



EUROPEAN COMMISSION

Brussels, 8.12.2010
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COMMISSION DECISION

of 8.12.2010

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

(Case COMP/39.398 - Visa MIF)

(Only the English text is authentic)

(Text with EEA relevance)

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THE EUROPEAN COMMISSION,

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

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty¹, in particular Article 9(1) thereof,

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

Having expressed concerns in the Statement of Objections of 3 April 2009,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns²,

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

Having regard to the final report of the Hearing Officer of 26 November 2010,

WHEREAS:

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

2 OJ C 138, 28.5.2010, p. 34.

1. SUBJECT MATTER

- (1) This Decision is addressed to Visa Europe Limited ('Visa Europe') and concerns the setting of multilaterally agreed interchange fees (the 'MIFs') that apply to cross-border and certain domestic³ point of sale ('POS') transactions with VISA, VISA Electron and V PAY consumer immediate debit payment cards within the EEA by Visa Europe (the 'immediate debit MIFs').
- (2) In its Statement of Objections of 3 April 2009 (the 'Statement of Objections'), the Commission came to the provisional conclusion that Visa Europe had infringed Article 101 of the Treaty and Article 53 of the EEA Agreement when setting those MIFs.

2. THE PARTIES

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

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

- (4) On 6 March 2008 the Commission initiated proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003 and, on 3 April 2009, adopted a Statement of Objections which set out its competition concerns. The Statement of Objections constitutes a preliminary assessment for the purposes of Article 9(1) of Regulation (EC) No 1/2003.
- (5) On 15 June 2009, EuroCommerce, a retail, wholesale and international trade association, submitted a complaint pursuant to Article 7 of Regulation (EC) No 1/2003 against Visa Europe's MIFs.
- (6) On 26 April 2010, Visa Europe submitted commitments in respect of its immediate debit MIFs and certain other network rules (the 'Proposed Commitments').
- (7) On 28 May 2010 a notice was published in the *Official Journal of the European Union* pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the Proposed Commitments and inviting interested third parties to give their observations on the Proposed Commitments within one month following publication.

3 Currently, the countries where the immediate debit MIFs are set by Visa Europe and Visa Europe immediate debit cards are issued are Greece, Hungary, Iceland, Ireland, Italy, Luxembourg (pre-paid cards only), Malta, the Netherlands (pre-paid cards only), and Sweden.

- (8) On 23 July 2010 the Commission informed Visa Europe of the observations received from interested third parties following the publication of the notice. On 10 September 2010, Visa Europe submitted an amended proposal for commitments (the 'Revised Commitments').
- (9) By letter of 27 September 2010, the Commission informed EuroCommerce, in accordance with Article 7(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty,⁴ that the Revised Commitments appeared to address the Commission's competition concerns in respect of Visa Europe's immediate debit MIFs and that it took the preliminary view that there was not sufficient European Union interest to investigate further the complaint against the alleged infringement inasmuch Visa Europe's immediate debit card MIFs are concerned.
- (10) On 21 October 2010, EuroCommerce responded to the letter of 27 September 2010. The complainant essentially repeated the arguments that it had already made in the observations on the Proposed Commitments.
- (11) On 26 November 2010, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 26 November 2010, the Hearing Officer issued his final report.

4. PRELIMINARY ASSESSMENT

4.1. Relevant markets

4.1.1. Product market

- (12) In its Statement of Objections, in line with established practice⁵, the Commission distinguished an upstream “network market” and downstream “issuing” and “acquiring” markets.
- (13) The upstream network market is the market where payment card scheme operators compete to persuade financial institutions to join their payment card schemes and on which they provide services to such institutions in return for scheme fees.
- (14) Downstream, the financial institutions act as (i) acquirers for merchants, accepting card payments in exchange for merchant service charges (the 'MSCs'), which are

⁴ OJ L 123, 27.04.2004, p. 18.

