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EC Antitrust Law In Payment Card Systems

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Summary

Payment card industry has developed together with competition and cooperation. Competition in payment card systems takes place at both inter-system and intra-system levels. Certain operating rules and bylaws of four-party or open payment card systems have been faced with challenges from three-party or closed payment card systems, customers and competition authorities under antitrust law. Such rules and bylaws in some circumstances may be considered as agreements between financial institutions or decisions by payment card associations which appreciably affect trade and which have as their object or effect the prevention, restriction or distortion of competition. They consequently may fall within Article 81 EC, Section 1 of the Sherman Act or other similar antitrust rules.

However, the four-party payment card systems like Visa and MasterCard are associations organized as cooperative joint ventures whose members are financial institutions. Some cooperative behaviours are necessary and desirable to achieve efficiencies with network effects. They need to be standardized by operating rules and bylaws of associations. Therefore, the rules and bylaws deemed to be anti-competitive should be examined under the rule of reason. Certain rules and bylaws fall outside antitrust provisions because their benefits outweigh their anti-competitive effects or their harms to end-users, both cardholders and merchants. Others fall within and are forbidden because they exceed the permitted limit.

Case law relating to the application of antitrust rules to ubiquitous payment card systems in Europe together with ones in the US and practices in Australia are analyzed in order to have a detailed look at this subject. They involved both price and non-price competition issues derived from the operating rules and bylaws of these open payment card systems such as the multilateral interchange fees, the no-discrimination rule, the exclusion and exclusivity rules, the honour all cards rule, etc. It is nevertheless difficult to determine whether particular rules and bylaws of an open payment card system are essential to its existence or efficiencies or whether their impact is anti-competitive. Indeed some rules and bylaws may have both consequences. The final judgments, decisions and practices in this field in Europe, the US or Australia may be similar or different because they depend on specific economic contexts. Generally, the demarcation between the legal behaviours and illegal ones in open payment card systems under the antitrust perspective is not clear. However, the competition authorities should consider the network effects of payment card systems and the trade-off of competitive effects in order to have a favourable attitude to some rules and bylaws, especially the ones seem to restrain intra-system competition. Therefore, the fact finding and fact evaluation play a decisive role in the application of antitrust law in payment card systems.

Preface

Competition is one of the principles of a market economy and is the incentive for innovation and development. However, in order to maximize profits certain actors in the economy often carry out anti-competitive behaviours which ultimately harm customers' benefits and violate competition law. Therefore, competition authorities have to control and eliminate such anti-competitive behaviours to preserve and develop the welfare of customers and competitiveness of economy.

Competition in payment card industry also follows that tendency. Antitrust litigation concerning this field was first raised in the 1970s in the US. At the moment, both American and European and other national competition authorities have been investigating and examining some antitrust issues in payment card systems. What are the antitrust issues in payment card systems? How are they considered and evaluated under antitrust rules? Are the operating rules and bylaws of open payment card systems anti-competitive? If so, are there any objective justifications for them? These questions together with the advice of Professor Lars Gorton at the beginning inspired me to write the thesis "EC Antitrust Law in Payment Card Systems" to complete the Master of European Affairs Programme- Law Section at Faculty of Law, Lund University, Sweden. The main content of this thesis also tries to describe, analyze and explain the above questions.

To finish this Master thesis, besides the efforts of myself, I received a lot of support and encouragement from the professors, staff at the Faculty of Law, Lund University and from my friends in Lund, Sweden as well as my family, colleagues and friends in Vietnam. I would like to express my sincere gratitude to them. Especially, I am very grateful to Jean Monnet Professor Carl Michael Quitzow, my supervisor for this thesis. I also thank Associate Professor Hans Henrik Lidgard together with the professors and lecturers of the Master of European Affairs programme in academic year 2002-2003 from whom I have learned much.

Knowing that nothing is absolutely perfect, I am solely responsible for any deficiency and shortcoming in the thesis. Any constructive comments are highly appreciated.

Finally, I hope that I would have opportunities to more deeply and comprehensively research this subject as well as other subjects relating to competition law in the near future.

Thanh Tu Nguyen

Lund, May 2003

Abbreviations

APRA: Australian Prudential Regulation Authority

ATM: Automated Teller Machine

CFI: Court of First Instance

CPP: Competitive Policy Program

EC: European Community/ European Community Treaty

ECJ: European Court of Justice

EEA: European Economic Area

EFTPOS: Electronic Funds Transfer Point Of Sale

EMU: European Monetary Union

EU: European Union

HAC: Honour All Cards

IRF: Interchange Reimbursement Fee

MIF: Multilateral Interchange Fee

NDR: No-Discrimination Rule

OFT: Office of Fair Trading

PIN: Personal Identification Number

POS: Point Of Sale

RBA: Reserve Bank of Australia

UK: United Kingdom

US: United States of America

1. Introduction

1.1. General

Payment systems are a vital constituent of the economic and financial infrastructure. They give rise to public policy issues in three main areas¹, one of which is competition policy, where, as with other significant components of the economic infrastructure, there is a public policy interest in ensuring that a competitive environment exists and that any competitive restriction and/or abuses are curbed, thereby contributing to the welfare of consumers and the competitiveness of the economy.

The EU payment systems in general and EU payment card systems in particular are integrating and developing progressively under the influence of freedom to provide services, free movement of capital and payments, globalization, technological advance, and ongoing market liberalization. Integration and development are resulting in increased levels of competition in many sectors of the EU economy; and competition in payment card systems inevitably faces with that tendency. Especially, with the establishment of the EMU together with the circulation of Euro, and the 5th enlargement of the EU in 2004, the competition in payment card systems is increasingly more severe. Besides the increasingly important role in the economic life and the pro-competitive rules and agreements of payment card systems, there are many anti-competitive effects and behaviours in need of greater vigilance in the application and enforcement of EC antitrust law in payment card systems. In 2001 and 2002, the European Commission adopted two decisions under Article 81 EC with regard to international payment cards in the *Visa International* and the *Visa International-Multilateral Interchange Fee* cases². Furthermore, the European Commission has been examining the Visa membership provision in the context of case COMP/37.860. In the US, litigation relating to payment card systems under antitrust law appeared before the court in the 1970s. US Federal Courts are now proceeding a series of cases involving antitrust challenges to Visa and MasterCard payment card networks.³ Besides, the Reserve Bank of Australia issued the Reform of Credit Card Schemes in Australia in August 2002 in order to eliminate the competitive restriction on payment card systems, and the UK Office of Fair Trading on 11 February 2003 announced its proposal to adopt a decision that the multilateral interchange fee agreement between MasterCard's UK members infringed the Competition Act 1998.

¹ Three main areas are: (1) Structure of payment systems, (2) Efficiency and effectiveness of financial sector and (3) Competition policy. For further see Bank of England (2000), *Oversight of Payment Systems*, November 2000, p.7, <http://www.bankofengland.co.uk/fsr/ops.pdf> (18/3/2003 10:31:08 AM).

² European Commission, Decision 2001/782/EC of 9 August 2001, Case No COMP/29.373- *Visa International*, OJ L 293, 10/11/2001, p. 24-41 and Decision 2002/914/EC of 24 July 2002, Case No COMP/29.373- *Visa International-Multilateral Interchange Fee*, OJ L 318, 22/11/2002, p. 17-36.

³ Wildfang, K. C. (2002), The Credit Card Cases, *The National Law Journal*, November 11, 2002 edition, reprinted at <http://www.rkmc.com/article.asp?articleId=208> (18/1/2003 12:58:41).

Therefore, competition in payment card systems with the tendency of increasing use of payment cards, especially in the era of e-commerce and knowledge-based economy⁴, is an area on which competition authorities in the world including the European Commission are currently concentrating their attention. There are many controversial opinions and arguments for and against the application of antitrust rules to payment card systems in some issues. They raise several problematic aspects for competition policy. In particular it requires competition authorities to strike a balance in order to ensure that restrictions necessary for the provision of payment card services should be minimal and not allow financial operators to earn extra-profits.⁵ Thus, competition in payment card systems is a very interesting topic both under economic and legal perspectives which needs the comprehensive economic analyses and the flexibility and efficacy of antitrust law.

At the moment, there are many monographs more or less related to this subject not only in the EU but also in the US, Australia and other countries. However, they mainly focus on competition in payment systems in general or on some aspects of payment card systems or under the economic perspective, not particularly and wholly on payment card systems and antitrust issues of payment card systems under the legal perspective.

1.2. Purpose

The thesis aims to research the EC antitrust law in payment card systems in comparison with the US and Australian antitrust rules concerned in order to have a specific look at this subject with two-fold purpose. The first is to describe and analyze the cooperation and competition characteristics of payment card systems under economic and antitrust law perspectives at two interrelated levels: inter-system (the network services level or competition among systems) and the intra-system (mainly the issuing and acquiring levels). The second purpose is to consider specifically the application of antitrust rules to open payment card systems concerning price competition issues such as the multilateral interchange fee, the no-discrimination rule and non-price competition issues like the access to network, the exclusion and exclusivity rules, the honour all cards rule and others. Two European Commission's decisions relating to Visa payment card association, case law of US Federal Courts and Australian practices are used to illustrate.

The thesis is divided into five parts as following:

Part 1: *Introduction*- generally introduces the thesis, purpose, method and delimitation;

⁴ According to Visa research, 92% of online payments are made with credit card, see Network Economics Consulting Group Pty Limited (2002), *Subsidies between and within Payment Mechanisms: Fact or Fiction*, Preparation for Visa, p.23, <http://www.necg.com.au/pappub/visa-subsidies-may02.pdf> (30/4/2003).

⁵ See Pons, J.F. (2002), *Competition in the Financial Services in Europe Today*, 3rd Annual Conference on Retail Banking in Europe, http://europa.eu.int/comm/competition/speeches/text/sp2002_011_en.pdf (1/1/2003).

Part 2: *Economics, Payment Card Systems and Antitrust Law*- considers the payment card network effects, the operation of systems, the cooperation and competition characteristics of network, legal issues under antitrust law relating to competition at inter-system and intra-system levels of payment card systems;

Part 3: *Price Competition Issues* and Part 4: *Non-Price Competition Issues*- These two parts aim at describing and analyzing the EC antitrust law and two European Commission's decisions in comparison with the US case law and Australian practices relating to competition in payment card systems;

Part 5: *Conclusion*- some conclusions and proposals are made to sum up the thesis.

1.3. Method

The methods used in this thesis combine both law and economics with descriptive, comparative, analytical, systematic methods and case law analysis. Two European Commission's decisions relating to Visa are principally discussed and compared with the US case law, Australian practices.

1.4. Delimitation

This thesis researches the EC antitrust law in payment card systems⁶ and focuses on the antitrust issues relating to general purpose payment cards of four-party (open) payment card systems. Therefore, most antitrust issues analyzed in this thesis are limited to and derived from the operating rules and bylaws of two biggest ubiquitous payment card associations, Visa and MasterCard, under Article 81 EC or Section 1 of the Sherman Act.

⁶ There are four rules in the EC competition law which may be applied in payment card systems: Antitrust (Article 81 & 82 EC), Mergers and acquisitions (Merger Regulation), State aid (Article 87-89 EC), and State monopoly (Article 31 EC) and public undertakings (Article 86 EC). The EC usage of "competition law" corresponds more or less to the US term "antitrust law". For further see Lidgard, H. H. (2002), *Competition Classics: Classic Materials & Cases on European Competition Law and Practices*, Lund, September 2002, p. 14-21 and Norberg, S. and Gyselen, L. (2002), *The European Commission and EC Competition Rules or A View from Competition DG*, Lecture at Faculty of Law, Lund University, 29 November 2002.

2. Economics, Payment Card Systems and Antitrust Law

2.1. Background

Money transmission is an indispensable part of everyday life. Money flows continually among individuals, businesses and governments in order to pay for goods or services or in the form of taxes and wages, for example. The overall process by which one end user transfers funds to another end user or the mechanisms by which such transfers are made are known as payment systems.⁷ In other words, a payment system means a fund transfer system that facilitates the circulation of money.⁸

The payment mechanism that consumers use to purchase goods and services has changed dramatically over last 100 years. At that time, almost all consumer transactions were in cash while business payments were in cash or cheque. In a relatively short period, especially since Diners Club introduced the modern plastic card in 1950 payment cards have become many consumers' preferred means of payment for travel, entertainment, retail purchases, and in some cases for bill payment.⁹ In the US, the percentage of households with credit and charge cards quadrupled from 16% in 1970 to 68% in 1998. And the share of consumer spending paid for with general purpose credit and charge cards has increased from less than 3% in 1975 to 18.5% in 1999.¹⁰ The card payment accounted for 18% in Sweden and 31% in the UK in 1997.¹¹ At the end of 2001 there were more than 500 million internationally branded payment cards in issue across Europe.¹² Payment cards are playing an essential role for the development of e-commerce, particularly the B2C (business-to-customer) commerce.

⁷ See Cruickshank, D. (2000), *Competition in UK Banking: A Report to the Chancellor of the Exchequer*, March 2000, ISBN: 0 11 560075 2, p. 53, available at (18/3/2003 12:54:39 PM) http://www.hm-treasury.gov.uk/Documents/Financial_Services/Banking/BankReview/fin_bank_reviewfinal.cfm and Bank of England (2000), *ibid.*, p. 4.

⁸ See definition of payment system at Section 7 of the Payment Systems (Regulation) Act 1998 of Australia, <http://scaleplus.law.gov.au/html/pasteact/2/3141/0/PA000110.htm> (22/4/2003 1:12:47 PM). For further see *Encyclopaedia of Banking Law*, London: Butterworth, 2002, ISBN 0 406 99810 8, D1, p. 1-364.

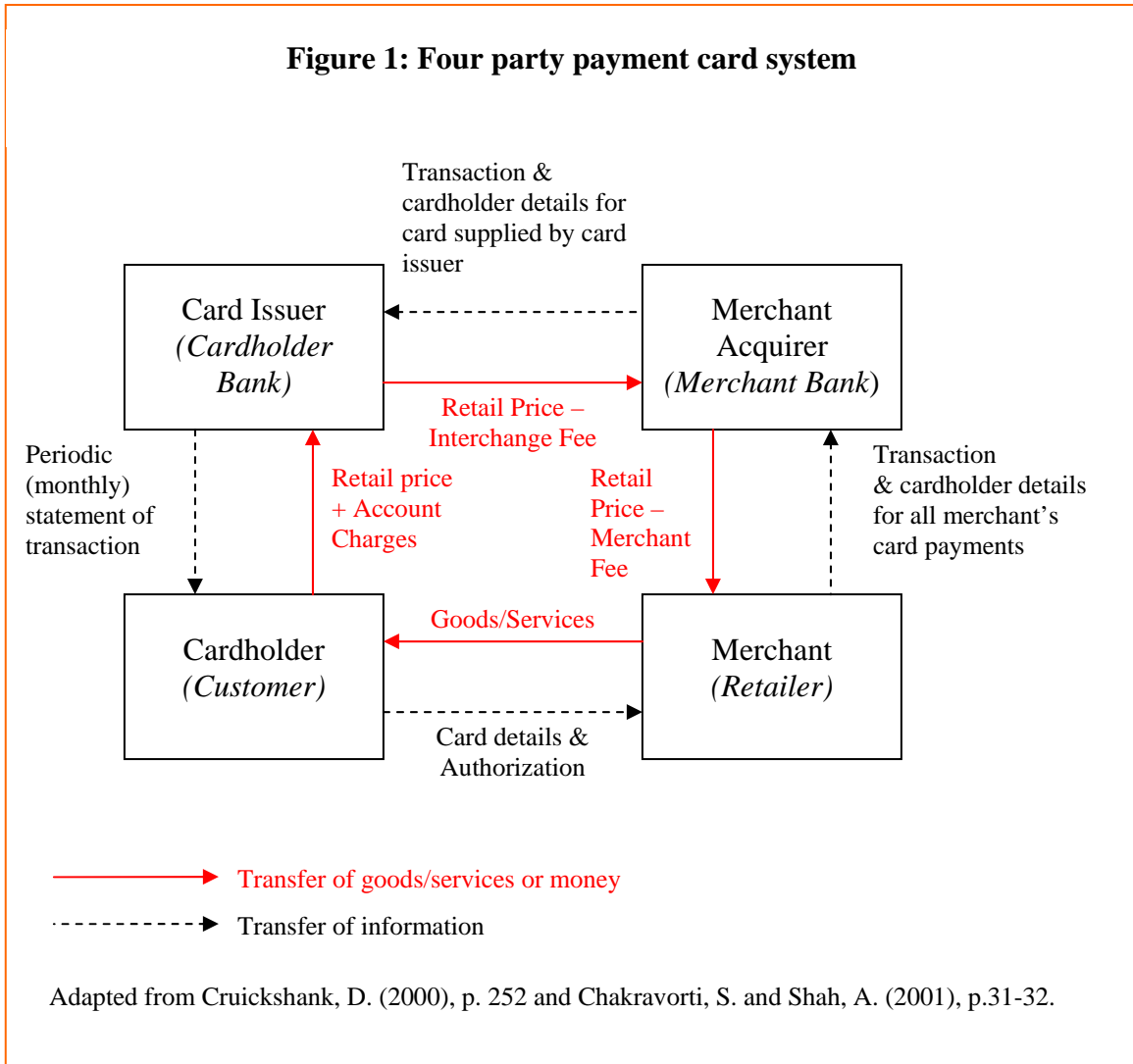
⁹ Sienkiewicz, S. (2001), *Credit Cards and Payment Efficiency*, Federal Reserve Bank of Philadelphia, August 2001, p.2, <http://www.phil.frb.org/pcc/workshops/workshop3.pdf> (1/1/2003).

