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COMPETITION COMMITTEE**

COMPETITION AND EFFICIENT USAGE OF PAYMENT CARDS

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Competition and Efficiency Usage of Payment Cards, held by the Competition Committee in June 2006.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la concurrence et utilisation efficiente des cartes de paiement, qui s'est tenue en juin 2006 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

by the Secretariat

1. In light of the written submission, the background note and the oral discussion, the following points emerge:

1. *Non-cash payment systems serve a valuable role, enabling transactions to occur that otherwise would not. However, free market competition between payment systems likely results in a disproportionately high usage of high-cost payment systems. This market failure exists because relative costs for different payment mechanisms are rarely reflected in consumer prices paid.*

Retail payment systems exist to oil the wheels of commerce, ensuring that purchasers and merchants can benefit from transactions with each other. If cash were the only payment system available, many transactions that would be lost to the economy, simply as a result of the constraint of purchasing only within the limit of cash in the wallet. Non-cash payment systems, such as checks, debit cards and credit cards, have enabled a significantly larger number of transactions to take place than otherwise would.

In any transaction using a payment system both the purchaser (in this case, a cardholder) and the merchant are consuming the services of the payment system; that is, both purchaser and merchant are consumers of payment systems. When comparing costs and benefits of payment systems, the costs and benefits to the integrated purchaser-merchant consumer should be considered.

In the past, governments have pursued a policy goal of minimizing the costs of transactions in order to promote more retail trade and, potentially, out of the view that payment systems are an intermediate product that enable transactions. This has led governments to play an active role in the retail payments sector, by ensuring that stores of value, such as cash, were considered reliable, trustworthy and easily identified as genuine.

In recent times, governments have typically held back from close oversight of new payment systems, which has allowed privately provided systems to take risks, grow and innovate. But the private systems have not been driven by a unique incentive to reduce transaction costs to the integrated consumer. Systems that yield the lowest costs to the group of purchaser/merchants may not be the ones that purchasers will choose to use. For example, if PIN-based debit cards are the minimum cost electronic payment instrument to the integrated consumer, but non-PIN cards offer purchasers a small financial incentive for each marginal use of the card, purchasers may choose the non-PIN card despite it being much more expensive for the merchant and less secure. That is, purchasers will not take into account the full costs of card use to the integrated payment system "consumer". As a result, modest rewards to purchasers for use of a much higher total cost payment system can lead purchasers to use the higher cost system much more frequently than they would if the costs of different payment systems were always reflected in the retail prices of goods.

The existence of price signals to the purchaser that are not reflective of costs to the integrated purchaser-merchant consumer will distort card usage towards more expensive cards, creating a misallocation of resources. This is a market failure. But it is important to note that not all market

failures have good or obvious remedies. In the case of payment cards, it is not clear what regulatory or legal interventions, if any, would best resolve the market failure.

2. *Card issuers may have market power towards merchants, and this market power may exist even for cards with small overall market shares.*

Merchants often complain that they do not have a realistic ability to turn away cards, even if they believe the merchant fees for using a card are unjustifiably high. While merchants do sometimes choose to refuse cards, such refusals are relatively unusual in many merchant sectors, particularly for commonly-used four-party payment systems. Three-party payment systems, such as American Express and Diners Card, with relatively higher merchant fees are more commonly turned away, supporting the view that there is a price elasticity of demand which constrains card issuers in the merchant fees they can charge. Some observers argue that American Express has reduced its merchant fees in response to merchant defections.

Nonetheless, it is likely that payment systems do have market power towards merchants, even if a given payment system has a small share of transactions, as long as the systems have broad acceptance.

In support of the point that card brands with small penetration can still have market power, note that price discrimination exists both for cards with large market shares and for cards with small market shares. Cards price discriminate between different types of merchants, with higher than average charges for certain merchants with predominantly high margins (e.g., hotels and restaurants) and lower than average charges for certain merchants with lower margins (e.g., supermarkets.) Some would interpret this price discrimination as an indication of market power.

3. *Certain card network rules often have effects that maintain the market power of a card network by limiting the ability of retailers to influence choice of payment mechanisms.*

The fact that many consumers may have and seek to use a certain brand of card limits merchant ability to reasonably refuse that card. If retailers accept the card, however, they are often bound by rules from the card brand governing how the merchants must behave with respect to the card. The precise nature of these rules differs across jurisdictions. At times, the full card rules were not even told to merchants. However, some rules were well understood. In particular, certain rules have the effect of limiting the retailer's ability to influence the choice of payment mechanism by the customer. These rules can make merchants less sensitive to merchant fees, by making their demand for card services more inelastic. The rules also limit the ability of merchants to negotiate for lower rates. Certain of these rules appear to have largely anti-competitive effects. Governments might consider whether such rules are consistent with desired policy goals and either challenge them under competition laws or address them with legislation.

The three main rules of concern are the honour-all-cards rule, the no-steering rule and the no-surcharge rule.

The honour-all-cards rule states that if a card brand is accepted, all cards issued under that brand must be accepted. This rule was challenged in the United States by merchants opposed to linking acceptance of major four-party credit cards to their sister debit cards. The four-party debit cards had much higher charges than other debit cards (often more than 10 times as expensive), but merchants were not permitted to refuse the debit cards unless they also refused the credit cards. The "all or nothing" approach of the card companies tied a product that merchants felt they had to accept (the credit card) with a new product the merchants did not want to accept (the four-

party debit card). Ultimately, Visa and MasterCard settled the U.S. litigation by dropping their honour-all-cards policy in the US, but it remained in effect elsewhere.

The no-steering rule means that merchants are not allowed to express their preference for certain forms of payment over others. For example, the merchants cannot tell cardholders that, although the merchant accepts a given credit card, they would prefer the cardholder to use a debit card or pay by cash or check. If merchants have the ability to steer cardholders away from a given card, that gives the merchant a direct way to respond to merchant fees that they consider unduly high.

