusion regarding the application of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement

(326) In conclusion, Visa has not demonstrated that the Rule fulfils the first three conditions of Article 81 (3) of the Treaty/Article 53(3) of the EEA Agreement. As the conditions for exemption are cumulative, it is not necessary to examine whether the fourth condition of Article 81 (3) of the Treaty/Article 53(3) of the EEA Agreement is met.

6.5. Addressees of the decision

(327) The Rule pursuant to which Morgan Stanley was refused membership of Visa Europe is a Rule of Visa International (Section 2.12 b of Visa International's By-Laws) and a rule of Visa Europe (Clause 5 of Visa Europe's Membership Regulations)[301].

(328) Visa Europe was incorporated on 1 July 2004[302].

(329) According to the articles of association of Visa Europe, "*The authority to regulate matters within the EU Region resides exclusively with the Board* [of Visa Europe]"[303]. In particular, "*The Board* [of Visa Europe] *shall decide, in its sole discretion* […] *whether to accept or reject any application for membership of* [Visa Europe]".[304].

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301 See paragraph (21) above.

302 See paragraph (11) and footnote 21 above.

303 Article 89.2 of the Articles of Association of Visa Europe (Commission file p. 7960).

304 Article 4.1 of the Articles of Association of Visa Europe (Commission file p. 7938). See also Article 88 of the Articles of Association of Visa Europe (Commission file p.7959) "[…] *the Board* [of Visa Europe] *shall be authorised to establish policies and promulgate rules and regulations regarding the administration (including, but not limited to, the* […] *conditions of membership* […] *of any organisation headquartered in the EU Region), operation and development of Visa's International's programmes within the EU Region* […]".

(330) Visa also pointed out that:

"*The International Board* [of Visa international] *has delegated to the* [Visa Europe] *Board* [i.e. the Board of Visa Europe] *the right to manage the activities of the Region and adopt additional rules for* [its] *Region on certain matters, provided they are consistent with the pertinent rules of Visa International. Broadly, the Regions have responsibility for all intra-regional matters, while the International Board has responsibility for matters with an inter-regional effect. Thus, three key areas in which the International Board has retained competence are international strategy, trademarks and systems interoperability.*

[…]

Following incorporation [of Visa Europe] *the Board of Visa Europe has the power to determine membership applications in its own right further to its Membership Regulations, albeit in accordance with the Visa International By-Laws.*"

(331) Visa stated on 3 December 2004, after the incorporation of Visa Europe, that "*the exclusion of* [Morgan Stanley] *under Rule 2.12 (b) is* […] *a decision of Visa International. At all material times the adoption of and implementation of the Rule were and remain decisions of Visa International. As of 1 July 2004 Visa Europe considers applications pursuant to Clause 5 of its Membership Regulations, but is still bound by the Visa International By-Laws and, specifically, the designation of "competitors" made thereunder.*"[305]

(332) Both Visa International and Visa Europe were parties to (and signed) the Settlement Agreement of 21 September 2006 pursuant to which Morgan Stanley should be granted membership of Visa Europe: [details of the terms of the settlement agreement between Visa and Morgan Stanley] both Visa International and Visa Europe are together referred to by the term "Visa".

(333) Visa submitted that Morgan Stanley's application for membership of Visa Europe on 18 September 2006 (in the context of the Settlement Agreement) was made by means of a form consisting of three documents: [information provided by Morgan Stanley when it applied for membership]. While the [information provided by Morgan Stanley when it applied for membership] was entered into and signed by Visa Europe, the [information provided by Morgan Stanley when it applied for membership] agreement was entered into and signed by Visa International.[306]

(334) Having regard to the above elements, the Commission analysed the issue of responsibility for the infringement by distinguishing the period until the incorporation of Visa Europe (a period during which it is clear that Visa International was solely responsible for the infringement, as Visa Europe did not exist) and the period running from the incorporation of Visa Europe until the admission of Morgan Stanley.

(335) Visa Europe's responsibility for refusing membership of Morgan Stanley for the period from 1 July 2004 (creation of Visa Europe) until 22 September 2006 (admission of Morgan Stanley) can be concluded from the following:

[305] Visa's submission of 3 December 2004, paragraph 199, p.56 (Commission file p. 8496).

[306] See the reply of Visa of 24 April 2007 to the Commission request for information of 3 April 2007 [information provided by Morgan Stanley when it applied for membership].

(i) refusal to admit Morgan Stanley – which continued after 1 July 2004 – was, according to the articles of association of Visa Europe, within the authority and discretion of the Board of Visa Europe;

(ii) Visa Europe is a party to the Settlement Agreement which provides that membership of Visa Europe shall be granted to Morgan Stanley; and

(iii) the [information provided by Morgan Stanley when it applied for membership] submitted by Morgan Stanley as part of its application is an agreement between Visa Europe and Morgan Stanley.