⁵ Commission decision C(2007) 6474 of 19 December 2007 in Cases COMP/34.579 — MasterCard, COMP/36.518 — EuroCommerce, and COMP/38.580 — Commercial Cards recital 278; and Commission Decision 2002/914/EC of 24 July 2002 in Case COMP/29.373 – Visa International – Multilateral Interchange Fee, OJ L318, 22.11.2002, p. 17, recital 43.

typically transaction-based, and (ii) issuers of payment cards to cardholders who may be required to pay an annual cardholder fee. The services provided on the acquiring and issuing markets are complementary in nature but have distinct features and are provided to two different customer groups (merchants and cardholders). Although the respective demands of merchants and cardholders for payment card services are inter-related, the demand behaviour of the two distinct customer groups is significantly different.

- (15) The supply and demand side analyses of the acquiring and issuing markets showed that neither acquiring nor issuing of cards were sufficiently substitutable for any equivalent services for other means of payment, in particular cash, cheques, credit transfer or direct debit payments, to be considered part of the same market. The Commission left open whether acquiring and issuing markets should be further subdivided.
- (16) Therefore, in the Statement of Objections the Commission took the preliminary view that the relevant product market in these proceedings was the market for acquiring payment cards.

4.1.2. Geographic market

- (17) According to the preliminary assessment made in the Statement of Objections, the acquiring markets are still national in scope. That conclusion was based on the strong divergences in pricing of the acquiring services in different Contracting Parties to the EEA agreement, the considerable differences in the market structure and the fact that cross-border acquiring remains limited.

4.2. Position of the parties on the relevant markets

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

4.3. Practices raising concerns

- (19) In the Statement of Objections, the Commission took the preliminary view that Visa Europe, which is considered an association of undertakings, infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by setting the MIFs that apply to cross-border and certain domestic⁶ point of sale transactions with VISA, VISA Electron and V PAY consumer payment cards within the EEA.
- (20) Interchange fees are in effect paid by a merchant's bank (the 'acquirer') to a cardholder's bank (the 'issuer') for each transaction made at a merchant outlet with

6 See footnote 3.

a payment card. When a cardholder uses a payment card to buy goods or services from a merchant, the merchant in effect pays a MSC to its acquirer. The acquirer keeps part of the MSC (the acquirer margin), part is passed on to the issuer (the MIF) and a small part is paid to the scheme operator (scheme fees collected by Visa Europe). In practice, a large part of the MSC is determined by the MIF.

- (21) The Statement of Objections expressed a concern that the MIFs have as their object and they also have as their effect an appreciable restriction of competition in the acquiring markets to the detriment of merchants and, indirectly, their customers. The MIFs appeared to inflate the base on which acquirers set the MSCs by creating an important cost element common to all acquirers. According to the Commission's preliminary view, Visa Europe's MIFs are not objectively necessary. The restrictive effect in the acquiring markets is further reinforced by the effect of the MIFs on the network and issuing markets as well as by other network rules and practices, namely the Honour All Cards Rule (the 'HACR'), the No Discrimination Rule (the 'NDR'), blending⁷, and application of different MIFs to cross-border as opposed to domestic acquirers⁸. Furthermore, according to the Statement of Objections, the MIFs do not meet the requirements for an exception under Article 101(3) of the Treaty of producing efficiencies with a fair share of the resulting benefit being passed on to consumers.
- (22) The Statement of Objections was also addressed to Visa Inc. and Visa International Service Association (the 'Global Visa Entities') on 29 May 2009. The objections raised against the Global Visa Entities concern in particular the potential application of the Inter-Regional MIFs by default, that is to say,

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

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

inasmuch as those fees could apply to cross-border or domestic transactions with VISA consumer cards within EEA and their involvement in setting the HACR and the NDR.

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

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

5. PROPOSED COMMITMENTS

- (24) The key elements of the Proposed Commitments offered by Visa Europe on 26 April 2010 are as set out in recitals 25 to 28.
- (25) Visa Europe commits to cap its yearly weighted average cross-border MIFs applicable to transactions with its consumer immediate debit payment cards at 20 basis points (0.2%) two months following the notification to Visa Europe of the Commission decision rendering the Proposed Commitments binding pursuant to Article 9(1) of Council Regulation (EC) No 1/2003 (the 'commitment decision'). The cap will also apply separately in each of those Contracting Parties to the EEA Agreement for which Visa Europe directly sets specific domestic consumer immediate debit MIF rates and in those Contracting Parties to the EEA Agreement where the cross-border consumer immediate debit MIF rates apply in the absence of other MIFs.
- (26) In addition, Visa Europe commits to continue to implement and to further improve the transparency measures that were introduced by the Visa Europe Board in March 2009. In particular, Visa Europe commits:
- (a) to continue to operate the rule against blending the MSCs applicable to more than one payment card system or more than one

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type of Visa Europe cards and to require acquirers to itemise the MSCs according to different types of cards when invoicing.