The most direct form of steering would be in response to price signals. The no-surcharge and no-discount rules prohibit merchants from establishing prices that are different depending on the mode of payment. Discounts for cash payment have sometimes been offered, for example, as well as surcharges for use of certain cards. Surcharges are not extremely common when they are permitted (though certainly present), which has led the European Commission to suggest that no-surcharge rules are innocuous. Such a conclusion is likely too hasty, however, as the ability of merchants to surcharge changes the terms of negotiation with a card issuer over merchant fees, making the merchant better able to avoid unduly high prices. When Australia recently allowed surcharging, as a result of policy actions by the Reserve Bank of Australia, a small but significant number of merchants did choose to surcharge for credit cards and terms of negotiation changed.

4. *Customers who purchase without cards are likely providing an implicit “subsidy” to card users; Card users with low merchant fee cards (such as debit card users) are likely providing an implicit “subsidy” to card users with high merchant fee cards (such as credit card users).*

To the extent that retail prices are uniform for purchasers who use payment mechanisms with different costs, the users of the high-cost payment mechanisms are likely receiving benefits akin to a cross-subsidy from users of the low-costs payment systems. That is, the users of the high-cost payment mechanisms would pay less than they would were they charged for the full cost of using their payment system and the users of the low-cost payment mechanism would pay more than they would in the absence of the high-cost payment mechanism.

This pattern of support may have perverse income distribution effects because the users of low-cost payment systems are more likely to be low income than the users of high-cost payment systems. As a result, the low-income purchasers will pay a higher retail price than they otherwise would, while the high-income purchasers will pay a lower retail price than they otherwise would.

5. *Regulation can have unintended effects not predicted by government policymakers. For example, competition law enforcement focused on four-party payment systems is likely having an unintended impact of moving systems towards a three-party structure, which may result in higher merchant fees.*

In a number of OECD countries, competition authorities or other competent authorities have investigated or charged four-party payment systems with violations of the competition law or with behaviour that is harmful to welfare. Such charges have typically not been directed to three-party payment systems. Even where concerns have been expressed towards three-party systems, as in the Reserve Bank of Australia’s actions towards American Express, the agreement reached with American Express has been different and from that with the four-party systems. In many jurisdictions, this difference in treatment arises, at least in part, from the fact that underlying four-party systems is a system of shareholding of banks, so that there has at least been the appearance of collusive price setting, if not the practice. Another reason for the difference is that

interchange fees, which are observable in four-party systems, could easily be hidden in three-party systems, so that interchange fee regulation would be much more all-encompassing economic intervention into the practices of three-party systems than four-party systems.

One impact of this behaviour by policymakers, as pointed out by David Evans, is that four-party systems may choose to mutate their corporate form to more closely resemble three-party systems. To the extent that three-party systems have typically chosen to set higher merchant fees than four-party systems, this tendency may give policymakers pause. Enforcement limited to four-party systems actually generates incentives for changing corporate form to one that has had higher charges to the combined merchant-purchaser, than those of existing four-party systems. In fact, two of the main international four-party systems, MasterCard and Visa, both announced changes to their corporate structure in recent years moving them towards three-party structures. Many outside observers attribute these changes to card systems perceiving a reduced risk of government action if they operate under a three-party structure that at least superficially eliminates the practice of joint price-setting by the banks.

6. *Structural solutions to market failure may offer the best prospect for long-term, non-distortionary solutions to the previously identified market failures. Structural solutions might be based on technological change or arrival of products operated with owners with different incentives from current card systems.*

Consideration should be given to methods of promoting entry by potential new technologies and competition authorities should analyze with particular care acquisitions by existing card networks of potentially disruptive technologies.

Governments should consider clarifying whether merchants can form payment ventures, acquisition joint ventures or other negotiating ventures. Such joint ventures would have fundamentally different incentives from existing payment card networks and could promote competition between payment card systems.

If structural solutions do not offer the prospect of near-term impacts, and the current situation in a given jurisdiction is deemed unacceptable, governments may need to weigh the costs and benefits of more activist approaches to addressing market failures.

The history of payment systems reveals that technologies for payment systems have been subject to a few drastic innovations and many incremental innovations over time. Innovations have included the introduction of a card that substitutes for money in merchants who accept the card, magnetic swipe strip, automated authorizations, introduction of Personal Identification Number chips, different sizes of cards, and introduction of debit card payments. Future innovations are assured. Some innovations that are currently discussed and, to some extent, in use are mobile-phone based payment mechanisms. These payment systems could potentially operate without partnership with the current payment system networks, but would still need access to basic checking account information at reasonable terms in order to succeed. Thus access regulation may be necessary to the success of new technologies.

In the past, large payment systems have acquired some leaders of new technologies (such as credit card systems acquiring debit card systems) and then changed pricing structures in a manner that reduces the rivalry from the potential challenging sector. Competition authorities should therefore examine acquisitions by established payment systems of new technologies with care.

Perhaps the most natural alternative provider of payment systems to the bank-based systems would consist of a joint venture of merchants. Such a joint venture would have an incentive to keep total fees in the system low. To some extent, merchants may not have considered forming such joint ventures out of fears that they might violate competition laws. Competition authorities should consider (i) examining the conditions in which such ventures would not create concerns and (ii) publicly stating these conditions, in order to promote the formation of alternative ventures.

SYNTHÈSE

Par le Secrétariat

2. Les aspects suivants ressortent particulièrement du rapport écrit, du document de référence et des débats oraux :

1. *Les moyens de paiement scripturaux remplissent une fonction appréciable, en permettant des transactions qui ne pourraient être effectuées d'une autre façon. Cela étant, la libre concurrence sur le marché entre les différents systèmes de paiement peut aboutir à une utilisation disproportionnellement importante de systèmes de paiement à coût élevé. Cette défaillance du marché s'explique par le fait que les coûts relatifs des différents moyens de paiement sont rarement répercutés sur les prix payés par le consommateur.*

Les systèmes de paiement de détail ont pour utilité de mettre de l'huile dans les rouages du commerce, assurant que les acheteurs et les commerçants peuvent effectuer des transactions pour leur avantage mutuel. Si l'argent liquide était le seul moyen de paiement disponible, l'économie se trouverait privée de nombreuses transactions, de par la simple contrainte de ne pouvoir faire des achats qu'à concurrence de l'argent disponible dans le porte-monnaie. Grâce aux moyens de paiement scripturaux, comme les chèques, ou les cartes de débit et de crédit, un nombre nettement plus important de transactions a pu aboutir.