¹⁰ See US Court of District, *US. v. Visa USA., Inc.*, 163 F.Supp.2d 322 (S.D.N.Y 2001), p. 334 quoted from Schmalensee Dir. at 123.

¹¹ See Cruickshank, D. (2000), *ibid.*, p. 61. For more details see Bank for International Settlements-Committee on Payment and Settlement Systems (2001a), *Statistics on Payment Systems in the Group of Ten Countries- Figures for 1999*, CPSS 44, Basel, Switzerland, ISBN 92 9131 618 0, <http://www.bis.org/publ/cpss44.pdf> (24/4/2003 12:50:44 PM).

¹² European Card Review, *European Payment Card Yearbook 2002-03*, Synopsis, p. 1, available at http://www.europeancardreview.com/pdfs/Synopsis_02-03.pdf (20/4/2003).

Generally, there are three types of payment cards distinguished from one another by the nature of the card-issuing firm: retailer cards, proprietary general purpose cards and bank cards.¹³ Regarding the general purpose payment cards which can be accepted at numerous, unrelated merchants, there are three main sub-types. These are:¹⁴



¹³ For further see Carlton, D.W. and Frankel, A.S. (1995b), The Antitrust Economics of Credit Card Networks, *Antitrust Law Journal*, Vol. 63 (1995), p. 645-646, <http://www.nextera.com/content/publications.html> (25/3/03 10:00:00).

¹⁴ For further see Cruickshank, D. (2000), *ibid.*, p. 54-55 & p. 248-249 and US District Court, E.D. New York, *In re Visa Check/MasterMoney Antitrust litigation*, No. 96-CV-5238 (JG), Feb. 22, 2000; US District Court, *US v. Visa USA, Inc.*, 163 F.Supp.2d 322 (S.D.N.Y 2001), p. 331.

Debit card: accesses money directly from a cardholder's checking or deposit account ("pay now" card);

Charge card: requires the cardholder to pay the card issuer in full for all transactions made in a fixed period, normally one month, at the end of that period ("deferred debit" card);

Credit card: permits cardholders to pay only a portion of the balance at the end of a fixed period, normally one month, and to take out longer term credit with the card issuer ("pay later" card).

A payment card transaction generally involves four main participants as follows¹⁵:

Cardholder (Customer): who makes a payment using the card;

Card issuer (Cardholder bank): who supplies the payment card to the cardholder (customer) and operates the account from which payment is made;

Merchant (Retailer): who exchanges goods or services for the customer's card details and consent to make the payment;

Merchant acquirer (Merchant bank): who reimburses the merchant and obtains fund from the card issuer.

A card payment is a service offered to two parties, the cardholder and the merchant: end-users, jointly by other two parties, the issuer and the acquirer. Figure 1 describes the flow of information and money in a card transaction, and the costs, benefits attached to that transaction.

Four-party payment card systems like Visa and MasterCard are open systems created by associations requiring inter-bank cooperation and funds transfers. The issuers and acquirers are members of these associations. The associations' networks permit transaction authorization and clearing house. These associations also engage in joint promotion, fraud control, and other collective activities.¹⁶ If the card issuers and the merchant acquirers are single entities, they found the three-party payment card systems, for example, American Express, Discover, Diner Club. They are closed systems. They just sign the licensed agreements with licensees if they feel necessary for their business strategy.¹⁷

¹⁵ For further see Cruickshank, D. (2000), *ibid.*, p. 251-252, HM Treasury (2000), *Competition in Payment Systems- A Consultation Document*, December 2000, p. 45-46, <http://194.200.85.88/docs/2000/pay.html> (1/1/2003) and Sienkiewicz, S. (2001), *ibid.*, p.5-7.

¹⁶ Carlton, D.W. and Frankel, A.S. (1995b), *ibid.*, p.646.

¹⁷ In Australia, for example, American Express is the sole merchant acquirer for the network and is the issuer of the vast majority of American Express-branded cards. In 1998, APM began to issue American Express-branded cards under a licensed card issuer agreement and became the first non-American Express issuer on the American Express network in Australia. Accordingly, in the American system, there are two basic kinds of American Express-branded card: Those issued by American Express and its affiliates ("proprietary cards") and those issued by parties under a license from American Express ("non-proprietary

2.2. Network Effects, Cooperation and Competition in Payment Card Systems

At its beginning, the payment card industry faces a “chicken and egg” problem which is highly typical of network industries¹⁸: merchants will not accept payment cards unless there are large numbers of consumers willing to use them and consumers are not willing to use payment cards unless large numbers of merchants are willing to accept them. This means that payment card systems contain in themselves the network effects that each user gains from the addition of further users. As more people use payment cards, more merchants are induced to add POS terminals to accept the payment cards, since allowing customers a convenient means of payment will increase their sales, and as more merchants permit card payment, the value to the customers of having a payment card increases too.¹⁹

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 the customers and businesses of network arise only gradually with the increasing use. However, once the network is well established, it can be extremely difficult, inefficient and time consuming to create new networks because the established network holds two important advantages. First, the end-users faced with a choice will usually prefer to use the larger network if other conditions are equal. Second, many merchants already own or use equipment connected to the existing network.²⁰

Due to network effects, cooperation must exist in payment card systems for the proper operation and development of the network. A key element of open payment card systems is that they require the cooperation of all four parties for a transaction to be completed. They can not work in isolation because members and end-users are affected by the operations of systems. The actions necessary for the transaction to occur require the acceptance of payment cards by the merchant, the consumer, and both the acquiring and the issuing banks. In essence, these are jointly produced transactions requiring satisfaction of joint demand among participating parties in that system.²¹

cards” or “network cards”). For further see American Express (2001), *Competition in Payments Systems-Submission to Reserve Bank of Australia*, p. 3-4, http://www.ara.com.au/gov_sub/ara_rba_submission.pdf (1/13/2003). In Vietnam, Vietcombank is the issuer and acquirer of American Express under the exclusive licensed agreement, see <http://vnexpress.net/Vietnam/Kinh-doanh/2003/03/3B9C5FB9/> (19/3/2003).

¹⁸ For details see Evans, D.S. (2002), *The Antitrust Economics of Two-sided Market*, AEI-Brookings Joint Center for Regulatory Studies, Related Publications 02-13, September 2002, <http://aei.brookings.org/admin/pdffiles/phpMt.pdf> (2/4/2003 12:39:40 PM) and Evans, D. S. (2001), Payment Card Business: Chickens and Eggs, and Other Conundrums, *Master Management Online*, Financial Times Online, http://www.ftmastering.com/mmo/mmo03_2.htm (2/4/2003 6:16:01 PM).

¹⁹ For further see McAndrews, J. (1997), Network Issues and Payment Systems, *Philadelphia Fed's Business Review*, November-December Issue 1997, and Australian Bankers' Association (2001), *ABA Supplementary Submission on the Network Effects and Setting of the Interchange Fees*, Submission to the Reserve Bank of Australia-Inquiry into the Credit Card Systems, September 2001, p. 1-6, http://www.rba.gov.au/PaymentsSystem/PaymentsPolicy/CreditCardSchemes/IIISubmissionsReceivedVolu1/G.4_aba_sub.pdf (24/4/2003 3:50:36).

²⁰ Cruickshank, D. (2000), *ibid*, p. 65.

²¹ Sienkiewicz, S. (2001), *ibid.*, p.6.

Cooperatives like Visa and MasterCard associations proved a particularly efficient business structure for creating products for a two-sided market with network effects. Their members could sign up cardholders and merchants in their geographic areas, and thereby enable the cooperative brands to get past the “chicken and egg” problem with minimum investment in promotion. They provided a scalable platform to create a global brand: as the payment cards became more popular, more banks and other financial institutions in more places wanted to join the association, in that way helping to create truly global brands.

Besides, the bank members' pursuit of self-interest also paid off handsomely for cardholders and merchants. Consumers got the benefits of large size - in terms of network effects and economies of scale - without being subjected to monopoly pricing. In many countries, the members of the associations compete fiercely among themselves on price, service, and features. For example, in the US more than 6,000 banks compete for cardholders; in New York City alone, individuals can obtain payment cards from more than 125 different issuers.²²

Therefore, the competition in payment cards industry tends to be severe and vigorous. It takes place at two interrelated levels. The first is between different payment systems/networks (different payment card schemes/networks and possibly means of payment other than cards), while the second is between financial institutions (usually banks) for card-related activities, essentially the issuing of cards to individuals and the acquiring of card payments from merchants. The former of these two types of competition is conventionally termed "inter-system/network market" or "upstream market", while the latter is conventionally termed "intra-system or downstream market". Competition among systems -where Visa, MasterCard, American Express, Discover, Diner Club, JCB, for example, compete- plays a major role in determining the overall quality of the brand, encompassing system-level investments in brand advertising, the creation of the new products and features and cost saving increases in the efficiency of the electronic backbone of the networks. In the intra-system, within each payment card system, bank members compete with each other to issue cards bearing that brand and/or to acquire merchants accepting that card. Competition among issuers and/or acquirers largely determines the prices that cardholders and merchants pay and the variety of card features and services that cardholders and/or merchants can obtain.

2.3. Application of Antitrust Law to Payment Card Systems

In payment card systems, like other network industries, some cooperation among competitors may be essential for efficiency in the network but such cooperation is precisely opposite to the way economists usually think about generating efficient behaviour. The logical underpinnings of antitrust law are based on the economist's belief

²² Evans, D. S. (2001), *ibid*.

in the desirability of competition.²³ From the traditional antitrust perspective, the proper functioning of the market is closely associated with a high level of rivalry among firms. Nevertheless, new kinds of industries such as payment card industry, are introducing the need for cooperation as a necessary and desirable instrument to achieve efficiencies.²⁴ If traditional antitrust concept continues to be applied to network industries, it will create the potential endless litigation and confusion together with uncertainty. The antitrust considerations about cooperative behaviours of and its application to payment card systems, therefore, have been changing by particular features of network industries.

Open payment card systems like Visa and MasterCard are organized as associations. All activities of the members and operations of the system must obey rules and bylaws which are agreed directly or indirectly by members and which stipulate the interoperability, standardization, cooperation of that system. Competition patterns in open payment card systems coexist with a generalized and desirable policy of coordination of behaviour.²⁵ As a result, such rules and bylaws can be considered as agreements between financial institutions or decisions by associations. They can be attacked under antitrust law if they appreciably affect trade and if they have as their object or effect the prevention, restriction or distortion of competition and harm customers' benefits. In this case, the operating rules and bylaws of these payment card systems may violate Article 81 EC²⁶ or Section 1 of the Sherman Act or others similar stipulations of antitrust law in other countries in the world. However, in some specific circumstances, the anti-competitive behaviour of a cooperative can be considered as an abuse of dominance²⁷ or collective dominance²⁸ and fall within Article 82 EC or Section 2 of the Sherman Act or other similar anti-monopoly rules.

In practice, despite the success of four-party payment card systems in recent times, Visa and MasterCard associations have faced with commercial and legal challenges from both

²³ Carlton, D.W., *The Economics of Cooperation and Competition in Electronic Services Network Industries*, , <http://www.nextera.com/content/publications.html> (25/3/03 10:00:00).

²⁴ See Ballell, T.R.D.L. (2002), Multilateral Agreements on Prices in Payment Systems: An Antitrust Approach, *World Competition* 25(2): 223-237, 2002, p.224-225.

²⁵ Ballell, T.R.D.L. (2002), *ibid.*, p.225-225.

²⁶ For application of Article 81 EC, four independent, cumulative criteria are required: an agreement (Agreement criterion) must be established, which must have an appreciably adverse impact on both trade between Member States (Trade criterion) and on the competitive climate (Competition criterion) in the European Community. Additionally, the agreement shall be made between undertakings (Undertaking criterion), see Lidgard, H.H (2002), *ibid.*, p. 49. Besides, the delineation of the sphere of application of EC antitrust law and that of a Member State's antitrust law depends on the scope of trade restraint, see ECJ, Case 22/78, *Hugin v Commission*, 31 May 1979, [1979] ECR 1869, paragraph 17. For further see Dassel, M. and Isaacs, S. (1985), *EEC Banking Law*, London: Lloyd's of London Press Ltd., ISBN 0-90743280-8, p. 2-4.

²⁷ The European Commission considered that SWIFT, a cooperative owned by over 2000 banks which manages an international telecommunications network specializing in the supply of data transmission and processing services to financial institutions around the world, infringed the Article 82 EC when it refused La Poste to access to the network. See European Commission, *XXVIIth Report on Competition Policy (1997)*, Brussels-Luxembourg, 1998, page 26, point 68 and *Case No IV/36.120 La Poste/SWIFT + GUF*, OJ C 335, 6/11/1997, p.3. Also see Usher, J.A. (2000), *The Law of Money and Financial Services in the European Community*, 2nd Edition, Oxford: Oxford University Press, ISBN 0-19-829877-3, p. 71-73.

²⁸ See Monti, G. (2001), The Scope of Collective Dominance under Article 82 EC, *Common Market Law Review*, 38: 131-157, 2001.

inside and outside. As growth has slowed, conflicts among members have increased. Meanwhile, the very success of these cooperatives has made them targets of envious closed system rivals and disgruntled customers. Rivals and customers have found that antitrust laws, which are designed to assume the worst about collaborations among firms, can be used to their own advantage. Besides, competition authorities in Europe, the US, Australia and many other countries have challenged the anti-competitive bylaws and operating rules concerning both price and non-price issues of these associations.

Regarding price competition issues, the multilateral interchange fees and no-discrimination rule have been investigated. Concerning non-price price issues, the access criteria to the network with the exclusion and exclusivity rules, the honour all cards rule together with other rules restricting freedom to providing payment card services of members have been scrutinized. There are many arguments and theories for or against the price and non-price competition issues in open payment card systems.

In order to analyze the anti-competitive behaviours of a payment card system for antitrust violation, the relevant market, market position and rule of reason should be considered.

The relevant market includes the relevant product market and the relevant geographic market. First, a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the product's characteristics, their price and their intended use.²⁹ Normally, the general purpose card network services market (for inter-system competition analysis) and the general purpose card market (for intra-system competition analysis) are the relevant product market for antitrust analysis of payment card systems. However, it depends on specific circumstances to narrow down or broaden that relevant product market.³⁰ Second, the relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area.³¹ In most antitrust cases concerning payment card systems, the relevant geographic market is national (the US, the UK, or Australia, for example) because the markets for issuing and acquiring payment cards are basically national markets. In some

²⁹ Regarding the EU, see European Commission Notice on the Definition of the Relevant Market for the Purpose of Community Competition Law, OJ C 372, 9/12/1997, p. 5-13, paragraph 7 and ECJ, Case 27/76, *United Brands Company v EC Commission*, 14 Feb 1978: [1978] ECR 207, paragraph 28 &29. Regarding the US, see US Supreme Court, *US v du Pont*, 351 U.S. 377, 404, 76 S.Ct. 994, 100 L.Ed. 1264 (1956) and US District Court, *US v Visa USA, Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001), p. 335.