- (b) to continue to require Visa Europe members to register all MIF rates and apply them to cross-border issued and cross-border acquired transactions;
 - (c) to publish all cross-border and domestic MIFs on its website in a way that identifies an applicable interchange rate for all types of transactions and to require acquirers to inform merchants of the publication;
 - (d) to ensure that commercial cards issued in the EEA are fully visibly identifiable and that all such cards can be electronically identified at POS terminals by the acquirer or merchant if the terminal has the necessary capability;
 - (e) not to make any changes to the HACR as it applies to transactions with its immediate debit cards. Visa Europe already has separate HACR for VISA, VISA Electron and V PAY cards, that is to say, merchants may freely choose to accept VISA and/or VISA Electron and/or V PAY cards. In addition, Visa Europe will require its acquirers to inform merchants that they are permitted to accept VISA and/or VISA Electron and/or V PAY cards and/or the competing schemes' cards; and
 - (f) to maintain its current position whereby merchants are permitted to have different acquirers for handling transactions with each type of payment card within the Visa Europe system and/or competing schemes.
- (27) Visa Europe will appoint a Monitoring Trustee to monitor Visa Europe's compliance with the commitments. Before appointment, the Commission will approve or reject the proposed Trustee.
- (28) The commitments were proposed for a period of four years from the date of notification of the commitment decision to Visa Europe.

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

- (29) In response to the publication on 28 May 2010 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, the Commission received thirteen observations on the Proposed Commitments from interested third parties. Overall, the main observations received related to the maximum weighted average level of the MIFs and the methodology used to calculate that level. However, the

respondents also made specific and in some cases technical comments concerning other Proposed Commitments.

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

6.1. Observations of MasterCard

- (31) MasterCard argued that the Proposed Commitments do not cover credit and deferred debit card MIFs and, therefore, maintain an unlevel playing field to the benefit of Visa Europe. In addition, MasterCard noted that some of the Proposed Commitments were not in line with MasterCard's own unilateral undertakings of the same nature submitted to the Commission on 1 April 2009 (the 'Unilateral Undertakings').

6.2. Assessment of MasterCard's observations

- (32) MasterCard's claim that there will not be a level playing field on account of the fact that the Proposed Commitments do not cover credit and deferred debit cards is unjustified. By definition, competition investigations involve a case-by-case analysis of the factual situation of the parties concerned and their behaviour, and competition decisions only apply to their addressees. It is therefore entirely natural that the Proposed Commitments are not identical to the Unilateral Undertakings. In substance, the same approach has been adopted in respect of the two card schemes except when there are grounds for differentiating between them. On the key point of the acceptable MIF level for consumer immediate debit card transactions under the Merchant Indifference Test⁹ (the 'MIT'), the Commission has adopted an identical approach to both schemes. Visa Europe did not offer commitments in relation to credit and deferred debit card MIFs. Furthermore, unlike the Unilateral Undertakings, the Proposed Commitments cover not only cross-border transactions but also domestic MIFs in nine Contracting Parties to the EEA Agreement. Nevertheless, as announced at the time of publication of the Notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 the Commission intends to continue its investigation of Visa Europe's credit and deferred debit card MIFs and will continue to apply the competition rules to all players in the sector in a consistent manner.

6.3. Other observations from the payment industry

- (33) The Commission received observations from five other payment institutions.
- (34) Four payment card schemes argued that (i) MIFs do not restrict competition, (ii) cash is not the right comparator as it does not provide a number of additional

9 The Merchant Indifference Test is a methodology originally developed in economic literature to assess efficient interchange fees. For a description of the methodology and its application in the present case, see recitals (57) to (68).

benefits that cards do provide, (iii) the MIT is based on a non-repeat customer and fails to appreciate that card payments increase sales for merchants, (iv) 0.2% is not the right level for immediate debit MIFs, and (v) the review clause provides for uncertainty as to what MIF level will finally be acceptable.