Dans toute transaction faisant appel à un système de paiement, l'acheteur (en l'occurrence, le porteur de la carte) et le commerçant consomment tous deux les services du système en question ; autrement dit, ils sont l'un et l'autre, clients des systèmes de paiement. Pour comparer les coûts et les avantages de ces systèmes, il faut tenir compte des coûts qu'encoure et des avantages qu'en retire le client intégré constitué du couple acheteur/commerçant.

Dans le passé, les pouvoirs publics ont poursuivi un objectif politique visant à minimiser les coûts de transaction en vue de promouvoir le développement du commerce de détail, probablement, sans tenir compte du fait que les systèmes de paiement sont un produit intermédiaire permettant d'effectuer des transactions. Cela les a conduits à intervenir activement dans le secteur des paiements de détail, en assurant que les réserves de valeur, comme les espèces, soient considérées comme sûres, incontestables et facilement authentifiables.

Ces derniers temps, les pouvoirs publics se sont généralement abstenus de surveiller de près les nouveaux systèmes de paiement, ce qui a permis aux systèmes fournis par le secteur privé de prendre des risques, de se développer et d'innover. Mais les systèmes privés n'ont pas été guidés par la seule motivation de réduire les coûts de transaction applicables au client intégré. En effet, les systèmes appliquant les coûts les plus faibles au couple acheteur/commerçant ne sont pas toujours ceux que les acheteurs choisissent d'utiliser. Ainsi, même si les cartes de débit à code PIN sont l'instrument de paiement électronique le moins onéreux pour le client intégré, mais que les cartes sans code PIN offrent aux acheteurs une petite incitation financière à chaque utilisation marginale de la carte, ceux-ci choisiront sans doute de s'en servir, bien qu'elles soient nettement plus coûteuses pour le commerçant et aussi moins sûres. Autrement dit, les acheteurs ne tiendront pas compte des coûts totaux découlant de l'utilisation de la carte pour le « client » intégré du système de paiement. En conséquence, les acheteurs étant modestement rétribués pour l'utilisation d'un système de paiement à coût nettement plus élevé, cela peut les inciter à utiliser le système dont le coût total est plus élevé bien plus souvent qu'ils ne le feraient si les coûts des

différents systèmes de paiement étaient systématiquement répercutés sur les prix de détail des produits.

La présence pour l'acheteur de signaux de prix ne reflétant pas les coûts assumés par le client intégré qu'est le couple acheteur/commerçant va fausser l'utilisation qui est faite des cartes, en l'orientant vers les plus onéreuses d'entre elles, ce qui induira une mauvaise allocation des ressources. Il s'agit là d'une défaillance du marché. Il faut cependant souligner qu'il n'est pas possible de remédier correctement à toutes les défaillances et que cela n'est pas évident. Dans le cas des cartes de paiement, on peut se demander en quoi les interventions réglementaires ou législatives pourraient, le cas échéant, remédier au mieux à cette défaillance.

2. *Les émetteurs de carte sont susceptibles de détenir un pouvoir de marché vis-à-vis des commerçants et ce pouvoir peut aussi être exercé par les systèmes de cartes détenant une petite part du marché global.*

Les commerçants se plaignent souvent de ne pouvoir raisonnablement refuser les cartes, même s'ils estiment que les commissions commerçant liées à l'utilisation de la carte sont d'un niveau injustifiable. S'ils décident parfois de refuser, il s'agit plutôt d'une exception dans de nombreux secteurs marchands, notamment dans le cas des systèmes de paiement quadripartites dont l'usage est courant. Les systèmes de paiement tripartites, comme American Express et Diners Card, appliquant des commissions commerçant relativement plus élevées sont plus souvent refusés, ce qui confirme l'idée que l'élasticité de la demande limite les commissions commerçant que les émetteurs de cartes peuvent imposer. Selon certains observateurs, American Express a réduit ces commissions par suite de défections des détaillants.

Néanmoins, les systèmes de paiement peuvent effectivement exercer un pouvoir de marché vis-à-vis des commerçants, quand bien même un système donné ne représente qu'une faible fraction de l'ensemble des transactions, dès lors que ces systèmes sont largement acceptés.

Pour confirmer que les marques de cartes à faible pénétration peuvent quand même détenir un pouvoir de marché, soulignons que les systèmes détenant une part de marché importante, mais aussi ceux détenant une petite part de marché, pratiquent une discrimination par les prix. Le prix des cartes établit une discrimination entre différentes catégories de commerçants, des commissions supérieures à la moyenne étant imposées à certains commerçants réalisant généralement des marges élevées (comme les hôtels et les restaurants) et des commissions inférieures à la moyenne à certains autres dont les marges sont plus faibles (comme les supermarchés). On peut voir dans cette discrimination par les prix l'indication qu'il existe bien un pouvoir de marché.

3. *Certaines règles imposées par les réseaux de cartes ont généralement pour effet de maintenir le pouvoir de marché d'un réseau donné en limitant la possibilité pour les détaillants d'influencer le choix du moyen de paiement.*

Le fait que de nombreux clients puissent être tenus d'utiliser ou puissent souhaiter utiliser une certaine marque de carte limite la possibilité, pour le commerçant, de refuser raisonnablement la carte en question. Cependant, si les détaillants acceptent cette carte, ils doivent généralement respecter les règles édictées par la marque en question leur imposant ce qu'ils doivent faire. La nature précise de ces règles varie d'un pays à l'autre. Parfois, les commerçants n'ont même pas été informés de l'ensemble des règles. Cependant, certaines d'entre elles sont bien connues, notamment celles qui ont pour effet de limiter la possibilité pour le détaillant d'influencer le choix du mécanisme de paiement par le client. Les commerçants peuvent être moins sensibles

aux commissions qui leur sont applicables, compte tenu de ces règles, car elles renforcent l'inélasticité de leur demande de services de cartes de paiement. Ces règles limitent aussi la capacité des commerçants à négocier des taux moins élevés. Certaines d'entre elles semblent avoir des effets largement anticoncurrentiels. Les pouvoirs publics pourraient se demander si ces règles sont conformes aux objectifs politiques visés et les contester en vertu du droit de la concurrence ou traiter le problème par la voie législative.