(336) Visa International's joint responsibility for refusing membership of Morgan Stanley for the same period (in addition to the period from 22 March 2000 until 30 June 2004, for which it is responsible on its own) can be concluded from the following :

(i) the International By-Laws of Visa International are binding upon Visa Europe and the latter declared that it was specifically bound by the designation of "competitors" made thereunder;

(ii) since the International Board of Visa International had delegated the right to manage the activities of the Region to the Visa Europe Board, and since Visa Europe has to comply with the By-Laws and Operating Regulation of Visa International and with the decisions taken thereunder, Visa International could have decided to release Visa Europe from its obligation to abide by the designation of Morgan Stanley as a competitor (see paragraph (331) above);

(iii) Visa International was a party to the Settlement Agreement which provides that membership of Visa Europe shall be granted to Morgan Stanley; and

(iv) as part of the application which it had to submit to become a member of Visa Europe, Morgan Stanley had to conclude a [information provided by Morgan Stanley when it applied for membership] with Visa International.

(337) Visa Europe cannot, and does not, claim that the decision to refuse membership of Morgan Stanley had been imposed on it by Visa International with the effect that Visa Europe should not be held liable for such refusal. Visa Europe has the duty to comply with Article 81 of the Treaty and Article 53 of the EEA Agreement in spite of any conflicting decision of, or any other form of authority exerted by Visa International. Visa Europe does not provide evidence that it attempted to comply with Article 81 of the Treaty and Article 53 of the EEA Agreement by admitting Morgan Stanley, or of pressure exerted by Visa International on Visa Europe to the effect that the latter refused membership of Morgan Stanley against its own will.

(338) In view of the above, it is concluded that:

(i) until 30 June 2004 (incorporation of Visa Europe the day after) Visa International infringed Article 81 of the Treaty and Article 53 of the EEA Agreement;

(ii) during the period from 1 July 2004 until 22 September 2006 (admission of Morgan Stanley) Visa Europe and Visa International together jointly infringed Article 81 of the Treaty and Article 53 of the EEA Agreement.

7. LEGITIMATE INTEREST

(339) While the infringement to which this decision relates has been terminated, it is necessary to adopt a decision for the following reasons:

(i) Visa continues to deny that their behaviour was contrary to Article 81(1);

(ii) it is important for the proper functioning of the single market for payments that anti-competitive practices committed by market players are not tolerated;

(iii) As explained in section 8 below, the Commission has the power to impose fines in the present case and wishes to do so. It is established case law that the express power to impose fines necessarily entails a power to find an infringement (see *GVL v Commission*[307], paragraph 23, quoted in paragraph 36 of the judgment in *Sumitomo*[308]), and that the Commission's power to impose fines is in no way affected by the fact that the conduct constituting the infringement has ceased (see *ACF Chemiefarma*[309], paragraph 175, quoted in paragraph 37 of *Sumitomo*).

8. FINES

(340) Under Article 23 (2) of Regulation (EC) No 1/2003, the Commission may, by decision, impose fines upon undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 81 of the Treaty. For each undertaking or association of undertakings participating in the infringement, the fine must not exceed 10 % of its total turnover in the preceding business year.

8.1. The Commission can impose fines

(341) The Commission can impose fines in this case as:

(i) the infringement terminated on 22 September 2006 only, that is to say, within the limitation period specified in Article 1 of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition [310] [311]and

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307 Case 7/82 *GVL v. Commission*, [1983] ECR p.483.

308 Joined Cases T-22/02, *Sumitomo Chemicals Co. Ltd. and others v. Commission*, [2005] ECR p. 4065.

309 Case 41/69 *ACF Chemiefarma NV vs. Commission*, [1970] ECR p.661.

310 OJ L 319, 29.11.1974, p. 1-3

311 Therefore, the present case is quite different from the *Sumitomo* case where the Commission was precluded from imposing fines because the infringement had ceased five years before the Commission initiated the procedure and where the Court of First Instance annulled the decision on the ground that the Commission failed to consider in its decision whether it had a legitimate interest in adopting the decision.
In the present case, contrary to that in *Sumitomo*, the limitation period specified in Article 1 of Regulation No 2988/74 does not preclude the Commission from impose fines as the infringement terminated on 22 September 2006, i.e. *after* the Commission had sent a Statement of Objections (2 August 2006) and a letter of facts (6 July 2006).
(Joined Cases T-22/02, *Sumitomo Chemicals Co. Ltd. and others v. Commission*, [2005] ECR II p.2065; Case 7/82 *GVL vs. Commission* [1983] ECR p.483; and Case 41/69 *ACF Chemiefarma NV vs. Commission*, [1970] ECR p.661.)