- (35) One member bank of Visa Europe welcomed the fact that a certain MIF appears to be acceptable for the Commission but expressed a desire for the calculation of the 0.2% cap to be made public and for the Commission to clarify its position on other MIFs as well.
- (36) Finally, a new entrant payment card scheme, which is not affiliated to Visa Europe's member banks, opposed the setting of a weighted average MIF cap and, more specifically, the cap of 0.2%, which it considers as unacceptably high for stakeholders. It also argued that aligning the cost of cards to the cost of cash lacks ambition as electronic payments should be more competitive than cash in its view. Most importantly, it voiced its concern that the international schemes apply rules preventing banks from co-badging¹⁰ their cards with other brands.

6.4. Assessment of the observations from the payment industry

- (37) As regards the claim that the Proposed Commitments address unjustified concerns and go too far, the role of the Commission in the context of Article 9 of Regulation (EC) No 1/2003 is confined to verifying that the Proposed and Revised Commitments address its concerns expressed in the Statement of Objections and that the parties have not offered less onerous commitments that also address those concerns adequately¹¹.
- (38) As regards the proportionality of the proposed maximum weighted average MIF level and the use of the MIT, this is assessed in Section 8.
- (39) As regards the review clause, it is necessary in order to ensure that the maximum weighted average MIF continues to correspond to the actual conditions on the markets. In any case the possibility to "*reopen the proceedings*" and review commitments is included in the text of Article 9(2) of Regulation (EC) No 1/2003. Furthermore, the final sentence of paragraph 5.3 of the Proposed Commitments

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

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

states that reopening proceedings pursuant to paragraphs 5.3(a) or 5.3(b) would be without prejudice to Visa Europe's right to be heard. The final sentence of paragraph 5.3 is a reflection of existing rights to be heard as recognised by European Union law, in particular Article 27 of Regulation (EC) No 1/2003. In this case, those rights to be heard relate in particular to the proceedings leading up to the adoption of a decision pursuant to Article 7 of Regulation (EC) No 1/2003 following the reopening of proceedings. The Proposed Commitments may not be interpreted as creating additional rights for Visa Europe.

- (40) Finally co-badging can be a helpful entry route for some payment card schemes, but may also have anti-competitive effects in some cases. There does not appear to be a strong enough justification to refuse the Proposed Commitments on those grounds.

6.5. Observations from the complainant and other merchants' representatives

- (41) The complainant, EuroCommerce, as well as some of its members and other retail associations, made seven submissions on the Proposed Commitments.
- (42) EuroCommerce, as well as other merchants' representatives, object to the use of the MIT for a number of reasons and argue that the cap of 0.2% is too high and non-transparent as to how it has been calculated. According to one respondent if it were applied in the United Kingdom, it would lead to an increase of debit MIFs by over 10%. One large merchant, however, welcomed the 0.2% cap for debit and called for its extension to all schemes.
- (43) In addition, merchants' representatives claimed that an ad valorem fee was not justified and that not all merchants would benefit equally. It was argued that immediate debit card payments would still be more expensive than cash for certain categories of merchants. Nonetheless, a number of merchants' representatives called for extension of the Proposed Commitments to also cover credit and deferred debit card MIFs. In addition, EuroCommerce complained that the Proposed Commitments would not bring real benefits to merchants as most Contracting Parties to the EEA Agreement where a large majority of immediate debit transactions occurs are not covered by the Proposed Commitments.
- (44) As regards the transparency measures, some merchants argued that the HACR should be abolished in particular for different card types within the VISA brand (commercial, pre-paid, magnetic stripe) and that the NDR preventing surcharging and discounting should be clarified. Some merchants complained that the Proposed Commitments did not remove all the barriers to cross-border acquiring (in particular that MIFs remain tied to the location of the merchant rather than that of the acquirer) and that acquirers continue to discourage merchants from having unblended fees. They also asked for publicity of the relevant rules adopted by Visa Europe in March 2009, the continuation of which form part of the Proposed Commitments, and for more transparency on the costs of fraud as well as on the scheme fees. Some merchants were also worried that the published MIFs might

not be easily found on the Visa Europe website. Finally, some merchants requested a periodic review of the cap (every 6 or 12 months).