Les trois principales règles donnant matière à préoccupation sont les suivantes : la règle obligeant les commerçants à accepter toutes les cartes ou règle de non-discrimination, la règle interdisant aux commerçants d'orienter les clients vers des instruments de paiement moins onéreux et la règle interdisant l'application d'un supplément en cas de paiement par carte.

La règle obligeant les commerçants à accepter toutes les cartes stipule que si une marque de carte est acceptée, toutes les cartes émises sous cette marque doivent l'être aussi. Elle a été contestée aux États-Unis par les commerçants opposés à la pratique consistant à lier l'acceptation des cartes de crédit des grands systèmes quadripartites à celle des cartes de débit de même marque. Les cartes de débit des systèmes quadripartites étaient assorties de commissions nettement plus élevées (généralement plus de 10 fois plus chères) que les autres cartes de débit, mais les commerçants ne pouvaient les refuser sans renoncer aussi aux cartes de crédit du même système. Cette approche du « tout ou rien » appliquée par les réseaux de carte liait un produit que les commerçants estimaient devoir accepter (la carte de crédit) à un nouveau produit qu'ils ne souhaitaient pas accepter (la carte de débit quadripartite). En fin de compte, Visa et MasterCard ont réglé ce différend aux États-Unis en renonçant à la règle de non-discrimination dans ce pays, mais en la maintenant en vigueur dans les autres.

La règle interdisant aux commerçants d'orienter les clients vers des instruments de paiement moins onéreux signifie que les commerçants ne sont pas autorisés à exprimer leur préférence pour certaines formes de paiement par rapport à d'autres. Ils ne peuvent ainsi dire aux porteurs de cartes que, bien qu'acceptant une carte de crédit donnée, ils préféreraient un règlement par carte de débit ou en espèces ou par chèques. Quand les commerçants ont la possibilité de détourner les porteurs de cartes d'une carte donnée, ils disposent d'un moyen direct pour réagir face aux commissions commerçant qu'ils jugent indûment élevées.

La forme la plus directe de réorientation du client constituerait une réaction aux signaux de prix. Les règles proscrivant l'application d'un supplément ou l'octroi d'une remise interdisent aux commerçants de fixer des prix variant selon le mode de paiement utilisé. Des remises sont parfois concédées moyennant un paiement en espèces et des suppléments appliqués en cas d'utilisation de certaines cartes. Lorsqu'ils sont autorisés, ces suppléments ne sont pas très courants, (même s'ils sont indéniablement pratiqués), ce qui a conduit la Commission européenne à laisser entendre que la règle interdisant l'application d'un supplément était inoffensive. Cette conclusion est sans doute trop hâtive, cependant, dans la mesure où la possibilité laissée aux commerçants de facturer un supplément modifie les conditions de négociation des commissions commerçant avec les émetteurs de cartes, en plaçant les premiers en meilleure position pour échapper aux tarifs indûment élevés. Lorsque l'Australie a récemment autorisé l'application d'un supplément, à la suite de l'intervention de la Banque de réserve d'Australie, un nombre restreint mais représentatif de commerçants a choisi de facturer un supplément en cas de paiement par cartes de crédit et les conditions de négociation ont évolué.

4. *Il est probable que les clients qui ne règlent pas leurs achats par carte « subventionnent » implicitement les utilisateurs de cartes et que les utilisateurs de cartes à faible commission commerçant (comme les utilisateurs de cartes de débit) « subventionnent » implicitement les*

utilisateurs de cartes à commission commerçant élevée (comme les utilisateurs de cartes de crédit).

Dans la mesure où les prix de détail sont uniformes pour les acheteurs utilisant des moyens de paiement assortis de coûts différents, les utilisateurs de moyens de paiement à coût élevé sont susceptibles d'en tirer des avantages assimilables à une subvention croisée à la charge des utilisateurs des systèmes à faible coût. Autrement dit, les utilisateurs des moyens de paiement à coût élevé paieraient moins cher qu'ils ne le feraient si le prix total lié à l'utilisation de leur système de paiement leur était appliqué. À l'inverse les utilisateurs des moyens de paiement à faible coût paieraient plus qu'ils ne le feraient en l'absence du moyen de paiement à coût élevé.

Cette forme de soutien peut avoir des effets pervers en termes de redistribution des revenus, car les utilisateurs des moyens de paiement à faible coût sont davantage susceptibles d'avoir des revenus modestes que les utilisateurs de systèmes de paiement à coût élevé. Il s'ensuit qu'un acheteur à faible revenu paiera un prix de détail plus élevé qu'il ne l'aurait fait autrement alors que les acheteurs à fort revenu paieront, quant à eux, un prix de détail moins élevé.

5. *La réglementation peut avoir d'autres effets que ceux qu'escomptent les pouvoirs publics. Ainsi, il est probable que l'application du droit de la concurrence centrée sur les systèmes de paiement quadripartites ait involontairement pour effet un déplacement de ces systèmes vers une structure tripartite, ce qui peut entraîner une augmentation des commissions commerçant.*

Dans un certain nombre de pays de l'OCDE, les autorités de la concurrence ou d'autres autorités compétentes ont mené des enquêtes ou déposé des plaintes à l'encontre des systèmes de paiement quadripartites pour infraction au droit de la concurrence ou pour comportement portant atteinte au bien-être collectif. Généralement, les systèmes tripartites échappent à de telles accusations. Même lorsque des préoccupations s'expriment à leur encontre, comme cela a été le cas lors de l'intervention de la Banque de réserve d'Australie vis-à-vis d'American Express, l'accord passé avec American Express n'était pas de même nature que celui conclu avec les systèmes quadripartites. Dans de nombreux pays, cette différence de traitement est due, au moins en partie, au fait que les réseaux quadripartites correspondants reposent sur un système de participation bancaire, de sorte qu'il y a, à tout le moins apparemment, sinon réellement, une entente sur les prix. Une autre raison expliquant cette différence est liée au fait que les commissions d'interchange, qui sont visibles dans les systèmes quadripartites, peuvent facilement être dissimulées dans les systèmes tripartites, et que la réglementation de la commission d'interchange constituerait une intervention économique bien plus complète dans les pratiques des systèmes tripartites que dans celles des systèmes quadripartites.