³⁰ In *NaBanco v Visa USA*, 596 F.Supp.1231 (S.D. Fla. 1980) affid 779 F.2d 592 (11th Cir. 1986) and *South Trust Corporation v Plus System*, 71.219 (N.D. Ala. 1995) the relevant product market included all payment systems.

³¹ See European Commission Notice on the Definition of the Relevant Market for the Purpose of Community Competition Law, *ibid.* at paragraph 8, and European Commission, Decision 2001/782/EC, Case No COMP/29.373-*Visa International* at paragraph 44.

special circumstances such as in Europe, the relevant geographic market may be a Community-wide market.³²

On the subject of the market position, it may be shown by evidence of power to control prices or exclude competition.³³ In the US, Visa members accounted for approximately 47% of the dollar volume of credit and charge card transactions and MasterCard members for approximately 26%. American Express accounted for approximately 20% and Discover for approximately 6%.³⁴ In Europe, on the national markets for payment cards Visa holds, in terms of number of cards in circulation a market share varying between 4 % in the Netherlands and 69 % in Portugal. In terms of volume and value of Visa card transactions Visa's market share varies between respectively 2 % to 95 % and 2 % to 93 %. However, the market power of Visa should not only be measured in terms of market shares. Like MasterCard/Europay, Visa has important network economies: almost all banks issue Visa cards and Visa cards are accepted in millions of merchant outlets throughout the EU.³⁵ Therefore, Visa or MasterCard may have the market power in the general purpose card network services market in some specific market analysis, but an individual bank member rarely can have the market power in the general purpose card market. In the *US v Visa USA* case, the US District Court contended that Visa and MasterCard have the market power in the general purpose card network services market with significant barriers to entry and it is supported by US Department of Justice in the Brief of the United States, Final Version in the US Court of Appeal.³⁶ Nevertheless, the European Commission in two Decisions concerning Visa in 2001 and 2002 did not pay attention to it and asserted that: “[A]lthough there are no significant technical or legal/regulatory barriers for card systems to enter the Community payment card market and banks are free to join competing systems..., the Visa and Europay systems enjoy networking economies and represent sunk investments on the part of the banks so that it is unlikely that a major new system could be established. A very high proportion of banks in the Community is a member of one or both of those systems... In such circumstances it would be commercially difficult for any new product outside of those existing systems to establish itself in the market. However, the presence of other credit and charge card companies such as American Express, Diners Club and JCB shows that market entry is not impossible.”³⁷

If the operating rules or bylaws of payment card associations contain in themselves restraint of trade, they can be prohibited by Article 81(1) EC or Sherman Act or other similar competition rules. However, not all agreements that perceptibly restrict

³² For further see European Commission, Decision 2001/782/EC, Case No COMP/29.373-*Visa International* at paragraph 45-46 and US District Court, *US v Visa USA, Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001), p. 339-340.

³³ See US District Court, *US v Visa USA, Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001), p. 340.

³⁴ US District Court, *US v Visa USA, Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001), p. 341.

³⁵ European Commission, Decision 2002/914/EC, Case No COMP/29.373-*Visa International-MIF* at paragraph 54.

³⁶ US District Court, *US v Visa USA, Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001) and US Department of Justice, *The Brief of the United States*, Final Version (August 30, 2002) in the US Court of Appeal, 2nd Circuit on Appeal from *US v Visa USA, Inc.* case.

³⁷ European Commission, Case No COMP/29.373-*Visa International* at paragraph 52.

competition and affect trade are prohibited.³⁸ Although the Sherman Act, by its terms, prohibits every agreement “in restraint of trade”³⁹, it is clear that “[C]ongress intended to outlaw only unreasonable restraints”⁴⁰. For that reason, while some agreements are condemned unreasonable *per se*, others are analyzed under the rule of reason which seeks to “[d]etermine whether the restraints in the agreement are reasonable in the light of their actual effects on the market and their pro-competitive justification”⁴¹. In the European Community, by virtue of Article 81(3) EC, the prohibition in Article 81(1) EC may be declared inapplicable to any decision or category of decisions by associations of undertakings if they satisfy four conditions stipulated in Article 81(3) EC in which the their pro-competitive benefits outweigh the their anti-competitive effects or they satisfy the proportionality test.

Therefore, the rule of reason should be applied in all antitrust cases against four-party payment card systems like Visa, MasterCard because they are in fact considered as the cooperative joint ventures⁴² with horizontal collaboration between financial institutions. Nonetheless, while it is simple to state that the basic theoretical principle that antitrust intervention in joint ventures in general and four party payment card systems in particular is justified only when in the long run, the net present value of intervention to society is positive, in practice it can be difficult to discern whether the efficiency gains associated with a particular joint venture or certain of its practices like the by-laws and operating rules of Visa or MasterCard are outweighed by the reduction in competition.⁴³ As a result, the antitrust intervention into the payment card system should be done carefully, and the important roles and benefits of payment card systems must be considered. The final judgment or decision must depend on the fact finding and fact evaluation of competition authorities as well as the economic context in each specific case.

³⁸ Korah, V. (2000), *An Introductory Guide to EC Competition Law and Practice*, Seventh Edition, Oxford: Hart Publishing, ISBN: 1-84113-140-7, p.69.

³⁹ § 1 Sherman Act, 15 U.S.C. §1.

⁴⁰ US Supreme Court, *State Oil Co. v Khan*, 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997).

⁴¹ US Court of Appeal, *Clorox Co. v Sterling Winthrop, Inc.*, 177 F.3d 50, 56 (2d Cir. 1997).

⁴² See the concept of the Cooperative Joint Venture in the European Commission’s Notice Concerning the Assessment of Cooperative Joint Ventures Pursuant to Article 85 of the EEC Treaty (now Article 81 EC), OJ C 43, 16.2.1993, p.2 and for further see Lidgard, H.H. (2002), *ibid.*, p.138-152.

⁴³ Carlton, D.W and Frankel. A.L. (1995b), *ibid.*, p. 644-645.

3. Price Competition Issues

3.1. Overview

There are four interrelated sub-transactions concerning a card payment transaction: Issuer-Customer (Issuer-Cardholder), Merchant-Customer, Acquirer-Merchant and Issuer-Acquirer. All those sub-transactions involve fees and other pecuniary issues. Each of them needs to be analyzed under the antitrust perspectives, especially the rules of payment card associations relating to prices and fees.

Regarding the Issuer-Customer relationship, besides the issuers of three-party payment card systems like American Express, Discover, Diner Club, the customers can choose from many issuers who are members of four-party payment card systems like Visa, MasterCard. There are over 5,000 Visa members in the EU Region⁴⁴ with whom customers can sign the contract to get payment cards while in US consumer can choose from over 6,000 issuers⁴⁵. Payment card services offered to customers are bundled and competition exists on several dimensions such as interest rates, annual fees, other various fees and charges and even incentive programs, such as rebates, frequent flier miles and buyer protection programs. The issuers compete not only with each other within the system but also with the issuers of other systems. Although the consolidation in the payment card industry has now placed more than 77% of the market share into the hands of the top ten players⁴⁶, many new entrants along with existing issuers continue to offer new and innovative services to customers. Therefore, the market for issuers seems to be fairly competitive and contestable.⁴⁷ That is why price competition issues between the issuers and the customers have not been challenged under antitrust rules yet.

In the Acquirer-Merchant relationship, merchants get money from the sales to customers paying by payment cards through the acquirers. They, nevertheless, do not receive that full amount because they must pay the acquirers a merchant fee (merchant discount fee) for those services. In principle, merchant fees today are bilaterally negotiated between acquirers and merchants, and they depend on the merchant's business type, monthly card sales volume and average transaction amount.⁴⁸ Acquirers always tend to offer merchants

⁴⁴ See European Commission, Decision 2001/782/EC, Case No COMP/29.373-*Visa International*, paragraph 4.

⁴⁵ See Chakravorti, S. and Shah, A. (2001), *A Study of the Interrelated Bilateral Transactions in Credit Card Networks*, Emerging Payments Occasional Paper Series, EPS-2001-2, Federal Reserve Bank of Chicago, p.7, <http://www.chicagofed.org/publications/publicpolicystudies/emergingpayments> (1/1/2003).

⁴⁶ See *Market Power*, <http://www.cardweb.com/cardtrak/pastissues/feb00.html> (4/4/2003 12:05:12 PM); Cruickshank, D. (2000), *ibid.*, p. 238 and Reserve Bank of Australia (2002), *ibid.*, p. 8.

⁴⁷ Chakravorti, S. and Shah, A. (2001), *ibid.*, p.7-10.

⁴⁸ In cases where merchant discount are prohibited, issuers may charge usage fees to their cardholders. For example, from 2002 American taxpayers can officially charge their federal income taxes to their MasterCard, American Express, or Discover card (VISA is not participating in the program). There is a service charge of 2.5% to 3.0% to charge taxes. This service charge represents the typical fee a merchant

the best competitive merchant fees. Thus, merchant fees in the same way as the price issues between issuers and customers, have not received any complaints under antitrust law. Even more, merchants can protest against what they consider high merchant fees and choose the best acquirers in order to reduce such fees.

Therefore, price issues concerning the Issuer-Customer and the Acquirer-Merchant relationships have not posed any matters under the perspective of antitrust law at the moment. However, both the issuing market and the acquiring market are normally concentrated markets. If there are any agreements between members of payment card system fixing the tariffs charged to end-users (cardholders or merchants), whether fixed, minimum or maximum tariffs, they fall under Article 81(1) EC, provided that they may affect trade between Member States like the *Züchner* case⁴⁹ relating to a fixed commission to be charged to customers, the *Eurocheque-Helsinki Agreement* case⁵⁰ concerning a uniform maximum fee charged to merchants accepting Eurocheques or other price cartel cases in the banking sector such as fixed conversion charges for the Euro-zone⁵¹ or the *Lombard Club cartel* case⁵².

Contrary to the price issues concerning the Issuer-Customer and the Acquirer-Merchant relationships, the multilateral interchange fees which relate to the Issuer-Acquirer relationship and the no-surcharge rule (no-discrimination rule) which relates to Merchant-Customer relationship of payment card systems received many criticisms both in theory and judicial practices.

3.2. The Multilateral Interchange Fee

3.2.1. General

For typical transactions of four-party payment card systems, like Visa or MasterCard, acquirers pay issuers interchange fees. As mentioned above, American Express or Discover transactions do not have interchange fees. The compensation between American Express (or Dean Witter Discover) and its licensed issuers (if any) is a vertical

would pay to take a credit card. However federal law prohibits the IRS from absorbing this fee. Therefore the merchant fee is essentially passed on to the consumer via the service charges. See <http://www.cardweb.com/cardtrak/pastissues/feb00.html> (4/4/2003 12:05:12 PM).

⁴⁹ ECJ, Case 172/80 *Züchner v. Bayerische Vereinsbank*, 14 July 1981, [1981] ECR 2021. For further see Dasse, M. and Isaacs, S. (1995), *ibid.*, p. 17-28 and Usher, J.A. (2000), *ibid.*, p.60-64.

⁵⁰ European Commission, Decision 92/212/EEC of 25 March 1992, *Eurocheque-Helsinki Agreement*, OJ L 95, 9/4/1992, p. 50 and CFI, Joined cases T 39/92 & T 40/92, *CB & Europay v Commission*, 23 February 1994, [1994] ECR II – 49.

⁵¹ See European Commission, Decision 2003/25/EC of 11 December 2001, *Bank Charges for Exchanging Euro-zone Currency-Germany*, OJ L 15, 21/1/2003, p. 1 and Press Release, IP/01/1159, 31/7/2001.

⁵² See European Commission, Press release, IP/02/844, 11/6/2002. This case was brought to CFI in Cases T-259/02 to T-264/02, OJ C 274, 9/11/200, p. 28-31.

arrangement negotiated bilaterally and that is in direct contrast to the interchange systems of Visa and MasterCard.⁵³

Interchange fees are differently determined based on the types of transactions (e.g. paper based or electronic transactions) and the types of cards (e.g. consumer cards or corporate cards). They are either bilaterally agreed by the card issuer and the acquirer or collectively set by the members belonging to the system. However, bilateral arrangements are rare and the interchange fee used is nearly always the multilaterally determined interchange fee (MIF).⁵⁴ Therefore, the MIF, which is a fallback level for the interchange fee that applies when members fail to agree on the level of the fee bilaterally, is normally set at the network level. In the EU Region the MIF⁵⁵ is set by the Visa EU Board and applied by default to all EU intra-regional Visa card transactions in the absence of a bilateral agreement.⁵⁶

In the US, the MIF was found to be legal in the *NaBanco* case⁵⁷ in the middle of the 1980s. In the EU, according to the Commission's Decision 2002/914/EC in the *Visa International-Multilateral Interchange Fee* case in 2002, a 5 year exemption was given under Article 81(3) EC to the Visa intra-regional MIF applied to cross-border point-of-sale transactions with Visa customer cards. Besides, the Bank of Italy on 27 November 2001 adopted a decision exempting the MIF in a domestic Italian debit card payment scheme, PagoBancomat, after the level of the MIF was reduced to reflect relevant costs.⁵⁸ On 11 February 2003, the UK Office of Fair Trading initially found that an agreement between MasterCard's UK members on the MIF charged on transactions made in the UK by credit and charge cards infringes the Competition Act 1998.⁵⁹ In Australia, the Reserve Bank of Australia adopted the Reform of Credit Card Scheme in Australia in August 2002 in which, like the European Commission, imposed a standard involving an objective, transparent and cost-based benchmark for determining the interchange fees.⁶⁰

In general terms, the system of interchange fees for payment cards is repeated around the world. This reflects the ubiquity of the leading four party payment card systems, Visa and MasterCard. One exception is Denmark, where interchange fees for domestic card payments are prohibited.⁶¹ Nevertheless, under the antitrust perspective, there are many arguments for and against the MIF.

⁵³ American Express (2001), *ibid.*, p. 4-5.

⁵⁴ According to EuroCommerce in *Visa International-MIF* case, MIFs account for approximately 80% of merchant fee. In UK, MIFs account for over 90% of payment card transactions, see Cruickshank, D. (2000), *ibid.*, paragraph D3.48, p. 255.

⁵⁵ Visa defines the interchange reimbursement fee as "a fee reimbursed by an acquirer to an issuer in the clearing and settlement of an interchange transaction.

⁵⁶ European Commission, Decision 2002/914/EC, Case No COMP/29.373-*Visa International-MIF*, paragraph 10-12.

⁵⁷ US Court of Appeal, *NaBanco v Visa USA*, 779 F.2d 592 (11th Cir. 1986) and US District Court, *NaBanco v Visa USA*, 596 F.Supp. 1231 (S.D. Fla 1984).

⁵⁸ Ryan, S. (2002), Clarifying the Application of the Competition Rules to Card Payment Systems: the Commission's Exemption Decision on the Multilateral Interchange Fees of Visa International, *Competition Policy Newsletter*, No 3, October 2002, ISSN 1025-2266, p.35.

⁵⁹ See <http://www.offt.gov.uk/News/Press+releases/Statements/2003/Mastercard.htm> (4/4/2003 4:49:16 PM).

⁶⁰ Reserve Bank of Australia (2002), *ibid.*, p. 33-38.

⁶¹ Cruickshank, D. (2000), *ibid.*, paragraph D3.107, p. 268.

3.2.2. Arguments for the MIF

There are two broad rationales for the interchange fee. The first is to cover the cost of services provided by card issuers to merchants and acquirers. The second is that the interchange fee enables the payment card system to optimize the supply of payment services to cardholders and merchants.⁶² Therefore, the interchange fee is not only the cost of processing transactions but also the cost of the payment guarantee and the cost of the free funding period given to the cardholder incurred by the issuer.