6.6. Assessment of the observations from the complainant and other merchants' representatives

- (45) As regards the proportionality of the proposed maximum weighted average MIF level and the use of the MIT, this is assessed in Section 8.
- (46) The maximum weighted average MIF is proposed at an ad valorem level but Visa Europe will be free to set the individual MIF rates as fixed, ad valorem or a combination of the two or to set specific MIF rates for certain categories of merchants. Moreover, nothing prevents the merchants and their acquirers from having MSCs at fixed, ad valorem or combined levels. The Proposed Commitments ensure that overall merchants do not bear a cost that exceeds the weighted average MIF, but the Proposed Commitments do not determine the actual MSCs paid by individual merchants. This would be impractical and would interfere unnecessarily in the functioning of the market.
- (47) As concerns the limitation of the scope of the Proposed Commitments to immediate debit card MIFs, the investigation into credit and deferred debit card MIFs is still ongoing. As regards the alleged lack of significant benefits for merchants due to the fact that the Proposed Commitments do not cover domestic MIFs in all Contracting Parties to the EEA Agreement, in those countries where the domestic immediate debit MIFs are not set directly by Visa Europe but instead by its members, a significant number of National Competition Authorities has already initiated investigations. Furthermore, the Proposed Commitments are without prejudice to the right of the Commission to further investigate Visa Europe's MIFs for commercial card transactions.
- (48) In the Statement of Objections, the Commission identified the HACR and the NDR as rules that reinforce the restrictive effect of the MIFs, that is to say, not as possible infringements in themselves. In the context of commitments on immediate debit MIFs, it is not necessary to require the abolition of the HACR by Visa Europe. The Commission will be free to further investigate the HACR in isolation or in connection with other MIFs. With respect to the NDR, Article 52(3) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market¹² prohibits any limitation of discounting and surcharging unless a Member State opts out from the latter prohibition¹³.

¹² OJ L319, 5.12.2007, p.1.

¹³ *"The payment service provider shall not prevent the payee from requesting from the payer a charge or from offering him a reduction for the use of a given payment instrument. However, Member States may forbid or limit the right to request charges taking into account the need to encourage competition and promote the use of efficient payment instruments."*

- (49) In the Statement of Objections, the Commission was concerned that certain rules on cross-border acquiring reinforced the restrictive effect of the MIFs. The Commission's concern that certain cross-border acquirers could be foreclosed from competition with local acquirers due to different MIF rates applicable to the two groups has, however, been removed by the mandatory registration and application of domestic MIFs agreed by local acquirers. As regards the obligation for a cross-border acquirer to pay the MIF of the place of the transaction, the Commission has not investigated that point fully and reserves its right to investigate it further in the future.
- (50) As regards the merchants' call for availability of information on the costs of fraud and schemes fees, it is further explained in Section 8 that in accordance with the MIT, the MIF level should be set so that on average merchants are not penalised if they accept cards. On that basis, the identification of individual cost elements is not relevant as the Commission no longer looks at an issuer cost-based justification for MIFs. On the other hand, the cost of scheme fees is included in the calculation of the acquirer mark-up within the MIT and, therefore, the MIF which complies with the MIT takes account of the level of the scheme fees.
- (51) Finally, the review clause in the Proposed Commitments provides sufficient opportunity for review of the maximum weighted average MIF. A periodic review (other than compliance with the cap) is not feasible given the complexity of determining the maximum weighted average on the basis of the MIT.
- (52) In response to observations from merchants' representatives, Visa Europe offered to make it easy for merchants to find the MIF rates on its website by introducing a link to pages with the interchange fee information under the Business & Retailers menu of Visa Europe website homepage.