Comme l'a relevé David Evans, du fait notamment de cette attitude des pouvoirs publics, les systèmes quadripartites peuvent décider de se transformer pour adopter une forme sociale plus semblable à celle des systèmes tripartites. Dans la mesure où les systèmes tripartites décident généralement de fixer des commissions commerçant plus élevées que les systèmes quadripartites, cette tendance pourrait donner quelque répit aux pouvoirs publics. Limiter l'application du droit de la concurrence aux systèmes quadripartites incite dans la pratique ces derniers à adopter la forme sociale des systèmes appliquant au couple commerçant/acheteur des commissions plus élevées que celles pratiquées par les réseaux quadripartites en place. En fait, ces dernières années, deux des plus grands systèmes quadripartites mondiaux, MasterCard et Visa, ont annoncé la transformation de leur forme sociale en structures tripartites. De nombreux observateurs extérieurs attribuent ces changements au fait que, pour les systèmes de cartes, le risque d'intervention publique est jugé moins important s'ils exercent leur activité sous forme de

structure tripartite qui élimine, du moins en apparence, la pratique des ententes sur les prix à laquelle se livrent les banques.

6. *Des solutions structurelles visant à corriger les défaillances du marché peuvent offrir une meilleure perspective à long terme, autrement dit des alternatives qui n'induisent pas de dysfonctionnement et qui permettront de corriger les défaillances du marché recensées plus haut. Ces solutions structurelles peuvent être liées à une évolution technologique ou à l'arrivée de produits exploités par des propriétaires de systèmes de cartes ayant des motivations différentes de celles des systèmes actuels.*

Il faut prendre en compte les méthodes qui favoriseront l'arrivée de nouvelles technologies éventuelles et les autorités de la concurrence doivent examiner, avec une attention particulière, les acquisitions de technologies susceptibles de bouleverser le marché réalisées par les réseaux de cartes en place.

Les pouvoirs publics doivent se demander s'il convient de préciser si les commerçants peuvent former des entités de paiement, des coentreprises d'acquisition ou autres entités de négociation. Ces entités auraient des motivations fondamentalement différentes de celles des réseaux de cartes de paiement en place et leur existence pourrait favoriser la concurrence entre les différents systèmes.

Si les solutions structurelles ne sont pas porteuses d'effets à court terme et si la situation actuelle dans un pays donné est jugée inacceptable, les pouvoirs publics peuvent avoir à apprécier les coûts et avantages qui découleraient d'une intervention plus volontariste de leur part pour corriger les défaillances du marché.

L'histoire des systèmes de paiement montre que les technologies sur lesquelles ces systèmes reposent ont connu quelques rares mutations radicales et de nombreuses innovations marginales au fil du temps. Citons au nombre de ces innovations, la substitution de l'argent liquide par les cartes chez les commerçants qui les acceptent, les cartes à bande magnétique, les prélèvements automatiques, l'arrivée des cartes à puce à code PIN, les différents modèles de cartes et l'introduction des paiements par carte de débit. On peut sans aucun doute s'attendre à de nouvelles innovations. Le téléphone portable utilisé comme mode de paiement compte au nombre des celles qui suscitent actuellement des débats et qui sont déjà en partie utilisées. Ces systèmes de paiement peuvent théoriquement fonctionner sans lien avec les réseaux de cartes actuels, mais, pour réussir, il leur faudrait tout de même avoir accès aux informations élémentaires de vérification de compte dans des conditions raisonnables. Il peut donc être nécessaire de réglementer cet accès pour assurer le succès de ces nouvelles technologies.

Dans le passé, les grands systèmes de paiement ont racheté certains acteurs qui se trouvaient aux avant-postes des nouvelles technologies (acquisition par les systèmes de cartes de crédit de réseaux de cartes de débit, par exemple) avant de modifier la structure de prix de manière à réduire la concurrence exercée par le secteur qui était susceptible de les mettre en difficulté. Les autorités de la concurrence doivent donc examiner avec attention les acquisitions réalisées par les systèmes de cartes en place.

Les coentreprises formées par des commerçants seraient sans doute, en tant que prestataires de système de paiement, l'alternative la plus naturelle aux systèmes reposant sur des réseaux bancaires. Ces coentreprises auraient intérêt à maintenir de faibles commissions totales à l'intérieur de leur système. Il est possible que les commerçants se soient abstenus de former de telles entités par crainte, en partie, de contrevenir au droit de la concurrence. De leur côté, les

autorités de la concurrence doivent envisager (i) d'étudier les conditions dans lesquelles ces entités pourraient être sources de préoccupation et (ii) d'en rendre publiquement compte en vue de favoriser la formation de ces entités alternatives.

BACKGROUND NOTE

By the Secretariat

1. Introduction

In recent years, debit and credit cards have increasingly displaced checks and cash as retail payment instruments. Worldwide in 2002 general purpose payment cards were used for pay for goods and services with a value of 2.7 trillion USD.¹ As the card industry has grown and matured, competition law or policy has increasingly been applied in this area. Both competition authorities and financial regulators have investigated and taken action related to competition issues. The increased policy interest in payment card activities has been sparked largely by:

- Perceived market failures that may lead to the excessive use of high-cost methods of payment;
- Claims that market power may exist in some areas, with many merchants claiming that they do not have a reasonable ability to turn down certain cards;
- Practices common in the sector, including:
 - Joint-decision making by competitors;
 - Exclusivity; and
 - Historically similar shareholders across card platforms.