In general, each issuer sets its own fees (annual fees, late fees, and finance charges, etc.) for the payment cards it issues, and each acquirer contracts the fee (merchant fee) it charges the merchant for its acquiring services. To provide an incentive for banks to issue more cards and acquire more merchants and thus expand the network, payment card associations established the MIF which is used to allocate the costs and revenues between the issuer and acquirer. Accordingly, the MIF is essentially a compensation vehicle. It helps to ensure the cooperation and participation of the various parties in the system by balancing the incentives to increase the base of merchants accepting the card and the base of consumers using the card. This coordination has been argued to be essential to the success of the payment card associations and the growth of the industry.⁶³

Although the acquirer and the issuer can bilaterally negotiate the interchange fee, such bilateral negotiations may cause inconveniences⁶⁴:

Bilateral negotiations permit the abuse of a dominant position in order to impose prices that differ from the jointly fixed price;

If one assumes that the jointly fixed price incorporates proportionately the whole of the real supplementary costs, the decision to alter that price by bilateral negotiations is absurd and inefficient since it unreasonably destabilizes the equilibrium price;

Potential bilateral negotiations that succeed in reducing prices to below the jointly fixed price is a goal that only provides benefits to competitors and leads to an inefficient and incomprehensible management of costs since there is no entrepreneurial reason to lose a collectively guaranteed price in bilateral negotiations;

Furthermore, bilateral negotiations may cause difficulties to new members of four-party payment card systems. They have to bilaterally negotiate with thousands of existing member, not only in one territory but in one region (like the EU) or even in all over the world. This may restrict competition from the potential members.

According to Visa, the MIF should not be considered as a price for specified services provided by issuers to acquirers or merchants. Rather it considers the MIF as a transfer between undertakings that are cooperating in order to provide a joint service in a network

⁶² For further see Cruickshank (2000), *ibid.*, paragraph D3.43, p. 255.

⁶³ Sienkiewicz, S. (2001), *ibid.*, p.6.

⁶⁴ Ballell, T.R.D.L.H. (2002), *ibid.*, p.231.

characterized by externalities⁶⁵ and joint demand. The MIF is necessary as a financial adjustment to the imbalance between the costs associated with issuing and acquiring and the revenues received from cardholders with a view to increasing demand for and use of the payment services. Visa claims that without an appropriate interchange fee, the system would not operate at its optimal level and the key strength of the Visa system, namely a large number of cardholders and merchants, would be undermined. Consequently in Visa's view the MIF does not fall within the scope of Article 81(1). To that end Visa argues that the Visa payment services are jointly provided by the Visa member banks and that the MIF is a device enabling this business to function most efficiently and effectively. In particular, in the absence of joint action with regard to the MIF, banks would take no account, or too little account of the "positive externalities generated by their decisions". The Commission's Guidelines on horizontal cooperation states that horizontal cooperation "[b]etween competing companies that cannot carry out the project or activity covered by the cooperation" will not fall within Article 81(1) "[b]ecause of its very nature".⁶⁶ According to Visa its MIF is covered by this stipulation. In the event the Commission were to take the view that the MIF restricted competition, the MIF would qualify as an ancillary restraint and as such fall outside Article 81(1) since its MIF would be directly related to and necessary for the functioning of the Visa system.⁶⁷

In addition, there are many papers analyzing the MIF under the economic perspective which finally favour the MIF⁶⁸. Schmalensee⁶⁹, for instance, after comprehensively analyzing how the interchange fees balances charges between the cardholders and merchants under imperfect competition, concluded that there was no support for the policy that the antitrust authority should condemn the MIF for the same reason they would condemn competing banks fixing credit card interest rates or annual fees. According to Schmalensee, the interchange fee is not an ordinary market price; it is a balancing device to increase the value of the payment systems by shifting costs between issuers and acquirers and thus shifting charges between consumers and merchants. The MIF is not to harm the consumers by reducing output like the ordinary price fixings; it reversely maximizes the output and welfare in order to maximize the system's private value to its owners.

3.2.3. Argument against the MIF

The main argument against the MIF is that it is a price-fixing cartel because the level of the fee is said to be agreed on among the members of the four party payment card

⁶⁵ A network externality arises when a network effect is not internalized through a competitive market mechanism. For further see Australian Bankers' Association (2001), *ibid.*, p. 1-6.

⁶⁶ European Commission, Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Agreements, OJ C 3, 6/1/2001, p.2-30, paragraph 24.

⁶⁷ European Commission, Decision 2002/914/EC, Case No COMP/29.373-*Visa International-MIF*, OJ L 318, 22/11/2002, p.17-37, paragraph 14 and 56-57.

⁶⁸ According to the opinion of Professor Lars Gorton - Professor in Banking Law at Faculty of Law, Lund University – at the discussion with the author on Thursday 28 Nov. 2002, Visa or MasterCard can not be considered as price cartels.

⁶⁹ Schmalensee, R. (2001), *Payment Systems and Interchange Fees*, Working Paper 8256, National Bureau of Economic Research, April 2001, <http://www.nber.org/papers/w8256> (7/4/2003).

systems without any external scrutiny or accountability to the community⁷⁰ and it horizontally restrains competition among issuers and acquirers of the same system. Moreover, the MIF is considered as a mechanism to shift onto merchants and indirectly onto customers who pay by means of payment other than cards the costs of free advantages offered to cardholders. It is a kind of subsidization for customers who pay by payment cards.⁷¹

According to these opinions, the MIF agreement creates an appreciable restriction of competition not only among issuers but also among acquirers of a payment card system. It removes incentives for the parties to enter into bilateral agreements, which may mean that there will be little or no competition between them over the level of the interchange fee. Additionally, this fixed fee places a floor on the level of the merchant fee charged by acquirers to merchants. The merchant fee has to cover the MIF in order for acquirers to make a profit, so no acquirer would be willing to reduce the level of its merchant fee below the MIF. The MIF is a significant proportion of the merchant fee charged to most merchants. It accounts for about 67% to close to 100% of the merchant fee.⁷² Consequently, the MIF agreement significantly restricts the scope for acquirers to compete on price by reducing the level of their merchant fees. This leads to higher merchant fees which will be passed on to consumers through higher retail prices.⁷³

In the *NaBanco* case⁷⁴ in the US, NaBanco's basic complaint is that the MIF reduces or eliminate the non card-issuing acquirers' ability to compete with proprietary Visa members that both issue cards and sign merchants.⁷⁵ Because "on-us" transactions, in which the card-issuing and merchant-signing banks are the same, involve no interchange, therefore are not subject to the MIF, and proprietary members conducting "on-us" transactions can reduce the merchant fee they charge. This restrains the competition from the pure acquirers because they must keep their merchant fees higher than the MIF to ensure a profit. Merchants, for that reason, do not choose to contract with pure acquirers because they receive a better merchant fee from proprietary Visa members. NaBanco alleges that banks which also issue cards have set the MIF to keep purely merchant-signing banks from being able to compete and these proprietary members are equivalent to a group of competitors who have agreed to sell goods to each other (or, in this case, to themselves) at a lower rate to pure acquirers (NaBanco, for example). For that reason, the MIF amounts to horizontal price fixing.

⁷⁰ Reserve Bank of Australia (2002), *ibid.*, p.8.

⁷¹ Accordingly, some scholars contended that interchange fees allow payment card customers to impose a tax on cash customers, for example see Carlton, D.W. and Frankel, A.S. (1995b), *ibid.*, p. 661.

⁷² Chakravorti, S. and Shah, A. (2001), *ibid.*, p. 17.

⁷³ See UK Office of Fair Trading (2003), *MasterCard Interchange Fee- Preliminary Conclusions*, OFT634, <http://www.offt.gov.uk/nr/rdonlyres/eslevsm6jcwuvfydgnwdgufavf2mtbzi76gjsf3svxxv6ov64m7l6y6ej6yftbpoizx2gkedg4x3x3ykv2soj55nr3g/oft634.pdf> (15/2/2003).

⁷⁴ For further see US Court of Appeals, *NaBanco v Visa USA*, 779 F.2d 592 (11th Cir. 1986), p. 595-596.

⁷⁵ NaBanco cannot be a member of Visa because it was not eligible for federal deposit insurance. Nevertheless, NaBanco acts as a processing agent for merchant-signing Visa members. As such, it receives the card-holder paper from merchants, and then exchanges the papers with the card-issuing banks. NaBanco also has served as agent of card-issuing Visa members. See footnote 4, US Court of Appeals, *NaBanco v Visa USA*, 779 F.2d 592 (11th Cir. 1986), p.596.

In the *Visa International-Multilateral Interchange Fee* case⁷⁶ in Europe, the complainant, EuroCommerce, similarly asserts that the agreement setting the MIF is “[a] price cartel and therefore a hardcore infringement of competition law” because it restricts the freedom of banks individually to decide their own pricing policies and has restrictive effect on competition among issuers and acquirers of the same payment card system. It considers that the MIF is not indispensable for the Visa scheme to function successfully, and has provided examples of four party payment card schemes, which function without a MIF like German Ec-Karte scheme and the Australian EFTPOS debit card scheme, or which function with a MIF set at zero like Canadian Interac scheme. In EuroCommerce's view, no services are provided between the issuing bank and the acquiring bank, thus there is no need for any payment. The MIF is rather a tax, or levy, which has generated huge costs which are eventually paid by the consumer in higher retail prices. EuroCommerce further argues that the MIF slows down innovation, since banks concentrate on maintaining and developing their MIF income, to the detriment of developing new card-related products and services. Besides, the MIF is detrimental to merchants and unfairly advantageous to cardholders, since it transfers to merchant costs which relate to "free benefits" services, interest-free period funding, for example, provided to cardholders who in turn provide pressure on merchants to accept cards. In particular, it denies that the payment guarantee has been requested by merchants or should be paid by merchants. Moreover, EuroCommerce argued that the cost of processing and the cost of the free funding should not be included in the MIF either. Thus, according to EuroCommerce, the MIF constitutes a price cartel and is as such a restriction of competition by object and any efficiency gains produced by a cartel cannot outweigh its negative effects. In its view no exemption for the Visa MIF is possible.

Consequently, the MIF is considered to be set to maximize profits of members of payment card association rather than social welfare and it is appropriate to treat the MIF as a hard core cartel behaviour. Therefore some authors⁷⁷ have argued that the MIF should be banned. Others⁷⁸ have argued that the MIF should be set at zero by fiat or determined by the regulators on the basis of the system-related cost incurred by the issuers and acquirers.⁷⁹

3.2.4. Judgments and Decisions Concerning the MIF

In the *NaBanco* case⁸⁰, the US Courts applied the reasoning of the Supreme Court in the *BMI*⁸¹ and similar cases which indicated that while some price fixing was *per se* illegal,

⁷⁶ For further see European Commission, Decision 2002/914/EC, Case No COMP/29.373-*Visa International-MIF*, OJ L 318, 22/11/2002, p.17-37, paragraph 27-28, 34, 63, 77-78, 97, and 105.

⁷⁷ Small, J. and Wright, J. (2000), *Decentralized Interchange Fees in Open Payment Networks: an Economic Analysis*, NECG and University of Auckland.

⁷⁸ Balto, D.A. (2000a), The Problem of Interchange Fees: Cost without Benefits, *European Competition Law Review*, 21 (4), p.215-224.

⁷⁹ For further see Schmalensee, R. (2001), *ibid.*

⁸⁰ US District Court, *NaBanco v Visa USA*, 596 F.Supp. 1231 (S.D. Fla 1984); US Court of Appeal, *NaBanco v Visa USA*, 779 F.2d 592 (11th Cir. 1986).

⁸¹ US Supreme Court, *Broadcast Music, Inc. v Columbia Broadcasting Co.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d. 1 (1979).

other arrangements that literally fixed price should be judged under the rule of reason. Then the Courts balanced the pro-competitive and the anti-competitive purposes of the MIF. The effects of the MIF⁸² revealed that bilateral price negotiations are impractical, would produce instability and higher fees, and could result in the demise of the product offered. This means that no less restrictive alternative to the MIF is available. The MIF on balance is pro-competitive because it is necessary to achieve stability and thus ensure the one element vital to the survival of Visa system: universality of acceptance. Furthermore, Visa is a joint venture type enterprise in which the MIF acts as an internal control mechanism that yields pro-competitive efficiencies that its members could not create acting alone, and helps to create a product that its members could not produce singly. Finally, the US Courts concluded that the MIF is not a naked restraint of competition; it is an ancillary restraint that is more pro-competitive than anti-competitive. Therefore, the MIF does not violate Section 1 of the Sherman Act.

In Europe before the Decision 2002/914/EC *Visa International-Multilateral Interchange Fee*, the European Commission investigated and adopted some decisions under Article 81 EC (ex Article 85) concerning the multilateral agreements on interchange fees of payment systems. The Commission found such multilateral agreements to be contrary to Article 81 EC but exemptible pursuant to Article 81(3) EC in four cases: *Eurocheque-Package Deal* (1984), *ABB* (1986), *ABI* (1986), *NVB I* (1989)⁸³ and gave negative clearance in one case: *NVB II* (1999)⁸⁴. Therefore, it can be concluded from these decisions that in the European Commission's view, the multilateral agreements on interchange fees are all liable to restrict competition within the meaning of Article 81(1) EC but also that they merit an exemption pursuant to Article 81(3) EC provided that certain conditions are fulfilled.

Repeating the statements found in the above-mentioned decisions, the Commission's Notice on the application of the EC competition rules to cross-border credit transfers in 1995⁸⁵ explains –albeit in a nutshell– why an MIF may raise antitrust concern under Article 81(1) EC at paragraphs 40 to 42:

The MIF restricts the freedom of action of banks individually to decide their own pricing policies;

The MIF is likely to have the effect of distorting the behaviour of banks vis-à-vis their customers or distort intra-system competition; and

⁸² The MIF in *NaBanco* case is the IRF: Interchange Reimbursement Fee.

⁸³ European Commission, Decision 85/77/EEC of 10 December 1984, *Eurocheque-Package Deal*, OJ L 35, 7/2/1985, p.43; Decision 87/13/EEC of 11 December 1986, *Belgian Bankers' Association (ABB)*, OJ L 7, 9/1/1987, p.27; Decision 87/103/EEC of 12 December 1986, *Italian Bankers' Association (ABI)*, OJ L 43, 13/2/1987, p.51 and Decision 89/512/EEC of 19 July 1989, *Dutch Banks I (NVB I)*, OJ L 253, 30/8/1989, p.1.

⁸⁴ European Commission, Decision 1999/687/EC of 8 September 1999, *Dutch Banks II (NVB II)*, OJ L 271, 21/10/1999, p.28.

⁸⁵ European Commission, Notice on the application of the EC competition rules to cross-border credit transfers, OJ C 251, 27/9/1995, p. 3.

The MIF normally entail an appreciable restriction of competition where there is limited or no inter-system competition.

However, like the above-mentioned decisions under Article 81 EC, these points are not beefed up by further explanation as to why they imply the existence of a restriction of competition within the meaning of Article 81(1) EC. Therefore these points have met fierce criticism.⁸⁶

Besides, the Notice also confirms at paragraph 43 that “[W]here agreements on MIFs fall within Article 85(1) (*now Article 81(1) EC*), it is only where they are shown to be actually necessary for the successful implementation of certain forms of cooperation, positive in themselves, that they may be capable of obtaining an exemption under Article 85(3) (*now Article 81(3) EC*)... the Commission ... will examine the economic benefit which these agreements seek to achieve and consider whether the consumers ... will receive a fair share of the benefit and whether the particular interchange fee agreements are actually necessary as a means to achieve that benefit.”

