Commission fines Visa International and Visa Europe for not admitting Morgan Stanley Bank as a member

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1. Overview

On 3 October 2007 the Commission fined Visa International and Visa Europe (‘Visa’) €10.2 million for refusing to admit Morgan Stanley Bank (2) (a UK bank) as a member of Visa Europe for more than six years, from March 2000 to September 2006 (3). The Commission took the view that Visa’s behaviour constituted a serious infringement of Article 81 of the EC Treaty and Article 53 of the EEA Agreement.

The case was initiated following a complaint submitted by Morgan Stanley in April 2000. In 1999, Morgan Stanley incorporated its bank in the UK and in 2000 the Morgan Stanley Bank sought to become a member of the Visa organisation, which Visa refused.

As a reason for refusing the membership of Morgan Stanley Bank, Visa relied on an internal rule whereby it would not accept as a member any applicant deemed by the board of directors to be a competitor of Visa (‘the Rule’).

At the time of the infringement, the Morgan Stanley group owned the Discover card network in the US (4). However, Discover was not present on the EU market. Until Visa finally admitted Morgan Stanley Bank as a member, the card operations of Morgan Stanley in the EU were confined to issuing MasterCard cards in the UK.

In August 2004 the Commission sent a Statement of Objections to Visa, setting out the findings of its investigation. In December 2004 and July 2006 the Commission services informed Visa about certain new facts in the Commission file, and about the manner in which the Commission intended to use those elements.

The Commission’s investigation showed that Morgan Stanley was not a competitor of Visa in the EU because it had no payment card network in the EU and — given the high entry barriers to the networks market — there was no realistic possibility that Discover, Morgan Stanley’s US card network, would expand to the EU. The investigation also showed that retailers expect banks to offer card acceptance contracts as a package, including both Visa and MasterCard. Therefore, Visa’s refusal to admit Morgan Stanley as a member restricted competition not only in the provision of Visa card acceptance services, but also as regards card acceptance of other brands. In the UK, the market for providing merchants with card acceptance capabilities (the so-called ‘acquiring’ market) is highly concentrated and there is scope for further competition, which Morgan Stanley could have helped bring about.

Visa finally concluded a settlement agreement with Morgan Stanley in September 2006, and admitted it as a Visa member. As a consequence, Morgan Stanley withdrew its complaint with the Commission.

Although the complaint was withdrawn and the infringement ceased, the Commission decided to impose a fine as Morgan Stanley was excluded from the UK acquiring market for six and a half years — including more than two years after the Commission had sent a Statement of Objections to Visa.

In the Decision, the focus is neither on the Rule in isolation nor on the exclusion of Morgan Stanley as such. The Commission’s finding of anticompetitive behaviour relates to the Rule as it was applied to Morgan Stanley.

Beyond affecting an individual operator in the market, the importance of the case relates to the facts that (i) the Visa Rule applies throughout the EU; (ii) merchant acquiring is an economically significant activity that remains compartment-
talised along national borders and is character-
ised by weak competition; and (iii) new entrants
in the acquiring market are scarce, particularly
those with pan-European potential like Morgan
Stanley.

2. The relevant market
In the area of payment cards, a difference can be
made between:

— a market for network services, in which card
networks (such as Visa or MasterCard) provide
services to individual financial institutions;

— an ‘issuing market’ in which card issuers com-
pete with each other to issue cards and provide
card-related services to individuals; and

— an ‘acquiring market’ in which banks provide
merchants with the services necessary for the
merchant to accept cards.

The Decision focuses on the downstream acquir-
ing market only, where the restrictive effects on
competition were appreciable. For the purposes of
the Decision, the relevant product market is the
market for the provision of credit and deferred
debit/charge card acquiring services to mer-
chants.

Cash and cheques are outside the relevant market
as the product characteristics of services provided
to merchants for the acceptance of payment cards
are different from those for the acceptance of cash
and cheques.