The note will (1) discuss potential market power and price-setting related to payment cards, such as debit cards and credit cards, (2) review the regulatory (or self-regulatory) practices that sometimes govern the operation of card networks and (3) consider methods for increasing the role of competitive forces among payment cards. The note is not intended to provide a complete review of competition issues related to payment cards; instead, the intention is to provide a short and practical overview of a variety of potential competition policy problems and potential resolutions to these problems.

A number of points emerge:

- A substantial market failure exists because relative costs for different payment mechanisms are rarely reflected in consumer prices paid;
- A consequence of this market failure is that free market competition likely results in a disproportionately high usage of high-cost payment systems;
- There may be a competition policy problem both with interchange fee setting and, less frequently discussed, with merchant fees;²

¹ See Evans and Schmalensee, 2005, p. 2.

² Merchant fees are often called “merchant discounts”. However, given that the fee is most typically a reduction in funds received by a merchant, and that interchange fees are called fees, this note prefers the term “merchant fee”.

- Customers who purchase without cards are likely providing an implicit “subsidy” to card users;³
- Card users with low merchant fee cards (such as debit card users) are likely providing an implicit “subsidy” to card users with high merchant fee cards (such as credit card users);
- Consideration should be given to making it clear that merchants can form payment ventures, acquisition joint ventures or other negotiating ventures, as this could promote competition or negotiations between parties with fundamentally different incentives;
- Consideration should be given to methods of promoting entry by potential new technologies; and
- Consideration should be given to methods of solving the market failure that arises when consumers face inappropriate incentives to choose higher-cost over lower-cost payment methods.

While a variety of retail payment mechanisms exist, the note will focus primarily on those that have received most attention related to competition issues, namely debit and credit cards.⁴ The inter-connected infrastructure underlying card payments has, in some cases, been co-ordinated through joint ventures by banks (e.g., Visa, MasterCard). These create “four-party” systems, with the four parties being the consumer, the consumer-issuing bank (that oversees the issuance of the credit card), the acquiring bank (that acquires the merchant transactions) and the merchant (retailer). In other cases, the infrastructure has at its centre one party (e.g., American Express, Diners Card). These create “three-party” systems, with the three parties being the consumer, the card issuer/processor (that integrates the issuing bank and acquiring bank activities) and the merchant (retailer).

Cards represent only one set of retail payment instruments. Other prominent ones include cash and checks.⁵ Payment instruments exhibit different consumer and retailer costs and benefits, along with significant differences in the platform and social costs and benefits. Many countries have required that cash and checks be available without per usage cost to consumers from their bank, despite the fact that these forms of payment do involve costs, but efforts to regulate payment cards in similar ways have been limited.⁶

This note will not focus on electronic transfers, potentially usurious interest charges, online payments, monthly pre-planned payments or large scale electronic payments.⁷

The roundtable will:

- Provide background information about how payment card systems operate;
- Discuss selected distinctive economic features of payment cards, including the “two-sided markets” aspects of cards;

³ While the technical definition of subsidy may not be appropriate, the equivalence between subsidies and actual payment patterns is clear. In effect, non-card users will pay more than they otherwise would while card users will pay less than they would, were merchants to pass through their card fees.

⁴ The note will focus on general purpose cards and not, for example, store cards that are valid only in one store.

⁵ In at least one OECD country, checks are no longer used.

⁶ Costs have often been recovered through monthly banking fees and other specific fees. Check processing regulations have, for example, required at par clearance in some countries. Prior to the implementation of such regulations, some banks implemented high charges for processing checks to other banks.

⁷ Nor will this note focus on online payments, which have been addressed in other OECD work, e.g., focused on digital delivery and e-business, such as “Online payment systems for e-commerce,” DSTI/ICCP/IE(2004)18/FINAL.

- Examine whether fees and prices promote efficient use of cards;
- Consider whether there are problems with non-price features of card payments;
- Identify principles that have been suggested for intervention; and
- Discuss what part of government, if any, may be most appropriate for intervening with respect to competition issues in payment cards.

2. Background

A card is essentially a means of providing secure evidence that the consumer or the consumer's representative will pay a merchant for goods or services. The merchant wants to be guaranteed of payment through a mechanism that minimizes direct and indirect costs, such as merchant fees and payment processing time. Consumers value the flexibility of having access to their bank accounts or to credit without having to carry cash or checks. Cards can be used in their physical form, but also the numbers that delineate an account can be used without the card being present, for example over the Internet. Merchants use physical terminals or other means to verify the account is legitimate and ensure payment prior to consummating the transaction. They value cards for many reasons, including the relative security of the transaction (compared to a check), the speed of the transaction and the "quick credit" aspect of certain cards, based on the fact that, with credit or deferred debit cards, a consumer may be able to complete a purchase for which the consumer does not sufficient cash funds at the moment of the transaction.⁸

In order to discuss competition policy related to cards, it is important to understand:

- The steps involved in card usage;
- The types of payment card that exist; and
- The risks inherent in each (from the perspective of payment processes).

As payment platforms co-ordinate many business practices of their constituent members, through pricing and rules, there are frequent questions raised about the potential anti-competitive effects of such platforms. "The challenge to policymakers is to decide, based on the available information, whether a network's pricing strategy and rules are likely to advance or retard economic efficiency." (Hunt 2003, p. 81)

2.1 *The Steps in Card Usage and Parties Involved*

The payment card industry involves thousands of banks and other financial service providers who process payments as intermediaries between millions of merchants and more than a billion cardholders. Payment cards exhibit network externalities: they are more valuable to a consumer when more merchants accept them, and they are more valuable to a merchant when more consumers have them. One possible solution to the payment challenge would be for each issuer to negotiate bilateral contracts with each acquirer of transactions. Another solution, far more common, is for issuers and acquirers to form a joint venture that sets a number of system-wide rules, including pricing conditions. Such a solution involves setting up a payment platform. Platforms may help to minimise transaction costs that might otherwise arise