The European Commission applied the reasoning of the above-mentioned decisions and the 1995 Notice to the *Visa International-Multilateral Interchange Fee* case with more details. The Commission considers that the MIF in the Visa system restricts competition within the meaning of Article 81(1) EC by restricting the freedom of banks individually to decide their own pricing policies and the MIF has a restrictive effect on competition among Visa issuers and among Visa acquirers:

Firstly, the MIF is an agreement between competitors, which restricts the freedom of banks individually to decide their own pricing policies, and distorts the conditions of competition on the issuing and acquiring market of a payment card system. According to the Commission, issuing and acquiring are fundamentally different activities, involving different specializations and costs. Thus the MIF cannot be considered as an exchange of costs between partners in a production joint venture. Both issuing and acquiring activities are affected by the MIF, and the Visa member banks are thus competitors as concerns their agreement on the MIF. In particular, the agreement on a collective MIF between the banks involved is likely to have an effect on price competition at the acquiring and issuing level since the MIF agreement will fix a significant part of the parties' final costs and revenues respectively⁸⁷. Issuing banks are required to charge acquiring banks a certain fixed fee and are therefore prevented from developing at wholesale level an individual pricing policy vis-à-vis acquiring banks in so far as they provide services to them.

Secondly, the MIF moreover has as its effect to distort the behaviour of acquiring banks vis-à-vis their customers at resale level, because it creates an important cost

⁸⁶ For further see Gyselen, L. (1996), *EU Antitrust Law in the Area of Financial Services*, published in “Fordham Corporate Law Institute, 23rd Annual Conference on International Antitrust Law and Policy”, 18/10/1996 New York, http://europa.eu.int/comm/competition/speeches/text/sp1997_005_en.html (1/1/2003), paragraph 15-50.

⁸⁷ This reasoning can be seen in the European Commission Decision 1999/695/EC of 15 September 1999, Case No COMP/36.748-*REIMS II*, OJ L 275, 26/10/1999, p.17-31.

element which is likely to constitute a *de facto* floor for the fees charged to the merchants they acquire.

However, the Commission does not consider the MIF agreement to be a restriction of competition by object, since a MIF agreement in a four-party payment system has as its objective to increase the stability and efficiency of operation of that system, and indirectly to strengthen competition between payment systems by thus allowing four-party systems to compete more effectively with three-party systems. Therefore, Visa has been permitted to make a formal proposal to the Commission for amendment to its EU intra-regional MIF which comprises three elements as follows⁸⁸:

A reduction of the level of the intra-regional MIF: Visa will progressively reduce the level of its MIFs for different types of consumer cards;

The introduction of objective benchmarks against which to assess the Visa intra-regional MIFs currently paid by acquirers to issuers: the MIFs will be capped at the level of costs for three specific services provided by issuing banks, which in the Commission's view correspond to the services provided to those merchants who ultimately pay the MIF. These three cost categories are: the cost of processing transactions, the cost of free funding for cardholders⁸⁹ and the cost of providing the payment guarantee⁹⁰; and

Transparency: the cost studies of these three services will be carried out by Visa and audited by an independent firm of accountant and Visa will allow member banks to disclose information about the MIF levels and the relative percentages of the three cost categories.

After considering the revised MIF of Visa, the Commission concludes that, although the amended Visa MIF involves a price agreement between the Visa members within the meaning of Article 81(1) EC, it meets the condition for an exemption under Article 81(3) EC. In particular, the Commission accepts that some kind of default agreement on the terms of exchange between issuers and acquirers is necessary in practice in a large scale international payment card system, as without it, bilateral negotiations between many thousand banks would be highly inefficient and increase costs significantly. Nevertheless, a MIF has in practice the effect of dividing the costs of a payment card system between

⁸⁸ See European Commission, Notice pursuant to Article 19(3) of Council Regulation 17, Case COMP/29.373-*Visa International*, OJ C 226, 11/8/2001, p. 21.

⁸⁹ The "free funding period" corresponds to the cost of any time difference between payment by the issuer to the acquirer and the time when either the payment must be made by the cardholder, or the balance of the credit card bill rolled over into the extended credit facility, to which a rate of interest is applied (that is, it does not include any cost arising from the granting of extended credit to cardholder). This "free funding period" to cardholders is considered by the Commission to benefit retailers in a cross-border context by stimulating sales and increasing turnover.

⁹⁰ The term "payment guarantee" is used to describe the promise of the card issuer to honour card payments to the acquirer, even those which turn out to be inter alia fraudulent or for which the cardholder ultimately defaults, on the condition that the retailer undertakes all the security checks necessary to enable the issuer to promise payment. This promise is then extended to by the acquirer on to the retailer, and effectively constitutes a kind of payment insurance for the retailer.

two different users – cardholders and merchants – and for that reason only a MIF set in a manner which is equitable vis-à-vis both these can qualify for an exemption.⁹¹

Similarly, the Reserve Bank of Australia, in *the Reform of credit card scheme in August 2002*, applies the same reasoning and conclusion as the European Commission's. It accepts that interchange fees can play a role in redressing imbalances between the costs and revenues of issuers and acquirers in four party credit card schemes. However, it is not convinced that community welfare would be maximized if the setting of interchange fees, which play a pivotal role in determining price incentives for cardholders and merchants, were left entirely to the schemes and their members without any controls of the community. Consequently, the RBA imposes a standard on interchange fees that involves an objective, transparent and cost-based benchmark against which interchange fees in the designated credit card schemes can be assessed.⁹²

Accordingly, it can be concluded that despite the possibility of horizontal restriction of competition, the MIF in principle should be exempted under the antitrust rules or it should be left outside the antitrust rules in case there is no exemption stipulation like the US antitrust law due to its special characteristics and roles in the open payment card systems for the balance and development of systems when it meets the objective and transparent criteria, in which it is reasonable and equitable as between the two users of a payment card system. Although the European Commission's exemption decision in the *Visa International-Multilateral Interchange Fee* case only applies to the MIF for cross-border payment transactions with Visa consumer cards at retailer outlets within EEA, this tendency should be applied to other types of MIFs, for example MIFs for domestic payments or in different card payment systems like MasterCard. Consequently in my opinion, the UK OFT will apply the above reasoning in the *MasterCard UK-MIF* case⁹³ although it initially found that an agreement between MasterCard's UK members on a common fee charged on transactions made in the UK by credit and charge cards infringes the Competition Act 1998. After MasterCard UK make some changes to its agreement on the MIF which satisfies the above-mentioned objective and transparent criteria, the MIF for MasterCard UK transactions will be exempted under the Competition Act.

3.3. The No-Discrimination Rule

The no-discrimination or no-surcharge rule is a rule of payment card systems which imposes restrictions on merchant pricing and denies merchants the freedom to set their own prices. It prohibits merchants from surcharging the cardholders who pay with their payment cards or giving customers discounts for paying with other means of payment.

The arguments against the NDR are that it restricts competition between merchants, and limits merchants' freedom to determine prices according to cost. Due to the NDR,

⁹¹ Ryan, S. (2002), *ibid.*, p.33-35.

⁹² For further see Reserve Bank of Australia (2002), *ibid.*, p. 30-38.

⁹³ UK Office of Fair Trading (2003), *ibid.*

merchants are not free to pass on the merchant service fees to the users of payment cards. Instead, merchants face an “all or nothing” choice in accepting payment cards and have no alternative but to pass their payment card costs onto all customers, regardless of whether they are payment card users or not, through the prices of goods and services. Thus, customers who pay by other means of payment unfairly subsidize the costs of payment cards system, and the NDR prevents customers from getting a better picture of relative costs of particular means of payment and distorts demand for payment systems.⁹⁴ This leads to the restriction of inter-system competition. Moreover, restrictions on merchant pricing constrain the ability of merchants to negotiate with the acquirers and/or card issuers concerning the merchant fees and other condition under which they will accept the card payment.⁹⁵ As a result, the NDR restricts competition both at inter-system level and at intra-system level. That is why the NDR has been prohibited by several national Competition Authorities, i.e. the UK (in 1990), Sweden (in 1994), the Netherlands (in 1995, confirmed by the Administrative Court in appeal in 1997), and Australia (since 1/1/2003).

Besides the arguments against the NDR, there are many arguments supporting it or at least favouring the exemption under the antitrust law perspective. According to these arguments, there is no subsidization in favour of customers who use payment cards. In fact, merchants do benefit as well as attract and retain customers from card payment acceptance in the following ways⁹⁶:

Costs and risks of handling cash are reduced. Cash is expensive to handle and provides opportunities for theft and fraud;

Bad debt risks of accepting cheques are eliminated;

Merchants are able to receive settlement through efficient and speedy electronic payment. The overwhelming majority of these transactions are guaranteed payment;

Merchant’s sale is increased because customers are able to purchase items at their convenience, with less need to plan “how they intend to pay”,⁹⁷ and it is safer for customers to use payment cards than to carry around large amounts of cash.

Consequently, card payments provide a number of benefits to merchants by reducing their transactions costs, but importantly also by providing them with increased sales.⁹⁸

⁹⁴ Compared to cash, which costs supermarkets only about 22 cents per \$100 of purchase, credit cards appear to be extravagantly expensive, costing \$2.41, nearly 11 times as much (Food Marketing Institute, 1998), see Chakravorti, S and Emmons, W. R. (2001), *Who Pay for Credit Cards*, Emerging Payments Occasional Paper Series, EPS-2001-1, Federal Reserve Bank of Chicago, p. 3. However, the above costs are just visible cost.

⁹⁵ See Negenman, M. (1998), *EU Antitrust Law (Article 85 and 86) and Their Potential Impact on the Banking Sector of the Czech*, http://europa.eu.int/comm/competition/speeches/text/sp1998_016_en.html (1/1/2003) and Gyselen, L. (1996), *ibid.*, paragraph 51-65.

⁹⁶ See American Express (2001), *ibid.*, p. 4-5 and Chakravorti, S. and Shah, A. (2001), *ibid.*, p. 10-14.

⁹⁷ Regarding the spontaneous consumer payments, the trend has been away from cash and cheques towards greater use of plastic cards, see Cruickshank, D. (2000), *ibid.*, paragraph 3.15-3.16, p. 56-57.

⁹⁸ For further see Network Economics Consulting Group Pty Limited (2002), *ibid.*, p. 26.

Equally exchanging for the above benefits, merchants have to pay merchant fee. The merchant fee paid by the merchant to the acquiring bank represents the fee payable by the merchant for being able to participate in the payment card system and make a sale because of that system. It represents compensation paid by the merchant to the acquirer and the issuer for the costs and risks to which they are subject in the transaction and the value they have created in the system. If the merchant is entitled to recover this fee from a cardholder, then the merchant pays nothing for his fair duties from participating in the system and, as a consequence, the cardholder pays too much – he pays all the costs. This can cause to the “death spiral”⁹⁹: fewer cardholders, leading to fewer acquirers, leading in turn to fewer cardholders and depriving the merchants of the card acceptance benefits.

In the US, the issue of payment cards surcharge has a long legislative and regulatory history. Prohibitions on surcharging have faced antitrust challenges with mixed results.¹⁰⁰ At the present, several states legislatively prohibit merchants from imposing credit card surcharges such as California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, New York, Oklahoma, and Texas. The other states either allow merchants to impose surcharges on payment card purchases or have no laws prohibiting such practices.¹⁰¹

In Europe, before making a decision concerning the NDR in the Visa rules in the *Visa International* case, the European Commission required to implement the market surveys regarding the effects of the abolition of the NDR in Sweden and the Netherlands where the NDR has been abolished. The results of these market surveys conclude that¹⁰²:

First, although the abolition of the NDR restores merchants' freedom to set their own prices as they see fit, only relatively few merchants (about 5 % in Sweden and 10 % in the Netherlands) use this freedom by actually charging cardholders. The vast majority of merchants do not use the possibility of surcharging in the absence of the NDR. The main reason for this is a foreseen negative cardholder reaction leading to loss of customers. This fact indicates a limited effect of the NDR on competition on the inter-system market between card systems, since surcharging is a factor which could influence the decision of a consumer on which card to use, but even after the abolition of the NDR this factor did not enter much into play;

⁹⁹ MasterCard International Incorporated (2001), *Submission to Reserve Bank of Australia*, Sydney 140088 V1: 20/07/01, p.35-38, http://www.mastercard.com/au/rba/MC_submission_June2001.pdf (13/1/2003).

¹⁰⁰ In *Southtrust Corp. v PLUS Sys., Inc.*, 913 F. Supp. 1517, 1522 (N.D. Ala. 1995), surcharge ban was upheld. In *In re Arbitration Between First Texas Sav. Ass'n & Fin. Interchange, Inc.*, 55 Antitrust & Trade Reg. Rep. (BNA) 340, 364-66 (Aug. 25, 1988), ATM interchange fees were explained to be illegal unless network provided opportunity for surcharges or rebates. See footnote 22, Balto, D. A. (2000b), *Creating a Payment System Network: The Tie that Binds or an Honorable Peace*, *The Business Lawyer*, Vol. 55, May 2000, p. 1396, http://www.whitecase.com/balto_david.html (20/4/2003).

¹⁰¹ Chakravorti, S. and Shah, A. (2001), *ibid.*, p. 13.

¹⁰² See IMA Market Development AB (2000), *Study Regarding the Effects of the Abolition of the Non-discrimination Rule in Sweden for European Commission Competition Directorate General-Final Report*, 2000-02-29; ITM Research (2000), *The Abolition of the No-discrimination Rule*, Project number: R231, Amsterdam, March 2000 and also see European Commission, Decision 2001/782/EC of 9 August 2001, Case COMP/29.373-*Visa International*, OJ L 293, 10/11/2001, p. 24, paragraph 54-58.

Secondly, not only do most merchants not surcharge, they also say that the abolition of the NDR has had no effect on their merchant fees. Therefore, the abolition of the rule had only a very marginal impact on the intra-system acquiring market and it does not seem to increase competition between acquiring banks so as to drive prices down;

Thirdly, as far as the impact of the abolition of the NDR on competition between merchants is concerned, the ability to pay by card is an ancillary service to the merchants' core commercial activity, and this service is never "sold" in isolation. The pricing of this ancillary service represents only a marginal component of the merchants' offer and the market studies do not show that the abolition of the NDR substantially affects price competition between merchants on those markets, because little card surcharging has taken place, nor has it increased price transparency for consumers because, in practice, only few merchants surcharge. Even if they do surcharge, as such this does not inform consumers conclusively about the costs of the card, since merchants may actually charge more than the merchant fee, for example in the taxi and travel agencies sector in particular.

Therefore, in light of the empirical evidence obtained by the market surveys, the European Commission confirms that the NDR does not have an appreciable effect on competition and can therefore not be said to be restrictive of competition within the meaning of Article 81(1) EC.¹⁰³

Contrary to the European Commission decision concerning the NDR, the Reserve Bank of Australia imposed the standard on merchant pricing which provides that neither the rules of a designated credit card scheme nor any participant in the scheme may prohibit a merchant from charging a credit cardholder any fee or surcharge for use of a credit card in a transaction. However, the standard states that a merchant may voluntarily agree with its acquirer to limit the size of any "fee for service" to the fees incurred by the merchant in respect of credit card transactions.¹⁰⁴

In conclusion, the NDR of payment card systems restrict the freedom of merchants to act in so far as it prevents them to surcharge for card payments. This may have a restrictive effect on competition. Therefore, it should be under the scrutiny of competition authorities. It depends on specific circumstances and depends on the facts finding and fact evaluation to make a final decision whether the NDR falls within antitrust law or not. However card payment has been increasingly popular, especially in the US and the EU. Its benefits outweigh any possible harm, especially the benefits to both merchants and

¹⁰³ Article 81 EC stipulates that it covers agreements which have as their object or effect the prevention, restriction or distortion of competition with the Community. Once the anti-competitive object of the agreement has been established there appears to be little need to consider the effects of such an agreement. In 1966, the ECJ in Joined Cases 56 & 58/64, *Consten & Grundig*, 13 July 1966, [1966] ECR 229 confirmed this interpretation. However, in 1969 the ECJ apparently modified this position in Case 5/69, *Völk*, 9 July 1969, [1969] ECR 295 requiring a noticeable/appreciable effect. Therefore, the European Commission firstly enacted the "De minimis Notice" in 1970. It was replaced in 1977, 1986, 1994, 1977 and 2001 (OJ C 368, 22/12/2001, p. 13). For further see Lidgard, H.H (2002), *ibid.*, p. 85-89.