7. THE REVISED COMMITMENTS

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

8. PROPORTIONALITY OF THE REVISED COMMITMENTS

- (54) According to settled case law, the principle of proportionality requires that the measures adopted by institutions of the European Union must be suitable and not

exceed what is appropriate and necessary for attaining the objective pursued¹⁴. Although Article 9 of Regulation (EC) No 1/2003, unlike Article 7 of that Regulation, *"does not expressly refer to proportionality, the principle of proportionality, as a general principle of European Union law, is none the less a criterion for the lawfulness of any act of the institutions of the Union, including decisions taken by the Commission in its capacity of competition authority"*¹⁵. The *"application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must, however, take into consideration the interests of third parties."*¹⁶

- (55) The Revised Commitments are appropriate and necessary to address the concerns identified in the Statement of Objections without being disproportionate. In this respect, the Commission must evaluate the whole package of the Revised Commitments and not only its individual elements.
- (56) Certain elements of the proportionality of the Revised Commitments have already been examined indirectly in the assessment of the observations submitted by the complainant and other third parties in the market test (see Section 6). Recitals (57) to (68) verify the proportionality of the main commitment to reduce the weighted average immediate debit card MIFs set by Visa Europe to 0.2%.
- (57) When analysing the weighted average immediate debit card MIF cap in the Revised Commitments, the MIT, a methodology originally developed in economic literature¹⁷ to assess efficient interchange fees, was applied.
- (58) According to the MIT, interchange fees should be such that on average the MSCs do not exceed the transactional benefits that merchants derive from accepting payment cards. Such transactional benefits are the direct benefits of a card payment for a merchant relative to alternative payments, in particular cash. Cash is legal tender and the most common alternative to payments with immediate debit cards that involves no MIF.

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

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

16 *Ibidem*, paragraph 41.

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

- (59) Transactional benefits of card payments compared to an alternative payment instrument have to be quantified and measured in monetary terms. The lower the costs of a given payment instrument (for example, costs of transaction time or fraud), the higher are its transactional benefits. The MIT-compliant MSC should not exceed the level of the measured transactional benefits. In order to compute the MIF compliant with the MIT the average acquirer margin and the scheme fees paid by the acquirer are deducted from the MIT-compliant MSC (see recitals (65), (66) and (67) for more details). For instance, an increase in scheme fees or fraud costs borne by the merchants either directly or through MSCs should lead to a lower MIF under the MIT.

- (60) Economic theory shows that under reasonable assumptions which appear to apply to the payment card markets, the MIFs which comply with the MIT benefit consumers¹⁸. To the extent that the MIFs are passed on to the cardholders by the issuers, they ensure that cardholders make efficient choices with respect to payment instruments. Furthermore, MIFs that comply with the MIT allow cardholders to take into account when choosing their payment instrument the cost savings and other benefits for merchants. The MIT compliant MIF can therefore be characterised as economically desirable.

- (61) The MIF level compatible with the MIT aims to generate benefits to merchants and subsequent purchasers and allows the promotion of efficient payment instruments. By ensuring that overall merchants are indifferent between accepting and handling card payments and other means of payments, such a MIF creates a level playing field for competition between alternative payment instruments because it prevents card schemes from exploiting the reluctance of merchants to turn down card payments as they are afraid that their competitors would steal their customers if they refuse to accept card payments.¹⁹

- (62) In this context, a MIF that is above the MIT-compliant level would not appear to create efficiencies that would outweigh the possibly anti-competitive effect of the MIFs and a fair share of the resulting benefits would not be passed on to consumers, that is to say, the merchants and their subsequent purchasers. Such MIFs have as a consequence that card payments become more expensive than cash payments for the merchants. The subsequent purchasers are not normally aware of the relative costs of cards and cash for the merchants. As a result, the use of a card rather than other means of payment would impose a hidden cost on all purchasers as merchants reflect the MSCs in their retail prices which tend to be the same for

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

19 See by analogy for instance recitals 504, 506, footnote 570 and Annex 2 § 24 of Commission Decision of 19 December 2007 in Cases COMP/34.579 — MasterCard, COMP/36.518 — EuroCommerce, COMP/38.580 — Commercial Cards (notified under document C(2007) 6474). The non-confidential version of the Decision is available on DG Competition's website under the case number COMP/34.579.

the card users and the users of other means of payment (surcharging is not allowed in all Contracting Parties to the EEA Agreement and where allowed only a minority of merchants surcharges in practice). A reduction of the MIF to the MIT-compliant level would therefore benefit merchants and their subsequent purchasers, both card users and non-card users, by reducing MSCs. In a competitive market, retailers would be expected to pass the benefits of reduced MIFs on to purchasers.