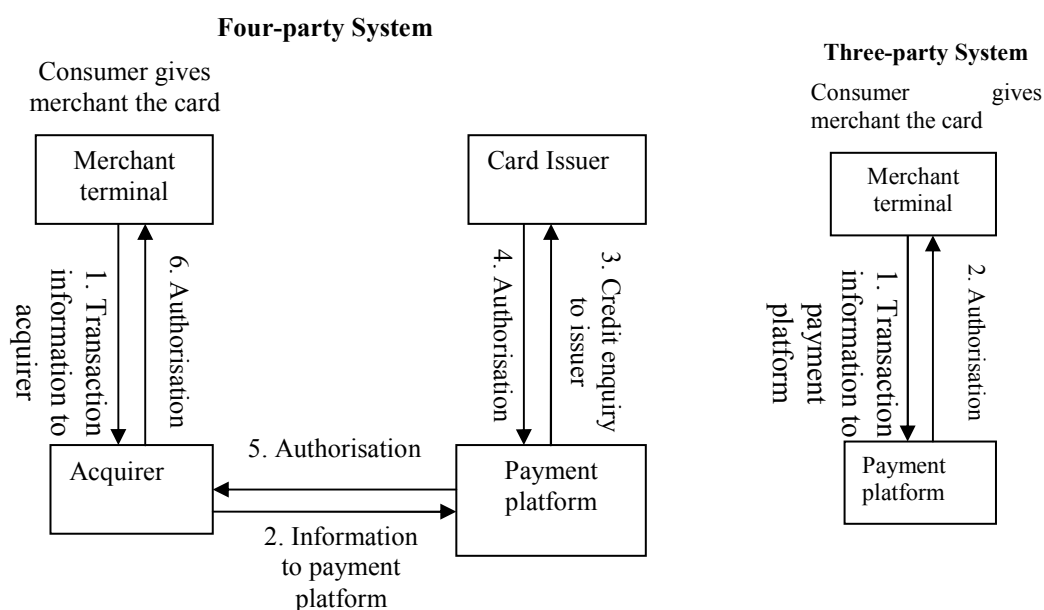
⁸ A credit card gives consumers the option to take out a loan instantly, and thus may permit consumers who would otherwise be deterred from the time-consuming process of requesting a purchase-specific loan the incentive to continue with a transaction that would otherwise not have occurred.

through bilateral contracting, but at the same time may involve co-ordination over key business practices that could potentially result in anti-competitive harms to merchants, consumers or both.

The process of account verification and transaction authorisation goes through a number of stages that typically involve computers communicating with each other over dedicated and secure data lines but could also involve processing paper (e.g., with signatures) or phone calls (e.g., to provide approval for transactions that are outside the scope of a standard transaction).

In a four-party system, the merchant typically contracts with an external company that “acquires” the transaction.⁹ Through a terminal, the merchant communicates the amount of the transaction and the consumer card information to the acquirer. The acquirer will then consult the payment platform, which will, in turn, consult the issuer for verification that sufficient funds remain available to the customer for the transaction.¹⁰ Assuming the funds are available, the transaction may either be authorised immediately or the issuer may require that a phone call be made to confirm the transaction prior to issuing an authorisation. The stages of this transaction authorisation process are illustrated in Figure 1, below. Payment platforms that operate in the four-party domain include, among credit cards, Visa, MasterCard and JCB and, among direct debit providers, many different, largely national or regional electronic fund transfer (EFT) “debit” networks that are often linked to Automated Teller Machines (cash machines).¹¹

Figure 1. Multi-Party Systems

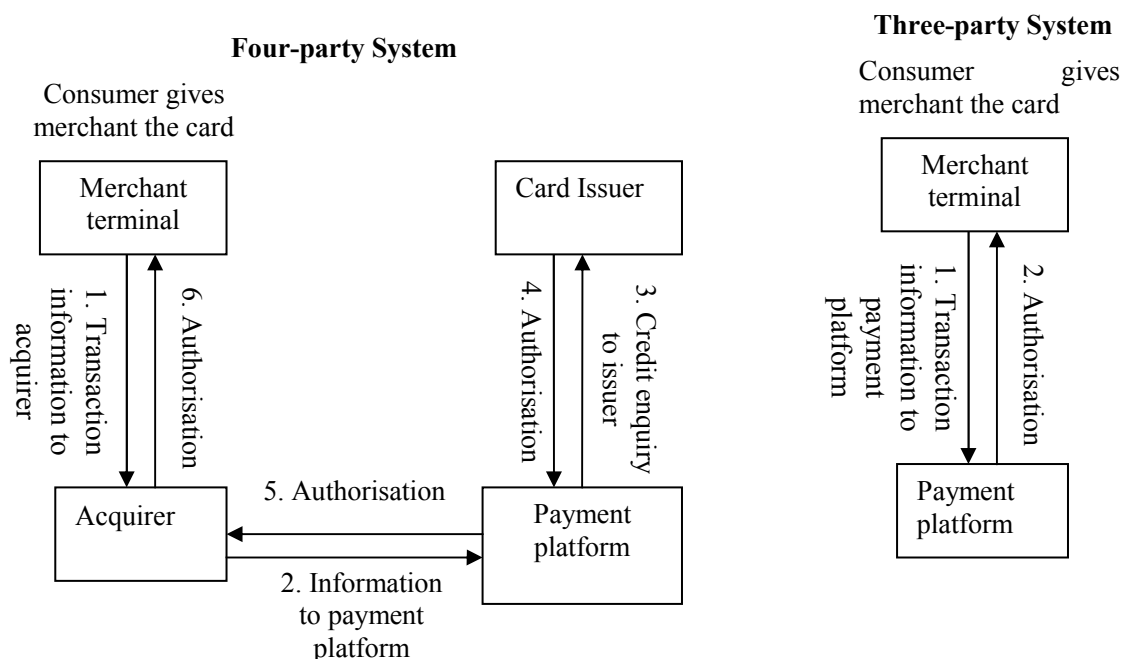


⁹ The four parties are the consumer, merchant, issuer and acquirer.

¹⁰ When the acquirer is also the issuer, the payment platform could theoretically be bypassed, however, for platforms with highly diffuse participation and different concentrations for acquirers and issuers, such occurrences may be unlikely. However, in highly concentrated markets, such bypass could be common.