¹⁰⁴ Reserve Bank of Australia (2002), *ibid.*, p. 38.

customers in comparison with payment made with cash or cheques. That is why the NDR in my opinion should be exempted or even fall outside the antitrust rules.

3.4. Summary

Price decisions between any payment card participants have effects on other bilateral relationships downstream and upstream.¹⁰⁵ Price issues concerning Issuer-Customer (Issuer-Cardholder) and Acquirer-Merchant relationships perform a competitive function. Under the antitrust perspective, they have to be freely and bilaterally negotiated. Besides, some price issues like the MIF or NDR can be considered as “price for using the network”. They act as standardization elements in payment card systems and multilateral agreements and rules, bylaws to set them may reach an efficient equilibrium between cooperation and competition.¹⁰⁶ Therefore, competition authorities should have a favourable attitude towards the MIF and NDR provided that the MIF has been determined transparently and objectively.

¹⁰⁵ See Chakravorti, S. and Shah, A. (2001), *ibid.*, p. 25.

¹⁰⁶ Ballell, T.R.D.L. (2002), *ibid.*, p. 235.

4. Non-Price Competition Issues

4.1. Access to Payment Card Systems

4.1.1. Overview

One of the most controversial non-price competition issues under antitrust law relates to the membership rules governing a payment card system. Three-party payment card systems (closed systems) like American Express or Discover are proprietary systems in which only one financial institution play the role of both the issuer and the acquirer. They are single entities and do not have members (only have licensees). Normally, only a four-party payment card system (open system) raises questions under antitrust law concerning its membership rules or the conditions for access to that system.

The conditions for access to open payment card systems may give competitive advantages to current members of such systems and restrict the intra-system competition. Such restriction may ultimately harm the benefits of customers, both cardholders and merchants. If one financial institution cannot access to an open payment card system, it cannot issue and/or acquire the payment cards of that system, and thereby it cannot compete with existing members of that system. In other words, participation in these systems is necessary for financial institutions to compete on the payment card market or downstream market. Besides, it takes financial institution(s), as analyzed in Part 2.2, too much time and costs too much money to create a new payment card system to compete with the current ones. Therefore, an open payment card system may constitute for certain financial institutions essential facilities for issuing and/or acquiring the payment cards.

Essential facilities have been defined by American and European competition authorities as facilities to which the access is not just only cheaper and easier than the alternative but essential in order to compete on the downstream market, and whose owner is dominant and has no valid reason (lack of capacity, cost of achieving interoperability, protection of intellectual property rights, etc.) to deny access.¹⁰⁷ In the payment card industry, the term refers neither to facilities which have been granted by law to one single economic entity nor to facilities which are *de facto* held by one competitor who for that reason dominates in the upstream market and finds itself as a judge in comparison with competitors. Rather it is a label which refers to system(s) which occupy such a prominent place in the means of payment market that outsiders would have to invest in an alternative facility at a cost

¹⁰⁷ In Europe, the first case law concerning the essential facilities and refusal to deal is *Commercial Solvents* (ECJ, Joined Cases 6 & 7/73, *ICI & Commercial Solvents Corp. v EC Commission*, 6 March 1974, [1974] ECR 223). For further see Lidgard, H.H. (2002), *ibid.*, p. 287-294 and see Caillaud, B. and Tirole, J. (2001), *Essential Facility Financing and Market Structure*, October 8, 2001, <http://www.idei.asso.fr/Commun/Articles/Tirole/Essential-Facility.pdf> (14/4/2003 11:10:58 AM) and Pitofsky, R., *The Essential Facilities Doctrine under United States Antitrust Law*, <http://www.ftc.gov/os/comments/intelpropertycomments/pitofskyrobert.pdf> (14/4/2003 11:28:55 AM).

which may be prohibitive or at least out of proportion in light of the expected performance of that new facility. Members of a payment system who run such a facility will therefore not be able to shirk their duty to put in place an objective access policy by merely arguing that the market can bear more than one such facility.¹⁰⁸ Any denial to access to essential facilities shall fall under the antitrust rules if it does not go together with the objective justifications.

Consequently, the major payment systems in general or the ubiquitous open payment card systems like Visa, MasterCard in particular contain in their membership rules the essential facilities. That is why one of the ten core principles for systemically important payment systems proposed by the Bank for International Settlements is that the system should have objective and disclosed criteria for participation which permit fair and open access.¹⁰⁹ Access criteria should encourage competition amongst participants and promote efficient and low-cost payment services. This advantage, however, may need to be weighed against the need to protect the system and their participants from participation in that system by institutions that would expose them to excessive legal, financial or operational risks. Restrictive access criteria sometimes may be justified by the desire to retain the benefits of investment in innovation because financial institutions which do not help to build and finance the system could, in effect, receive a “free ride” if they are able to participate in it on the same basis. That's why all access criteria should be stated explicitly and disclosed to interested parties and any restrictions on access should be objective and based on appropriate risk criteria.¹¹⁰ Such fair access to electronic payment system has been suggested by the European Commission in its Recommendation in 1987 on a European Code of Conduct relating to electronic payment.¹¹¹

However, like any other joint ventures or networks, an open payment card system has collective rules which limit membership within its system. These rules may exclude some financial institutions deemed to be competitive (exclusion rule) or may not permit banks to participate with the objective of acquiring without issuing (no acquiring without issuing rule). Such refusal to accept one undertaking to become the member of an open payment card system may restrict intra-system competition. Thus, the access to payment card system has been carefully examined by competition authorities in the world.

¹⁰⁸ Gyselen, L. (1996), *ibid.*, paragraph 67.

¹⁰⁹ Bank for International Settlements-Committee on Payment and Settlement Systems (2001b), *Core Principles for Systemically Important Payment Systems*, CPSS 43, Basel, Switzerland, ISBN 92 9131 610 5, Principle IX, p. 51-52, <http://www.bis.org/publ/cpss43.pdf> (14/4/2003 12:35:24 PM).

¹¹⁰ The European Commission questioned the admission rules of SWIFT (a cooperative owned by over 2000 banks) which limited the possibility of using the international payment message transmission network to some entities. The Commission considered SWIFT as an essential facility; thereby its access refusal is tantamount to a de facto exclusion from the market for international transfers. Finally, SWIFT had to revise its admission criteria to fulfill the objective and non-discriminatory requirements demanded by the Commission. See European Commission, *XXVIIth Report on Competition Policy (1997)*, Brussels-Luxembourg, 1998, p. 26, point 68 and Case No IV/36.120 *La Poste/SWIFT + GUF*, OJ C 335, 6/11/1997, p. 3.

¹¹¹ European Commission, Recommendation 87/598/EEC of 8 December 1987 on a European Code of Conduct relating to electronic payment, OJ L 365, 24/12/1987, p. 72-76, point III(5)(a).

4.1.2. The Exclusion Rule and *MountainWest* Case

In the *MountainWest (SCFC)* case¹¹², the antitrust litigation concerned the Visa access criteria -the Visa Bylaw 2.06- which states that “[s]hall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards deemed to be competitive by the Board of Directors; an applicant shall be deemed to be issuing such cards if its parent, subsidiary or affiliates issues such cards”. This Bylaw prevents the American Express or Discover networks from being able to issue Visa cards on the Visa network indirectly by establishing an affiliate or a subsidiary to join the Visa association or by buying a Visa member bank and thereby becoming a member/owner of Visa. In this case, Visa USA invoked Bylaw 2.06 to refuse the *MountainWest* owned by Sears (now Dean Witter) which issues Discover cards to issue new Visa cards.

Dean Witter claimed that Visa’s Bylaw 2.06 has two anti-competitive purposes and effects. Firstly, it harms customer because it prevents them from gaining access to the card, thereby hindering the intra-system competition within the Visa system. Secondly, Bylaw 2.06 harms competition by discouraging the creation and development of other proprietary cards. Because of the Bylaw, non-Visa members who develop a successful proprietary card would be prohibited from joining the Visa system and current Visa members would be expelled from the system if they develop such a card.

In response to the Dean Witter’s legal challenge, Visa asserted that Bylaw 2.06 is not unreasonable and is beneficial, rather than harmful, to competition with three main arguments. First, the exclusion of Dean Witter from the Visa association preserves the inter-system competition because Discover card is one of the few successful inter-system competitors with Visa in the relevant market. Dean Witter’s membership in Visa would violate Section 7 of the Clayton Act by substantially reducing inter-system competition. Besides, Visa argued that any harmful effects of Dean Witter’s exclusion are insubstantial. Because Visa does not set restrictions on the price or the output of Visa cards issued by thousand of its members, the present intra-system competition is vigorous and the Dean Witter’s exclusion cannot possibly have a substantial, negative effect on the competition in the relevant market. Furthermore, Visa maintained it instituted Bylaw 2.06 to protect its property from inter-system competitors who otherwise would enjoy a free ride at this time of entry.¹¹³

¹¹² US District Court, *SCFC ILC, Inc. v Visa USA*, 819 F.Supp. 956 (D. Utah 1993) *affirmed in part and reversed in part* US Court of Appeal, *SCFC ILC, Inc. v Visa USA*, 36 F.3d 958 (10th Cir. 1994).

¹¹³ See US District Court, *SCFC ILC, Inc. v Visa USA*, 819 F.Supp. 956 (D. Utah 1993, p. 966 and 973-975 and see Carlton, D.W. and Frankel, A.S (1995a), Antitrust and Payment Technologies, *Federal Reserve Bank of St. Louis Review*, Vo. 77, No. 6, November/December 1995, p. 43 http://research.stlouisfed.org/publications/review/95/11/Antitrust_Nov_Dec1995.pdf (26/4/2003 6:04:03 PM) and Carlton, D.W. and Frankel, A.S (1995b), *ibid.*, p. 651.

Following the trial, a jury reached unanimously a verdict in favour of Dean Witter.¹¹⁴ The District Court, while expressing views contrary to those of the jury on some questions, nevertheless upheld the jury's verdict. However, the US Court of Appeal overturned the District Court decision by two reasons. First, it contended that Visa's justification is necessary to prevent free-riding¹¹⁵ in a market in which there is no evidence that price was raised or output decreased or Sears needed Visa USA to develop the new card. Second, the US Court of Appeal underlined that the ultimate objective of the Sherman Act is to protect competition, not a competitor. According to that Court, the Visa's Bylaw 2.06 does not substantially harm the consumer welfare, thereby does not violate the Sherman Act.¹¹⁶ And the US Supreme Court declined to hear Dean Witter's appeal.¹¹⁷

4.1.3. No Acquiring Without Issuing Rule

The European Commission is currently conducting an investigation into the Visa membership rules preventing organizations deemed to be competitive from being admitted to the Visa payment card network in the context of Case COMP/37.860 under Article 81 EC.¹¹⁸ However, some other issues concerning the access to the payment card systems have been dealt in the Commission Decision 2001/782/EC Case COMP/29.373-*Visa International*, especially the no acquiring without issuing rule.

Regarding the no acquiring without issuing rule, according to the Commission the requirement that all members of the Visa payment card system must issue cards before acquiring and that they should issue a reasonable volume of cards restricts the commercial freedom of the participating banks. However, the obligation to issue cards may be said to promote the development of the Visa card system by ensuring a large card base, and thereby making the system more attractive for merchants. The no acquiring without issuing rule does not in itself create significant barriers to entry on the acquiring market. Therefore, this rule does not in itself restrict competition in an appreciable way and therefore falls outside the scope of Article 81(1) EC.¹¹⁹

4.1.4. The Reform of Credit Card Schemes in Australia

¹¹⁴ Three special interrogatories were answered: (1) Has Sears proved, by a predominance of evidence, that Visa's Bylaw 2.06 has a substantially harmful effect on competition in the relevant market? (Yes); (2) Has Sears proved, by a predominance of evidence, that the harmful effect substantially outweighs any beneficial effect on the competition in the relevant market? (Yes); (3) Has Sears proved, by a predominance of evidence, that it was injured by Visa's Bylaw 2.06? (Yes).

¹¹⁵ Carlton and Frankel, the consultants to Dean Witter in the suit, contended that the actual history of Visa shows that the concern about theft of secret and free riding is baseless, see Carlton, D.W. and Frankel, A.S. (1995b). However, in my opinion they did not distinguish the access to the system of a normal bank and the one of a current competitor of the system.

¹¹⁶ US Court of Appeal, *SCFC ILC, Inc. v Visa USA*, 36 F.3d 958 (10th Cir. 1994), p. 972.

¹¹⁷ US Supreme Court, *SCFC ILC, Inc. v Visa USA*, 115 Supreme Court Reporter 2600 (1995).

¹¹⁸ All information and observations relating to this case at the moment are confidential, see email reply by Silvia Kersemakers, who is in charge of this case at DG Competition- Financial Services, D1 Unit to the author on May 8, 2003.

¹¹⁹ European Commission, Decision 2001/782/EC of 9 August 2001, Case No COMP/29.373-*Visa International*, OJ L 293, 10/11/2001, p. 24, paragraph 65.

Access regime together with interchange fee and merchant fee are three issues of the Reform of credit card schemes in Australia in 2002. According to the Reserve Bank of Australia, each scheme in Australia imposes minimum entry standards that are intended to ensure the safety of the scheme, but have the effect of unduly limiting competition. Generally speaking, only authorized deposit-taking institutions supervised by the Australian Prudential Regulation Authority (APRA) are eligible for participation. Supervision by APRA is a broad-brush requirement that does not directly address the particular risks generated to the schemes by credit card issuers and acquirers. Two of the schemes prohibit their members from acting only as acquirers and two other schemes have penalties for members whose business is weighted heavily towards acquiring rather than issuing. Such restrictions and penalties discourage the participation of specialist credit card acquirers which could promote competition in the acquiring market and strengthen the representation of acquiring interests in the process of setting interchange fees.

Therefore, the reform concerning the access regime now makes explicit that a designated credit card scheme is free to impose its own business and operational criteria in assessing applications to participate in its scheme. However, it must not discriminate between specialist credit card institutions as a class and other authorized deposit-taking institutions as a class in relation to any of these criteria, or to the rights and obligations of participants in the scheme. Each scheme must also publish the criteria it imposes in assessing applications for participation in Australia. Besides, the reform prohibits the imposition of any restrictions or form of penalties on participants seeking to specialize in acquiring. This means that neither the rules of the scheme nor any participant in the scheme shall prevent a participant in the scheme in Australia from being issuer only or an acquirer only or both an issuer and an acquirer.¹²⁰

It can be concluded that the RBA is severe in the restrictions on forms of restriction on participant seeking to specialize in acquiring because in RBA's view it lacks of competition in the merchant acquiring market in Australia. The reasoning of the RBA is similar to Cruickshank's relating to the UK merchant acquiring market¹²¹. However, in my opinion, the RBA and Cruickshank evaluated the acquiring market separately and did not consider the network effects of an open payment system. The difference between the European Commission and Australian view relating to the no acquiring without issuing rules of payment card systems just can be explained by the differences in the fact findings and fact evaluations of parties.