Debit cards are also outside the relevant market.
From a merchant’s perspective, accepting credit
and deferred debit cards (also called ‘charge’
cards, where the customer must typically pay the
outstanding amount at the end of the month) is
significantly more expensive than accepting debit
cards. Also, debit cards are not effective substitutes
for credit and deferred debit/charge cards. While
customers value the credit function of credit cards
and expect to be able to pay with credit cards or
debit cards indifferently, retailers would not switch
from accepting one type of card to the other upon
an increase in the respective merchant service
charges (\(^5\)); they prefer accepting credit cards in
addition to debit cards rather than running the
risk of missing a sale.

In this case, it was unnecessary to further deter-
mine:

— whether deferred debit/charge cards constitute
a market of their own or whether they form one
market only together with credit cards. Given
that in the United Kingdom the number of
defered debit/charge cards and their transac-
tion volume and value are minimal compared
to those of credit cards, any restriction of com-
petition affecting credit cards that was appreci-
able would remain so in a market comprising
both credit and charge cards rather than credit
cards only;

— whether the market should be limited to cer-
tain 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 — because in the context of
a narrower market (e.g. for Visa cards) the
Rule — as applied to Morgan Stanley — would
be all the more restrictive of competition.

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 would still be appreci-
able in that broader market (\(^6\)).

As regards the relevant geographic market, the
Commission took the view that the conditions of
competition in the acquiring markets are not yet
sufficiently homogeneous between the different
EEA Member States to conclude that the market
is wider than national. The relevant geographic
market was therefore limited to the UK.

3. Lack of realistic possibility of inter-
brand competition and exclusion of
an efficient potential acquirer

The Decision establishes that Visa’s behaviour
can be regarded either as a decision of an associa-
tion of undertakings or as an agreement between
undertakings caught by Article 81(1) of the Treaty,
as Morgan Stanley was prevented by Visa from
competing in the UK credit and deferred debit/
charge card acquiring market and such behaviour
of Visa had potential anticompetitive effects in
that market.

\(^5\) Merchant service charges (MSCs) are the fees merchants
pay to their acquiring banks for the services provided by
the banks.

\(^6\) In the UK, credit and deferred debit/charge cards repre-
sent 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 pay-
ments (i.e. €196 billion out of a total of €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, and Commission case file).
More specifically, the Decision demonstrates that

(i) Morgan Stanley was not a competitor of Visa in the EU because it had no payment card network in the EU and it could not realistically enter as a card network in Europe by expanding its Discover system from North America to Europe. This is due to the existence of high entry barriers: network effects are very important in card systems, making it extremely difficult to introduce a successful system unless entry occurs from the start at a very large scale and heavy investments are made in order to reach that necessary minimum scale.

(ii) Exclusion from Visa membership results in Morgan Stanley’s exclusion from the UK acquiring market altogether. Beyond the fact that Visa has market power because its transactions represent 60% of the market, the Decision found that retailers expect banks to offer card acceptance contracts as a package including both Visa and MasterCard. Therefore, Visa’s refusal to admit Morgan Stanley as a member prevented Morgan Stanley from providing services to merchants not only as regards Visa transactions, but also as regards other payment cards transactions. That is, there is no demand for the supply of only MasterCard (or only Visa) card acquiring in the UK, and Morgan Stanley cannot therefore offer acquiring contracts for MasterCard only as it would not be commercially practicable.

(iii) The exclusion of Morgan Stanley from Visa membership and therefore from the merchant acquiring market in the UK had the result of depriving consumers of an additional efficient supplier of acquiring services. In the UK, the market for providing merchants with card acceptance capabilities (the ‘acquiring’ market) is highly concentrated and there is scope for further competition.