(ii) immunity from fines terminated on the date of entry into force of Regulation (EC) No 1/2003[312]. In any case, Visa cannot sustain a claim of legitimate expectation of immunity from fines for the period after 2 August 2004 as the Commission clearly stated in its Statement of Objections of that date that it "*envisages issuing a decision* […] *imposing fines pursuant to Article 23(2)(a) of Regulation 1/2003*".

(342) According to Visa[313], the Commission cannot impose fines for the period after 1 May 2004 because it was the Commission's own delay in dealing with Visa's notification and Morgan Stanley's complaint which caused Visa's immunity from fines under Regulation No 17[314] to be removed.

(343) The Commission did however not incur in a delay in the investigation of this case. The Commission proceeded with its investigation of the case well before 1 May 2004, to prepare the Statement of Objections notified to Visa on 2 August 2004. This can be seen, among others, by the requests for information that were sent to Visa[315] and to merchants[316]. Moreover, Visa continued the infringement for more than 2 years after it received the Statement of Objections indicating the Commission's intention to impose fines. Therefore, Visa's argument does not stand.

8.2. Duration of the infringement

8.2.1. Starting date

(344) In March 2000, Morgan Stanley wrote to Visa twice. First, on 1 March 2000, Morgan Stanley wrote to Visa International, asking for Visa membership and requesting Visa to make it clear that Morgan Stanley was not barred from Visa membership in the United Kingdom[317]. Second, on 13 March 2000, Morgan Stanley wrote to Visa UK requesting that a membership application form be sent to it[318].

(345) Although those two letters were left unanswered, Visa informed Morgan Stanley orally on 22 March 2000 that it was not eligible for Visa membership and that it refused to supply it with an application form[319]. Visa's refusal to admit MS therefore dates from 22 March 2000. On 18 August 2000, Visa confirmed to the Commission that Morgan Stanley was not eligible for Visa membership.[320]

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312 The Commission agrees with Visa that the Rule applied to Morgan Stanley was notified in early 1990. On the basis of that Rule, Morgan Stanley was refused membership of Visa Europe during more than six years (from 22 March 200 until 22 September 2006, as explained in paragraphs (344) to (349) below). Therefore, Visa benefits from immunity from fines for the period until 1 May 2004, i.e. the date of entry into force of Regulation (EC) No 1/2003.

313 Visa's submission of 3 December 2004, paragraph 39, p.14 (Commission file p. 8454).

314 "EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty", OJ L 13, 21.02.1962 p.204 – 211.

315 Requests for information were sent to Visa on 13 December 2002 (Commission file pp. 3073-3089), 14 March 2003 (Commission file pp. 3226-3240), 15 October 2003 (Commission file pp. 6067-6080) and 19 March 2004 (Commission file pp. 7155-7162).

316 The Commission sent requests for information to about 90 large and small UK merchants in 2003.

317 Letter annexed to the Complaint as part of Annex 10. See footnote 38 above.

318 Letter annexed to the Complaint as part of Annex 10. See footnote 38 above.

319 Telephone note of 22 March 2000, annexed to the Complaint as part of Annex 10. See footnote 38 above.

320 See footnote 38 above.

(346) Taking the above into account, the infringement should be considered to have started on 22 March 2000.

8.2.2. Date of termination

(347) On [date] 2006, the Visa International Board approved "Criteria for Assessment of risk of disloyal competition" under the Rule.[321].

(348) However, as explained in Sections 5.3.3.4. and 5.3.3.5. above, the exclusion of Morgan Stanley as a Visa member continued until 22 September 2006. Morgan Stanley's admission did not take place because Visa had reviewed Morgan Stanley's six year-old application for membership [details of the obligations contained in Visa's By-laws and Operating Regulations] [details of the date and terms of the settlement agreement between Visa and Morgan Stanley].

8.2.3. Conclusion on the duration of the infringement

(349) Although the infringement lasted six years and six months (from 22 March 2000[322] until the admission of Morgan Stanley as a Visa member on 22 September 2006), for the purpose of calculating the amount of the fine to be imposed, the period to be taken into account is the period between 2 August 2004 – the date of the Statement of Objections - and 22 September 2006.

8.3. The amount of the fine

(350) The methodology defined in the Information from the Commission "Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty" published on 14 January 1998[323] ("the 1998 Guidelines on Fines") is applicable in this case, as the Statement of Objections was notified on 2 August 2004[324].