- (63) In this case, and for the reasons set out above, the proposed weighted average immediate debit card MIF cap of 0.2% has been assessed under the MIT.
- (64) That amount was calculated by comparing the merchants' costs of accepting payments in cash to those of accepting payments made by a payment card. The calculations of the MIT-compliant MIF are based on four studies published by the central banks of the Netherlands, Belgium and Sweden comparing the costs of cards with those of cash²⁰. Those calculations are without prejudice to a further calculation should new information regarding the costs of cards as compared to the costs of cash become available.
- (65) First, for each study the costs and benefits that immediate debit card payments and cash generate for the merchants were identified.
- (66) Secondly, for each study on the basis of that cost information, merchants' cost functions for each of the payment instruments, namely immediate debit cards and cash were computed. The merchants' cost function of a payment instrument identifies the level of the relevant costs that on average merchants have to bear in relation to the total number of transactions and the total value of the transactions handled.
- (67) Thirdly, for each study a unique cost figure was computed on the basis of the cost function for each payment instrument. For each study cost figures were derived for credit and deferred debit cards, immediate debit cards and cash. With respect to immediate debit cards, an acquirer mark-up (that is to say, the sum of the average acquirer margin and scheme fees) was also included.
- (68) By comparing the immediate debit MIF computed on the basis of the four studies, the maximum weighted average immediate debit MIF proposed by Visa Europe does not appear to be in excess of the requirements of the MIT. A higher average MIF rate would not give the merchants any additional benefit from the potential

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

efficiencies generated by the immediate debit MIFs. At the same time, the Revised Commitments only cap the MIF rates and do not prevent Visa Europe from introducing lower MIF rates. Therefore those commitments are necessary and appropriate.

- (69) The Revised Commitments should be made binding for a period of four years following notification of this Decision to Visa Europe. The duration envisaged by the Revised Commitments is long enough to allow for a significant change in market practices, while at the same time ensuring that the effects of the Revised Commitments on the market are re-assessed within a reasonable period of time. Current market trends, such as the migration to SEPA²¹ are expected to significantly change the conditions of competition in the EEA. Potential new entrants and technological innovations, such as the emergence or failure of online and mobile payments platforms can greatly contribute to this transformation. The likelihood of those developments may increase the tendency towards effective competition and downward pressure on MIFs in this market. In the light of this it appears that a period of four years is appropriate.

9. CONCLUSION

- (70) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes commitments, offered by the undertakings concerned to meet the Commission's concerns expressed in its preliminary assessment, binding upon them. Recital 13 of the Preamble to Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.

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

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- (71) In the light of the Revised Commitments offered, there are no longer grounds for action by the Commission inasmuch as Visa Europe's immediate debit card MIFs are concerned. Without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.
- (72) The Revised Commitments do not cover Visa Europe's MIFs for consumer credit and deferred debit card transactions, which will continue to be investigated by the Commission. Bringing proceedings to an end on the basis of the Revised Commitments is also without prejudice to the right of the Commission to initiate or continue proceedings against other Visa network rules, such as the HACR, the rules governing cross-border acquiring, Visa Europe's MIFs for commercial card transactions, or the Inter-Regional MIFs.
- (73) The Commitments have been offered solely by Visa Europe. Consequently, the current antitrust investigation against the other parties to the proceedings being Visa Inc. and Visa International Service Association (see recital (22)) will remain open pending further assessment,

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

It is hereby concluded that there are no longer grounds for action in this case as regards Visa Europe Limited's consumer immediate debit card multilaterally agreed interchange fees.

Article 3

This Decision is addressed to:

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

Done at Brussels, 8.12.2010

For the Commission

Joaquín ALMUNIA

Vice-President

NON-CONFIDENTIAL VERSION

ANNEX

THE REVISED COMMITMENTS