4.2. Exclusivity Rule

In an open payment card system, a member may be terminated its membership if it issues the payment card of other competitive systems. Such exclusivity rule (exclusionary rule) may limit the ability of the members of an open payment card system from competing

¹²⁰ See Reserve Bank of Australia (2002), *ibid.*

¹²¹ See Cruickshank, D. (2000), *ibid.*, paragraphs D2.1-D2.40, p. 237-246.

with that system through another payment card system or on their own. In contrast with the exclusion rule¹²² which restricts the access to essential facilities and restrains the intra-system competition, the exclusivity rule affects the network level or inter-system competition.¹²³

The exclusivity rule in the open payment card systems such as Visa and MasterCard originated from the anti-duality rules of National Bank Americard (the predecessor to Visa) and MasterCharge (the predecessor to MasterCard). The anti-duality rules prohibited banks from issuing both Visa and MasterCharge cards.¹²⁴ In the early 1970s, the anti-duality rules was challenged in *Worthen v National Bank Americard* case¹²⁵ as a *per se* illegal group boycott, in violation of Section 1 of the Sherman Act. Although the courts did not decided in this case whether the anti-duality violated the antitrust law or not, Visa, faced with the ambivalent Antitrust Division of Department of Justice and threat of expensive private litigation, abandoned its anti-duality rule.¹²⁶

However, in the *National Bank of Canada v Interbank Card Association* case¹²⁷ concerning the anti-duality rule of MasterCard (Interbank) for its Canadian members, the US Federal Courts upheld the anti-duality rule. The courts contended that the rule was: (1) adopted when MasterCard entered the market; (2) necessary to protect the original members' start-up costs in the venture; and enforceable only for a limited period of time (that is eight years based on anticipated recovery of start-up costs). Moreover, the court declared that “[u]nderlying purpose of the exclusivity of the provision was to enhance the competition in the Canadian credit card market by introducing a new product... While it restricted intra-brand competition to some extent, it had the beneficial effect of increasing the inter-brand competition...”¹²⁸ Moreover, in 1990, 14 state antitrust enforcers forced Visa and MasterCard to split up their Point of Sale (POS) debit joint venture, known as

¹²² Some authors did not distinguish between the exclusivity rule (exclusionary rule) and the exclusion rule. They considered both of them are the exclusion rule, for example Jacobson, J.M (2002), Exclusive Dealing, Foreclosure, and Customer Harm, *Antitrust Law Journal*, Vol. 70, Issue 2, p. 311-370.

¹²³ For further see Balto, D.A. (1997), Banking Networks and Exclusivity: The Next Antitrust Challenge, *Journal of Retail Banking Services*, Vol. 19, Spring 1997, p. 41 and Balto, D.A. (1999), The Justice Department and Visa, MasterCard Face-Off – A Challenge to the Potential for Network Competition, *Electronic Banking Law and Commercial Report*, Vol. 4, No. 1, May 1999, p. 1, http://www.whitecase.com/balto_david.html (18/4/2003 1:55:05 PM).

¹²⁴ See Balto, D.A. (1999), *ibid*, p. 3.

¹²⁵ US District Court, *Worthen v National Bank Americard*, 345 F. Supp. 1309, (E.D.Ark. 1972); US Court of Appeal, *Worthen v National Bank Americard*, 485 F.2d 119 (8th Cir. 1993); US Supreme Court, *Worthen v National Bank Americard*, 415 US 918 (1974).

¹²⁶ For further see Balto, D. A. (1995b), Access Demands to Payment Systems Joint Ventures, *Harvard Journal of Law & Public Policy*, Vol. 18, No. 3, Summer 1995, p. 627-627.

¹²⁷ US District Court, *National Bank of Canada v Interbank Card Association*, 507 F.supp. 1113 (S.D.N.Y. 1980); US Court of Appeal, *National Bank of Canada v Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981).

¹²⁸ US District Court, *National Bank of Canada v Interbank Card Association*, 507 F.supp. 1113 (S.D.N.Y. 1980), p. 1123. The Court of Appeal affirmed the District Court opinion in part on the merits and in part on the grounds that the appellant failed to demonstrate a link between the behaviour complained of and anti-competitive consequences to US commerce (US Court of Appeal, *National Bank of Canada v Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981), p. 6). For further see Balto, D.A. (1995b), *ibid*, p. 627-628.

Entree.¹²⁹ The parties concerned finally reached a settlement agreement in which two associations would terminate Entree and separately create new POS networks.¹³⁰

In 1991 Visa USA passed Bylaw 2.10(e) which provides that “[t]he membership of any member shall automatically terminate in the event it, or its parent, subsidiary or affiliate, issues, directly or indirectly, Discover Cards or American Express Cards, or any other card deemed competitive by the Board of Directors”. This exclusivity rule prohibits Visa member banks from issuing cards of other payment cards systems deemed to be competitive. Therefore, the Bylaw 2.10(e) is different with the Bylaw 2.06, the exclusion rule concerning the access to Visa association which prevents other payment card systems deemed to be competitive from being able to issue Visa cards through their subsidiary or affiliate. However, such rule complements the Bylaw 2.06.

After that, Visa international began considering a global exclusivity rule patterned on Bylaw 2.10(e). However, in Europe, American Express and Dean Witter Discover complained the Visa’s proposed rule to the European Commission. Complainants argued that the proposed rule would restrict competition among banks as these would not be able to issue the entire range of general purpose cards. They further contended that it would restrict inter-system competition among card systems as it would foreclose access to a distribution channel which was crucial to further penetrate (in the case of American Express) or enter (in the case of Dean Witter) the European market. They also considered the proposed rule to be plainly discriminatory as it would not apply to Eurocard/MasterCard and perhaps some other card systems (such as Diner's Club and JCB). Finally they stressed that that they did not seek access to Visa's system but only to one of its distribution channels so that the proposed rule could not be defended on the free rider grounds.¹³¹

The European Commission launched the investigation in January 1996. The Commission’s Directorate General for Competition has reached the preliminary view that Visa's proposed exclusivity rule, if adopted, would have infringed the EC competition rules because it would have restricted competition between international cards systems as well as between banks which issue cards riding on those systems.¹³² Finally, the proposal was dropped and the only region with a prohibition on member bank issuance of American and Discover cards was and remains the US.¹³³

Following the Bylaw 2.10(e) of Visa USA, MasterCard USA similarly enacted the Competitive Program Policy (CPP) applicable only in the US. Contending that the exclusivity rules (Visa’s Bylaw 2.10(e) and MasterCard’s CPP) restrain competition

¹²⁹ US District Court, *State of New York et al v Visa USA Inc.*, No. CV-89-5043 (PNL), 1990 WL 75047, 1990-1 Trade Case P 69,016, S.D.N.Y., May 08, 1990.

¹³⁰ For further see Gould, N.E. (1990), *The Trend toward a Cashless Society: the Point of Sale Electronic Fund Transfer*, *Annual Review Banking Law*, 1991, 10 ANNRBL 521, Notes and Comments, available at Westlaw databases.

¹³¹ Gyselen, L. (1996), *ibid.*, paragraph 70.

¹³² See European Commission, Press Release, IP/96/585, 3 July 1996 and European Commission, *XXVIth Report on Competition Policy (1996)*, ISBN 92-828-0298-1, point 63.

¹³³ See US District Court, *US v Visa USA Inc.*, 163 F.Supp.2d 322 (S.D.N.Y 2001), p. 308.

among payment card networks, and thereby harm consumers, the United States sued Visa USA Inc., Visa International Inc. and MasterCard International Inc. for violating Section 1 of the Sherman Act in the *US v Visa USA* case.

The District Court found, based on the contemporaneous evidence, that in adopting its exclusivity rule (exclusionary rule), each association focused on blunting horizontal competition. These rules were adopted with two purposes¹³⁴:

To ensure that no member bank would gain the “competitive advantage” of issuing American Express or Discover cards that other members could not issue. Through the exclusionary rules Visa and MasterCard limit competition among the member banks by preventing them from competing against each other by offering their customers American Express and Discover brands and network features;

To weaken American Express and Discover as competitors to the bank-owned networks or to prevent American Express and Discover from competing in the network services market for the business of bank issuers.

According to the District Court, the exclusivity rules (exclusionary rules) cause anti-competitive effects because the agreements among banks not to issue cards on rival networks are facially anti-competitive. These agreements restrict competition in the issuing and network services markets. The District Court contended that the abolition of such rules would increase competition at the network level and benefit competition and customers because it will increase the card issuance, the merchant acceptance and the economies of scale. Therefore, such abolition would increase not only the card consumer’s choice but also the card merchant’s choice. The court contended that a bank issuance of general purpose cards across all networks would permit American Express and Discover to gather competitive strength, and cause Visa and MasterCard to respond competitively. This ultimately increases product variety and consumer choice.

In rebuttal, Visa and MasterCard asserted two putative business justifications for their exclusionary rules (exclusivity rules). First, these rules are “loyalty” or “cohesion” devices that protect their fragile association structure by preventing American Express and Discover from “cherry picking” key issuer banks through offers of substantial discounts and thus preserve the stability of the networks. Moreover, such rules are necessary to protect each association from American Express or other network competitors taking some association assets without compensation or free riding. Nevertheless, based on the records and evidences, the Court stated that “[t]he same behavior by each association’s largest competitor poses no threat to either association’s cohesiveness or governance” and “[d]efendants and their members bank executives have repeatedly testified that Visa and MasterCard have no interest in the banks’ relationship

¹³⁴See US District Court, *US v Visa USA Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001), p. 382 and US Department of Justice-Antitrust Division, *The Brief Of The United States (Final Version) in the US Court of Appeals for the Second Circuit*, August 30, 2002, No. 02-6074(L) consolidated with Nos. 02-7076, 02-6078, *US v Visa USA Inc. Case*, p. 21 and 63-64.

with their customers; so there is no asset on which free-riding could occur.”¹³⁵ Therefore, these justifications were rejected.

Finally, the District Court concluded that “[s]ince defendants’ exclusionary rules undeniably reduce output and harm consumer welfare, and defendants have offered no persuasive pro-competitive justification for them, these rules constitute agreement that unreasonably restrain interstate commerce in violation of Section 1 of the Sherman Act”¹³⁶.

If the Visa Bylaw 2.10(e) violates the antitrust rules, the rules similar to the Visa Bylaw 2.06 should be reconsidered. It may be justified if an open payment card system continues to exclude the American Express or Discover to participate its system. However, if it excludes financial institutions, which are not subsidiaries or affiliates of American Express or Discover and which have signed the contracts with American or Discover to issue these payment cards as partners/licensees, to participate in the open payment card systems, it seems to restrain competition between the existing members of open payment card system and such financial institution. But the result also depends on the evaluation of competition restriction degree. At the moment, the competition in the intra-system, particularly in the payment card issuing market in US or Europe is very vigorous and severe. That is why the US Department of Justice declared that “[h]ave no quarrel with the result in *MountainWest*”.¹³⁷

4.3. Honour All Cards Rule

Honour all cards rule (HAC) is a rule that a payment card system requires merchants who accept the payment cards of that systems to accept all kinds of its payment cards presented for payment. This rule gives assurance to the cardholders that their branded payment cards are universally accepted wherever that brand logo is displayed. The HAC rule applies irrespective of the nature of the transaction, the identity of the issuer, the type of card being used or the personal characteristics of the cardholder. In fact, open payment card systems like Visa and MasterCard and proprietary card issuers American Express and Discover, as well as the regional ATM systems, all are grounded in similar rules.¹³⁸

In the US in October 1996, a group of merchants, led by Wal-Mart Stores Inc., filed an antitrust lawsuit against Visa and MasterCard, challenging the HAC rule.¹³⁹ The central claim is that Visa and MasterCard have used their dominant positions in the credit card market to force or illegally tie merchants to accept debit cards. If the merchants refuse to

¹³⁵ See US District Court, *US v Visa USA Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001), p. 404.

¹³⁶ US District Court, *US v Visa USA Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001), p. 406.

¹³⁷ See US Department of Justice, *The Brief of the United States (Final Version) in the US Court of Appeal for the Second Circuit, US v Visa USA Inc.*, No.02-6074(L), August 30, 2002, p. 99-101.

¹³⁸ See MasterCard International Website, *The Honour All Cards Rule: Ensuring the Payment Industry’s Success*, http://www.mastercardintl.com/newsroom/honor_cards.html (15/4/2003 3:34:44 PM).

¹³⁹ US District Court, E.D. New York, *In re: Visa Check/MasterMoney Antitrust Litigation*, No. CV-96-5238.

accept the debit cards, they would breach the HAC rule and risk losing the ability to allow consumers to use credit cards.

The crux of the controversy over the HAC rule focuses on the ability of merchants to steer customer to lower cost payment mechanisms and enable the online debit networks to effectively compete with the offline networks.¹⁴⁰ The HAC rule together with the no-surcharge rule (NDR) restricts the merchants' ability to direct consumers in this fashion. The merchants claim that they are forced to pay more for the offline debit card transactions that require a cardholder's signature than for online debit card ones that have the cardholder use a PIN. According to the merchants in this case, when a customer signs a Visa or MasterCard debit-card slip, it costs merchants as much as USD1.49 for USD100 sale, compared with nine cents for many online debits cards.¹⁴¹ The merchants want the right to choose which Visa and MasterCard products they accept. Therefore, they allege the HAC rule of Visa and MasterCard associations breaches US anti-trust laws by illegally tying the acceptance of debit cards to credit cards or illegally leveraging their power in the credit card market to force merchants to use debit cards.

However, according to Visa and MasterCard associations, the HAC rule is pro-competitive and benefits cardholders, merchants and member financial institutions of these payment card systems:¹⁴²

For cardholders, the rule assures that:

The payment cards of cardholders will be accepted at any of the millions global acceptance locations displaying a Visa or MasterCard logo;

Cardholders have the flexibility to choose from among a wide variety of payment options to decide how they want to pay for goods and services;

Cardholders do not have to worry about whether their payment card might be accepted regardless of what bank issues it, what type of card it is, or what company or organization it is associated with.

For member banks, the rule enables them to:

Continue offering consumers new payment card options that provide a variety of choice and rewards;

Issue payment cards with the knowledge that those cards will enjoy widespread utility and universal acceptance.

For merchants, the rule:

¹⁴⁰ Balto, D.A (2000b), *ibid.*, p. 1395.

¹⁴¹ Wilke, J.R., Visa, MasterCard Campaigned to Undercut Rival Debit Cards, *The Wall Street Journal Online*, November 14, 2002, http://online.wsj.com/article_print/0,,SB1037228477223317468,00.html .

¹⁴² See MasterCard International, *The Honour All Cards Rule: Ensuring the Payment Industry's Success*, http://www.mastercardintl.com/newsroom/honor_cards.html (15/4/2003 6:44:07 PM).

Provides the foundation for the worldwide system which guarantees payment to merchants, no matter what type of Visa or MasterCard branded card a consumer uses;

Ensures that consumers have the widest range of payment options available, which has demonstrably helped increase merchants' sales and profitability.

To show that a tying arrangement is *per se* illegal, four elements are required¹⁴³: (1) the tying product and tied products are distinct; (2) the seller(s) actually tied the sale of the two products; (3) the seller(s) has (have) appreciable market power in the tying market; and (4) the tying arrangement substantially affects trade.

Under the rule of reason, tying arrangement is illegal by proving that “[t]he challenged action had an adverse effect on competition as a whole in the relevant market and, if the defendant shows a pro-competitive redeeming virtue of the action, that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition.”¹⁴⁴ In Europe, both four elements in *per se* test and proportionality test are used to decide whether a tying agreement is illegal and/or liable to get an exemption.¹⁴⁵

The final judgment under antitrust rules concerning the HAC rule has not been enacted by the US Courts. However, in the EU, the European Commission stated in Decision 2001/782/EC of 9 August 2001 that the HAC rule in the Visa rules falls outside Article 81(1) EC.

The Commission agreed that the HAC rule promotes the development of the payment card systems since it ensures the universal acceptance of the cards, irrespective of the identity of the issuing bank. A payment card system like Visa could not properly function if a merchant or an acquiring bank were able to refuse, for example, cards issued by a bank established abroad or by other domestic banks. The development of a payment card system depends on issuers being able to be sure that their cards will be accepted by merchants contracted to other acquirers. Without such assurance, a brand or logo on a payment card loses most of its meaning and utility, especially where an international card is concerned, and cards are often relied upon by travellers for foreign payments.

According to the Commission, the HAC rule cannot be said to be restrictive of competition. First, the fact that the fees are charged to merchants by an acquiring bank may be different does not demonstrate that different types of Visa cards are unrelated

¹⁴³ See US District Court, E.D. New York, *In re Visa Check/MasterCard Antitrust Litigation*, No. 96-CV-5238 (JG), February 22, 2000 and April 1, 2003 and US Supreme Court, *Eastman Kodak v Image Technical Services*, 112 S.Ct. 2072 (1992); US Court of Appeal, *US v. IBM Corp.*, 163 F.3d 737, 741 (2d Cir.1998).

¹⁴⁴ See US District Court, E.D. New York, *In re Visa Check/MasterCard Antitrust Litigation*, No. 96-CV-5238 (JG), April 1, 2003, WL 1712568 and US Court of Appeal, *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d. Cir.1997).