(351) In fixing the amount of the fine to be imposed, regard should be had to all relevant circumstances and particularly the gravity and duration of the infringement. In addition, the fine imposed should reflect any aggravating or attenuating circumstances.

8.3.1. The basic amount of the fine

(352) The basic amount of the fine is determined according to the gravity and duration of the infringement.

8.3.1.1. Gravity

(353) In assessing the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market - when it can be measured - and the size of the relevant geographic market.

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321 See paragraph (23) and Section 5.3.3.5. above.

322 On 22 March 2000 Visa informed Morgan Stanley that it was not eligible for Visa membership and that it refused to supply it with an application form.

323 OJ C 9, 14.1.1998, p. 3-5.

324 According to recital 38 of the Commission "Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003", OJ C 210, 1.9.2006, p. 2-52 ("the 2006 Guidelines on fines"), the 2006 Guidelines on fines only apply to cases where a Statement of Objections is notified after 1 September 2006.

8.3.1.1.1. Nature of the infringement

(354) Visa refused to grant Morgan Stanley Bank International Limited membership of Visa Europe. By doing so, Visa prevented Morgan Stanley from acquiring merchants, (that is, contracting with merchants to allow them to accept cards) not only as regards Visa but – due to the fact that UK merchants demand that acquiring banks offer the Visa and MasterCard acquiring services as a package[325] – as regards credit and deferred debit/ charge cards altogether.

(355) This type of infringement of Article 81 of the Treaty does not fall into the category of infringements that are generally regarded as very serious (price cartels and market sharing quotas). As will be explained (in Section 8.3.1.1.2.) below, the infringement also does not fall into the category of minor infringements in view of its impact on the market and the size of the relevant geographic market.

(356) By its nature the infringement is therefore serious.

8.3.1.1.2. Actual impact on the market

(357) While it is not possible to precisely measure the actual impact on the market, the exclusion decision was implemented and it is therefore reasonably probable that there was a wide impact on the market.

(358) The Visa brand is the most popular credit and deferred debit/charge card brand in the United Kingdom, and exclusion of an undertaking from Visa membership prevents it from acquiring credit and deferred/charge card transactions in the UK acquiring market altogether (that is to say, with regard to all credit and deferred/charge card brands)[326].

(359) Therefore, by not admitting Morgan Stanley as a member of Visa Europe, Visa prevented Morgan Stanley from acquiring merchants, that is, contracting with merchants to allow them to accept credit and deferred debit/ charge cards altogether.

(360) As explained in Section 5.3.2. above:

(i) there is scope for further competition in the UK acquiring market[327];

(ii) the number of potential efficient acquirers in the United Kingdom is extremely small[328];

(iii) Morgan Stanley's entry earlier on could have had a positive impact both on the price and quality of acquiring services, and resulted in more efficient intra-brand competition[329];

(iv) Morgan Stanley is a particularly well qualified potential acquirer in view of its long standing experience (in merchant acquiring and processing in the USA, in the operation four-party networks through its MasterCard issuing activities in the United Kingdom, and in relation to Chip and PIN technology in the United Kingdom).

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325 Section 5.3.1.2., paragraphs 92 to 105, of the Decision.
326 See Section 5.3.1.2., paragraphs (94) to (106) above.
327 See Sections 5.3.2.2.4. to 5.3.2.2.6., paragraphs (175) to (189) above.
328 See Section 5.3.2.2.1. to 5.3.2.2.3., paragraphs (161) to (174) above.
329 See Section 5.3.2.3., paragraphs (190) to (198) above.

(361) Beyond preventing Morgan Stanley from providing acquiring services in the UK market, Visa's behaviour impeded the operation of the more efficient and competitive market for merchant acquiring that Morgan Stanley could have helped bring about.

8.3.1.1.3. Size of the relevant geographic market

(362) In the present case, as explained in paragraph (69), it is concluded that the relevant geographic market is limited to the territory of the United Kingdom. Given that the United Kingdom is a major market for payment cards, Visa's behaviour led to effects restrictive of competition in an important market for the acquiring of credit and deferred debit/charge cards in the European Economic Area[330].

8.3.1.1.4. Conclusion on gravity

(363) For the above reasons, the infringement should be qualified as serious. The starting amount of the fine to be imposed in this case should be EUR 8 500 000.

8.3.1.2. Increase for duration

(364) As stated in paragraph (349), the period to be taken into account for the purpose of calculating the amount of the fine to be imposed in this case is the period between 2 August 2004 - date of the Statement of Objections - and 22 September 2006, that is to say, a period of two years, one month and twenty days. The Commission's practice is to apply an increase of 10% per year. The starting amount of the fine should then be increased by 20% to take account of the duration.