(iv) Morgan Stanley had the intention to enter the acquiring market (inter alia, it prepared detailed strategic and implementation plans for European merchant acquiring market entry). Within the very narrow circle of potential entrants, Morgan Stanley was one of the few operators to actually have envisaged entry, and had the necessary qualifications to operate efficiently on the market. Consequently, its exclusion had appreciable restrictive effects on competition, as Morgan Stanley’s market entry could be reasonably expected to have contributed to more efficient intra-brand competition in the UK, and have positive effects on prices and the quality of acquiring services.

4. The application of the Rule to Morgan Stanley was not necessary for (or directly related to) the proper functioning of the Visa system

The application of the Rule to Morgan Stanley would not be caught by 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 payment card network. The Decision, after a detailed analysis, concludes that it is not.

First, the Rule was applied by Visa in an incoherent manner. Visa admitted as members Citigroup (that operates the proprietary Diners Club network) and several shareholders of JCB Co. Ltd, a Japanese credit card company.

Second, Visa’s claims regarding the need to avoid ‘free-riding’ were not justified. Visa claimed that foreclosure of Morgan Stanley would not restrict competition as it would be indispensable to prevent free-riding of Morgan Stanley, consisting mainly in the use of Visa confidential information to the advantage of Morgan Stanley’s Discover card network. Visa argued that no other less restrictive means — such as the conclusion of confidentiality undertakings by Morgan Stanley vis-à-vis Visa — would be available.

Evidence shows, however, that the information claimed by Visa to be confidential is already accessible to Morgan Stanley (or would have been accessible to it if Morgan Stanley acted under a ‘froniting’ arrangement (7), to which Visa claims not to object), or is specific to the Visa EU Region and therefore not relevant for Discover in North America. Moreover, the Decision demonstrates that this claim is unfounded as Visa finally admitted Morgan Stanley on 22 September 2006 subject to confidentiality undertakings.

7 Acquiring banks often outsource certain elements of the acquiring service (usually related to transaction processing) to third-party providers. There are even 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 aspects 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 referred to as ‘froniting arrangements’.

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5. No exemption possible under Article 81(3)

The Commission did not find 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.

Moreover, as explained above, there is no risk of free-riding by Morgan Stanley that would discourage existing members from investing in the system and thereby frustrate innovation and efficiencies.

Visa’s admission of Morgan Stanley demonstrates that foreclosure of Morgan Stanley was not necessary and that admission was feasible in reality. It shows that there are less restrictive means of preventing a risk of free-riding (which, in addition, is not demonstrated in the case of Morgan Stanley) than outright refusal of membership, such as the conclusion of confidentiality undertakings.

6. The fine

The Commission imposed a fine of €10 200 000 on Visa International Service Association and Visa Europe Limited, for which they are jointly and severally liable. The infringement qualified as serious, in view of its nature (8), its actual impact on the market (9), and the size of the relevant geographic market (10). There were no aggravating or mitigating circumstances.

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(8) This type of infringement of Article 81 does not fall into the category of infringements that are generally regarded as very serious (price cartels and market sharing quotas).

(9) The Visa brand is the most popular credit and deferred debit/charge card brand in the UK, and by not admitting Morgan Stanley as a member of Visa Europe, Visa prevented Morgan Stanley from acquiring merchants so that they could accept credit and deferred debit/charge cards altogether (not just Visa cards). As explained in the Decision (i) there is scope for further competition in the UK acquiring market; (ii) the number of potential efficient acquirers in the UK is extremely small; (iii) Morgan Stanley is a particularly well qualified potential acquirer in view of its long-standing experience (in merchant acquiring and processing in the US, in the operation of four-party networks through its MasterCard issuing activities in the UK, and in relation to Chip and PIN technology in the UK); and (iv) Morgan Stanley’s entry could have had a positive impact on both the price and quality of acquiring services, and could have resulted in more efficient intra-brand competition. Beyond impeding the provision of acquiring services in the UK market by Morgan Stanley, Visa’s behaviour impeded the operation of the more efficient and competitive market for merchant acquiring that Morgan Stanley could have helped bring about.

(10) The relevant geographic market — the UK — is a major market for payment cards.