¹⁴⁵ See European Commission, Decision 79/86/EEC of 10 January 1979, *Vaessen/Moris*, OJ L 19, 26 January 1979, p. 32 and ECJ, Case C-333/94, *Tetra Pak International v EC Commission*, 14 November 1996, [1996] ECR I-5951.

products. Secondly, the merchant fee is decided by merchant acquirers, not laid down by Visa rules, and in many cases merchant fees are bilaterally negotiated. The Commission contended that leaving it up to an individual merchant whether to accept or not a particular Visa card, solely on the basis of the merchant fee which it is charged by its bank, would seriously endanger the universal acceptance of Visa international payment cards. Cardholders would not know in advance whether their Visa card would actually be accepted. Obviously, if it were left to merchants whether or not to accept a particular Visa card, solely on the basis of the merchant fee they may have to pay, this would endanger the international function of the card. Thirdly, the Visa's HAC rule does not oblige merchants to accept future types of Visa card, since merchants are free at any time to stop accepting Visa.¹⁴⁶

I support the Visa's HAC rule and agree with arguments of the European Commission except the last one. The payment cards of Visa or MasterCard are very popular today. If merchants stop accepting future types of these cards, they will lose customers and their revenue will reduce. Therefore, the third argument is not persuasive. However, it should be agreed that the benefits of the HAC rule outweigh the anti-competitive harms provided that the MIF is determined reasonably, objectively and transparently.

In my opinion, the US Federal Courts should follow the reasoning of the European Commission to give a judgment in favour of the HAC rules. First, the Court dealt this case contended that the HAC rules of Visa and MasterCard should be considered under the rule of reason.¹⁴⁷ When the US Federal Courts apply the rule of reason, the arguments like the European Commission (except the last one) will prevail in this case. The benefits of the customers outweigh the disadvantages of merchants.¹⁴⁸ Therefore, US Federal Courts will favour the HAC rule like they favoured the MIF in the *NaBanco* case¹⁴⁹. Second, US Federal Courts will consider the substantial consequences of this case. If Visa and MasterCard lose this case, they and member banks will face with the damage seeking of approximately USD100 billion from the merchants.¹⁵⁰ That may not only lead to the bankruptcy of Visa and MasterCard associations because even a fraction of this amount far exceeds the likely assets of these two card associations but also cause chaos in the US banking system because the member banks of these two associations will be responsible for the liabilities of these associations under the partnership theories.¹⁵¹

¹⁴⁶ European Commission, Decision 2001/782/EC of 9 August 2001, Case No COMP/29.373-*Visa International*, OJ L 293, 10/11/2001, p. 24, paragraph 66-69.

¹⁴⁷ See US District Court, E.D. New York, *In re: Visa Check/MasterMoney Antitrust Litigation*, No. CV-96-5238, Order, April 1, 2003 and Statement by Noah Hanft, General Counsel, MasterCard International Concerning Federal Judge John Gleeson's Ruling on MasterCard's Motion for Summary Judgment in the Wal-Mart Lawsuit Against MasterCard and Visa, April 1, 2003, available at http://www.mastercardintl.com/newsroom/merch_statements_01apr2003.html (10/4/2003).

¹⁴⁸ See Smith, F. B. (2003), Honour All Cards Suit Could Cost Customers, *Houston Business Journal Online*, <http://houston.bizjournals.com/houston/stories/2003/02/24/editorial3.html> (15/4/2003 8:08:25 PM)

¹⁴⁹ US District Court, *NaBanco v Visa USA*, 596 F.Supp. 1231 (S.D. Fla 1984) and US Court of Appeal, *NaBanco v Visa USA*, 779 F.2d 592 (11th Cir. 1986).

¹⁵⁰ See Wildfang, K.C (2002), *ibid.* Another figure of this treble damage is about USD 40-50 billion, see Wilke, J.R., Visa, *ibid.*, http://online.wsj.com/article_print/0,,SB1037228477223317468,00.html (1/1/03).

¹⁵¹ Under the US antitrust law, each co-conspirator would be jointly and severally liable for the full amount of the plaintiffs' damages, with no right of contribution from the other co-conspirators. See *Texas Indus. Inc.*

Moreover, if Visa and MasterCard go into bankruptcy, the closed payment card systems will control the market. In this case, competition in the payment card systems will become weaker and harm the customers' welfare. Another scenario of this case may be that the parties concerned will reach to the settlement agreement in which Visa and MasterCard may undertake to adjust their MIF concerning offline debit cards or even MIFs of all payment cards basing on the objective and transparent criteria. As a result, subject to Court's review and approval the Visa Check/MasterMoney case was settled out of Court after Visa and MasterCard had agreed to pay USD 3 billion within 10 years in compensation to retailers and to lower their MIF for certain payments made with their offline debit cards.¹⁵²

Accordingly, the HAC rule should be considered to fall outside the antitrust law provided that the MIFs have to be determined transparently and reasonably. Even in case it restricts the competition, it satisfies the proportionality test and it should be exempted because its benefits to customers and its special role for the success of the payment card industry.

4.4. Other Non-Price Competition Issues

Other non-price competition issues result from a payment card system's rules which limit the participants' business freedom of action. Although these issues relate to the principles of freedom of establishment, freedom to provide service and free movement of capital and payment, they should be examined under the antitrust rules because they may constitute private barriers to freedom to provide services and restrict the intra-system competition. In Europe, the European Commission has investigated the rules on cross-border card issuing and merchant acquiring and the principle of territorial licensing in the *Visa International* case. In US, the dual governance has put under the scrutiny in the *US v Visa USA* case.

Regarding rules preventing member banks from supplying cross-border payment card services, except in some special circumstances, the previous Visa rules obliged banks wishing to carry out issuing or acquiring activities outside their country of domicile in principle to do so through subsidiaries or branches. Due to such rules, customers did not have many choices for best issuers or best acquirers. Furthermore, they caused difficulties for pan-European businesses because they had to shop around for an acquiring bank in

v. Radcliff Materials Inc., 451 U.S. 630 (1981), <http://www.uscplus.com/online/index.asp?case=4510630> (16/4/2003 12:03:56 AM). Under the EC Treaty, it does not contain rules on damages for private parties, nor does European case law expressly warrant compensation for breaches of competition rules by such party. See Lidgard, H.H. (2002), *ibid.*, p. 414-418. However, concerning the fines imposed by the Commission, the Commission may require payment of fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association fined. See Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, OJ L 1, 4/1/2003, p. 1, Article 23(4).

¹⁵² See http://www.economist.com/finance/displaystory.cfm?story_id=1753577 and www.mastercardintl.com/newsroom/merch-statement-30apr2003.html (7/5/2003).

every Member States where it did business and negotiate the terms there even if these were less favourable.¹⁵³ However, Visa has modified these rules. It allowed Visa members to issue card to consumers and contract with all types of merchants in other Member States without prior establishment of subsidiary or branch in the country concerned. Therefore, these modified rules are not restrictive within the meaning of Article 81(1) EC according to the European Commission.¹⁵⁴

Besides, the principle of territorial licensing also restricts commercial freedom of actions of the Visa member banks because in principle it does not allow banks to issue cards and to acquire merchants' transactions outside the area in which they have established a branch or subsidiary and for which they hold a license. Nevertheless, the Commission contended that banks can obtain an amendment to the original trademark license or an additional license for any other territory where it is authorized to carry on banking activities. Consequently, this principle is considered not to constitute an appreciable restriction on competition.¹⁵⁵

With reference to the governance duality, the US Department of Justice claimed, based on the fact that the same banks control both Visa and MasterCard and the rules of two card associations enable an individual payment card issuer to simultaneously governs both association, that the dual Directors on each of the associations' boards have reduced incentive to invest in or to implement competitive initiatives. As a result, the Visa and MasterCard associations fail to compete with each other by constraining innovation and investment in new and improved products.¹⁵⁶ However, the District Court contended that the US Department of Justice failed to establish causation between dual governance and any significant blunting of brand promotion or network and product innovation, thereby failed to establish that dual governance caused a significant adverse effect on competition.¹⁵⁷

Regarding technical rules such as placement of information on the magnetic strip on cards, the encryption devices and codes, and other technical standards, such rules are essential and prerequisites for the proper function of system. The efficiency gains derived from technical rules seem to outweigh the potential damage (if any) to competition. Accordingly, competition authorities normally have taken a favourable view relating to such rules.

4.5. Summary

¹⁵³ Gyselen, L. (1996), *ibid.*, paragraph 71.

¹⁵⁴ European Commission, Decision 2001/782 of 9 August 2001, Case COMP/29.373-*Visa International*, OJ L 293, 10/11/2001, p. 24, paragraph 59-62.

¹⁵⁵ European Commission, Decision 2001/782 of 9 August 2001, Case COMP/29.373-*Visa International*, OJ L 293, 10/11/2001, p. 24, paragraph 63-64.

¹⁵⁶ US District Court, *US v Visa USA Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001), p. 328.

¹⁵⁷ US District Court, *US v Visa USA Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001), p. 379.

The access to payment card systems together with the exclusion and exclusivity rules as well as the honour all cards rule are the important non-competition issues which are still controversial under the antitrust perspective because they have both pro-competitive and anti-competitive effects. At the present, competition at the intra-system level is fierce and vigorous with thousands of issuers and acquirers in the EU and the US. In the meanwhile there are few competitors at inter-system competition level which is thereby the area of greatest competitive concern. As a result, the focus of the analysis of competition authorities should be primarily on the inter-system competition. Inter-system competition concerning non-price issues should be view not only in terms of existing competition but also the potential competition and innovation that might arise from new competitors in the network services market.¹⁵⁸ The harms and effects caused by the non-price competition issues should be evaluated not only at the present but also in the future.

¹⁵⁸ Balto, D. A. (1997), *ibid.*, p. 48.

5. Conclusion

Nowadays, the payment card becomes a popular means of payment for daily spend, especially in the e-commerce. The amount and value of transactions with the card payment increasingly grow. Providing the services relating to payment cards is one of the most important activities of a majority of financial institutions in the world. Therefore, competition in the payment card systems is increasingly severe both in intra-system and inter-system levels.

However, competition always goes together with prevention, restriction or distortion of competition because they are two sides of a coin. In payment card systems, with their network effects competition and cooperation exist in parallel. It may lead to anti-competitive behaviours and abuse of cooperation among competitors which may appreciably restrain inter-system and/or intra-system competition. In order to preserve the level playing field in the payment card industry and protect the customers' welfare, competition authorities have to comprehensively and carefully evaluate the pro-competitive benefits and the harmful effects of anti-competitive rules and agreements in the payment card systems under the proportionality test by focusing their net impact on price, quality, quantity of payment card services provided and choice of customers. Moreover, the network effects and cooperation in the open payment card systems as joint ventures should be duly considered. Therefore, the fact finding and fact evaluation are very important to reasonably apply the antitrust law to payment card systems.

After introducing the operation, the network effects together with the competition and cooperation in the payment card systems, the thesis analyzed the case law and practices of the application of antitrust law to payment card systems in Europe, the US and Australia. Regarding the price competition issues, the MIF and the NDR catch the special attention of competition authorities. Under the rule of reason, US Federal Courts contended that the MIF is legal. In Europe, the European Commission gave the MIF for cross-border payment transactions with Visa consumer cards at retailer outlets in the EEA an individual exemption under the condition that the MIF is reasonably, equitably, and transparently determined. The Reserve Bank of Australia similarly applied the objective, transparent and cost-based criteria for the MIF in Australia. However, the views of competition authorities regarding the NDR are quite different; they depend on specific circumstances, economic contexts and market analysis. The NDR legality gets mixed results and varies from states to states in US. In Europe, the European Commission basing on the market survey concluded that the NDR falls outside the antitrust rules because of its insubstantial effect on Community's trade. In the meanwhile the RBA has banned the NDR since January 1, 2003. As a result, prices as instruments to compete and prices as instruments to standardize in payment card systems should be examined and distinguished.¹⁵⁹ If prices are instruments to compete like the price issues concerning

¹⁵⁹ Ballell, R.D.L.H. (2002), *ibid.*, p. 233.

Issuer-Customer and Acquirer-Merchant relationships, they can not be directly or indirectly fixed or limited. Nevertheless, if they are considered as instruments to standardize the operation of payment card systems, they normally are not deemed to amount to collusive behaviours and should be measured to be pro-competitive, and thereby are exempted or fall outside the antitrust law.

With reference to the non-price competition issues, there are many rules, agreements and behaviours which seem to restrict or eliminate competition concerning the access criteria to the payment card systems, the exclusion and exclusivity rules, the honour all cards rule or other rules which restrict the freedom to provide payment card services of banks and credit institutions. However, the final conclusions depend on the fact finding and fact evaluation of competition authorities. US Federal Courts gave judgments favouring the exclusion rule, the dual governance but opposing the exclusivity rule. The European Commission considered that the honour all cards rule, the no acquiring without issuing rule, the principle of territorial licensing and modified rules on cross-border issuing and acquiring do not fall within the Article 81(1) EC. However, the litigation regarding non-price competition issues of payment card systems is still in process. For example, the US Federal Court has been examining the honour all cards rule of Visa and MasterCard, the European Commission has been investigating the Visa membership provisions. Due to specific characteristics of payment card systems, certain non-price rules and agreement seemed anti-competitive are proportionate and necessary for the operation and development of these systems.

It is noteworthy to state that the ultimate objective of antitrust law is to protect the benefits and welfare of customers, not the competitors'. If a rule, agreement or behaviour of undertakings or association of undertakings may affect the benefits of other competitors but does not appreciably affect the benefits of customers both at the present and in the future, such rule or behaviour should be considered not to violate the antitrust rules. Furthermore, competition authorities should not deeply intervene into the affairs of undertakings when they have not had enough clear evidence relating the antitrust violation of those undertaking. The rule of law should be applied in antitrust cases. And open payment card systems like Visa or MasterCard should not be considered as the public utility.

In practice in the EU and the US, the payment card market is an interesting anomaly. In terms of intra-system level, there is the appearance of strong rivalry and aggressive competition. But in terms of inter-system level, the degree of competition is much lower.¹⁶⁰ There are a lot of issuers and acquirers in the payment card systems. Although the payment card issuing market or the payment card acquiring market may concentrate on a minority of banks, the competition in these markets is very fierce and vigorous. The entry barrier to these markets is not substantial to prevent new participants. Most of the rules and behaviours which seem to restrain intra-system competition do not appreciably affect customers. Therefore, the rules and behaviours which restrict intra-system competition usually get a favourable view from competition authorities like the exclusion rule in the US, the honour all cards rule, no acquiring without issuing rules, the NDR in

¹⁶⁰ Balto, D.A. (1999), *ibid.*, p. 12.

the EU or the MIF both in the US and the EU. In reverse, the inter-system competition of payment card systems is not robust enough. There are few competitors in this field. Accordingly, the US and European competition authorities are stricter when they consider the rules and behaviours restricting the inter-system competition like the exclusivity rule because they would like to encourage the inter-system competition in order to increase customers' welfare and competitiveness of this industry.

However, the payment card systems, especially the open systems should reconsider and check their rules and behaviours in doing business. Regarding price competition issues, any scale of charges must be determined in an efficient, objective and transparent manner, taking account of actual costs and risks together with reasonable profits and the balance of the interest of parties in the network without involving any appreciable restriction of competition. With regard to non-price competition issues, fair access to the payment card system must be established. Any refusal for access to a payment card system, any restriction on provision of payment card services or restriction on behaviours of merchants or cardholder (if any) may be applied only if it has clearly legitimate and objective justification.

Finally, for the growth of the payment card industry in particular and banking industry in general, a competition culture should be established, maintained and developed. A competition culture will raise awareness among both the public at large and economic actors of the rules of competition where financial institutions have learned and built to obey the antitrust/competition law and where consumers become increasingly aware of its benefits. It thereby contributes to reduce the legal risk in payment card systems. Particularly, the competition culture is the intangible assets of a financial institution. Without it, the financial institutions in payment card industry may face with the substantial costs of antitrust litigation and may lose its prestige as well as customers' and business partners' confidence.

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