8.3.1.3. Determination of the basic amount.

(365) Taking into account the above considerations, the basic amount of the fine to be imposed in this case should be EUR 10 200 000.

8.3.2. Aggravating and mitigating circumstances

(366) In this case there are no aggravating circumstances.

(367) Visa invokes[331] the following mitigating circumstances:

(i) the Rule as applied to Morgan Stanley is not a price-fixing cartel, market sharing provision or a black-listed clause. It is a minor infringement only because it has minimal effects on the market and on end-consumers;

(ii) the infringement was confined to the United Kingdom;

(iii) this is not a case where the Commission needs to make an example of Visa for deterrence purposes;

(iv) Visa's bona fide belief that the Rule was justified is an attenuating factor;

(v) Visa has always cooperated on a continuous basis with the Commission in relation to all competition law matters since 1977.

330 See the value of transactions, the number of merchants acquired and the growth in the number of merchants acquired in the UK, paragraphs (84) to (88) (Tables 2 to 4) above.

331 Reply of Visa of 3 December 2004 to the Statement of Objections, p.167-168, paragraph 512 (Commission file page 8607-8608).

(368) As a general preliminary remark with respect to the question of whether there are any mitigating circumstances, it should be recalled Visa did not terminate the infringement until 22 September 2006, that is to say, more than two years after the Statement of Objections of 2 August 2004.

(369) In addition, none of Visa's arguments stand scrutiny for the following reasons:

(i) in accordance with the 1998 Guidelines on Fines the fact the infringement in issue is not a price-fixing cartel or a market-sharing provision and therefore does not qualify as a very serious infringement cannot be considered as an attenuating circumstance. The Commission precisely took the nature of the infringement into account - among other factors - to qualify it as a serious infringement;

(ii) assuming that the effects of the infringement were strictly confined to the United Kingdom - which is questionable as Morgan Stanley is also interested in entering the domestic acquiring markets of several Contracting Parties to the EEA Agreement and in cross-border acquiring[332] - Visa's behaviour had a wide market impact as the United Kingdom is a major market for payment cards. In any case, the fact that an infringement is confined to the United Kingdom is not a mitigating circumstance but, again, part of the considerations that the Commission took into account to define the gravity of the infringement;

(iii) the alleged absence of a need to make an example of Visa for deterrence purposes is not a factor attributable to Visa which can be considered as a mitigating circumstance;

(iv) Visa's alleged bona fide belief that the Rule is justified cannot be considered as a mitigating circumstance as the subject matter of these proceedings is not the Rule in itself but its application to Morgan Stanley. Visa could also not claim that it believed in good faith that the application of the Rule to Morgan Stanley was justified as it continued to refuse to admit Morgan Stanley as a member more than two years after the Commission notified its Statement of Objections;

(v) Visa's cooperation with the Commission is not sufficient to be taken as a mitigating circumstance in a case where Visa did not terminate the infringement as soon as the Commission intervened.

8.3.3. Conclusion on the amount of the fine

(370) In the absence of aggravating or attenuating circumstances, the amount of the fine to be imposed in respect of the infringement identified in this Decision should be EUR 10 200 000,

[332] See paragraph (198) and footnotes 193 and 194 above.

HAS ADOPTED THIS DECISION:

Article 1

Visa International Service Association and Visa Europe Limited have infringed – the former during the period from 22 March 2000 to 22 September 2006, and the latter from its creation on 1 July 2004 until 22 September 2006 – Article 81 of the Treaty and Article 53 of the EEA Agreement by excluding Morgan Stanley Bank International Limited (formerly Morgan Stanley Dean Witter Bank Limited) from membership of Visa Europe.

Article 2

For the infringement referred to in Article 1 a fine of EUR 10 200 000 is imposed on Visa International Service Association and Visa Europe Limited, for which they are jointly and severally liable.

Article 3

The fine shall be paid in euro within three months of the date of notification of this Decision into the following bank account :

Account number: 001-3953713-69 of the European Commission held with
FORTIS BANK S.A.
Rue Montagne du Parc, 3
B-1000 BRUXELLES
Code IBAN: BE71 0013 9537 1369
Code SWIFT: GEBABEBB

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.50 percentage points.

Article 4

This Decision is addressed to:

Visa International Service Association
900 Metro Center Boulevard,
Foster City, CA 94404
United States

VISA Europe
Nr 1, Sheldon Square
London W26WH
United Kingdom

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels,

For the Commission

Neelie KROES
Member of the Commission