¹¹ In fact, the process of intermediation can be even more complex, with merchants having a processor who, in turn, is linked to an acquirer (such as a bank) or an integrated payment platform. Many banks choose to outsource many of the functions related to acquisition and payment processing. Large merchants will tend to have a line open at all times, smaller merchants may open a phone line on a transaction by transaction basis.

Figure 1. Multi-Party Systems



In a three-party system, the process is similar to that for a four-party system, but the number of steps is smaller.¹² As before, the merchant typically contracts with an external company that “acquires” the transaction. Through a terminal, the merchant communicates the amount of the transaction and the consumer card information to the terminal processor who then communicates the consumer and transaction information directly to the payment platform. The payment platform performs both the role of acquirer and issuer. Assuming the funds are available, the transaction may either be authorised immediately or the issuer may require that a phone call be made to confirm the transaction prior to issuing an authorisation. The stages of this transaction authorisation process are illustrated in Figure 1, above. Payment platforms that follow the three-party model include American Express and Diners Club.

When accepting a card, the merchant typically does not receive the face value of the transaction. From a merchant’s perspective, credit cards are often significantly more expensive to process than debit cards, because the “merchant discount” is significantly higher for credit cards than for debit cards. A merchant discount could be 2% for credit cards, for example, and 0.5% for debit cards. While the percentages may seem trivial, the merchant discounts, in aggregate, are non-trivial: if the average merchant discount for all card purchases was 1% and the worldwide quantity of card purchases is 2.7 trillion USD, then the merchant fees would amount to 27 billion USD per year.¹³

From a consumer’s perspective, cards with different merchant fees may appear equivalent, in terms of the cost of purchase, while the consumer benefits may be marginally greater for the credit card purchase

¹² The three parties are the consumer, merchant and the single company acquirer-issuer.

¹³ This figure may be conservative. According to Hunt (2003, p. 81) “In the U.S., about 1.5% of the value of all general-purpose-card transactions flows to issuers in the form of interchange fees – about \$23 billion a year (see the Nilson Report, February 2002, No. 758.)”

compared to a PIN(Personal Identification Number) debit card purchase.¹⁴ With a credit card, for example, consumers may receive frequent flyer miles with certain cards, make automatic donations to non-profit institutions or potentially receive monetary rebates of as much as 1% of purchases back (e.g., the Discover card in the U.S.).¹⁵ Such incentives may lead consumers to prefer a credit card purchase.

For four-party payment platforms, there is typically an “interchange fee” paid by the acquirer to the issuer, which is generally set by rules agreed by the payment platform. The interchange fee is potentially quite significant. In the UK, for example, the interchange fee was approximately 1.1% for credit cards in 2000 (Cruickshank, 2000 Table D3.6). Revenue from interchange fees can be used by the issuing bank to provide rewards to cardholders, such as frequent flyer miles, that might not otherwise be possible. Interchange fees are generally much lower for debit cards than for credit cards. The interchange fees have typically been set, for domestic transactions, by domestic payment platform associations, whose members are primarily banks.

For typical transaction with a credit card in a four-party system, suppose the consumer pays 100.0 to the card issuer. The issuer might then pay the acquirer of the transaction 98.3 (keeping 1.7 as the interchange fee) and the acquirer might then pay 98.0 to the merchant. The merchant fee (also called merchant discount or merchant service charge) in this example would then amount to 2.0.

Credit card transaction example: Flow of Payments¹⁶

Consumer payment to issuer	100
Issuer payment to acquirer	98.3
Acquirer payment to merchant	98

For a debit card, a comparable overall structure of payments typically exists, although the level of the interchange fee is typically considerably lower than for the credit card, in this example it is 0.4. Similarly, the level of the merchant fee is lower for debit cards than for credit cards, being 0.5 rather than 2.0.

Debit card transaction example: Flow of Payments¹⁷

Consumer payment to issuer	100
Issuer payment to acquirer	99.6
Acquirer payment to merchant	99.5

Interchange fees vary substantially from one jurisdiction to another and from one business activity to another. Reliable, precise and comparable international data on interchange fees is not released by the major card issuers. However, some comparative information can be brought together from public sources. The Cruickshank Review estimates that the average debit card fee in the UK is about 6.4 pence,

¹⁴ PIN debit involves the customer typing in a personal identification number, often a four digit code, to increase the security of the transaction.

¹⁵ Signature debit cards may also include rewards for purchases.

¹⁶ These figures are illustrative. The British Retail Consortium, in its submission to the Cruickshank Review, estimated that the merchant service charge is on average 1.16% per transaction, around 86% of which would be paid to the issuer as an interchange fee. (Cruickshank 2000, p 258)

¹⁷ These figures are illustrative.

approximately 0.2 per cent of an average transaction value of £31.” In contrast, “the average credit card interchange fee is 54.2 pence, just over 1.1 per cent of the average transaction value of £48.” (p. 256) The 1.1 per cent interchange fee contrasts with the interchange fee for cross-border transactions in Europe. “MasterCards enhanced electronic rate is 0.95 percent and Visa’ electronic authorisation rate is 0.70 percent.” (Vickers, 2005 p. 233) As with credit cards, even within the category of debit, there can be substantial differences in interchange fees. Cruickshank reports that Switch debit has an average interchange fee of 3.8p while a Visa debit has an interchange fee of 9.2p. (p.259) In the U.S., a “\$40 signature debit transaction generates an interchange fee of about 60 cents, or 1.5 percent, while a comparable PIN debit transaction generates an interchange fee of about 18 cents, or 0.5% (ATM and Debit News 2002, as reported in Hunt, 2003.)

Moreover, interchange fees can vary in odd ways. The default rates for interchange set by payment schemes cover were estimated to cover more than 90 per cent of transaction s by the Cruickshank review.¹⁸ (p. 256) According to Cruickshank, Europay (now MasterCard) stated that “the fallback rate for interchange fees for intra-European transactions have remained constant over the period under consideration. The UK domestic fallback interchange fees were set at the same level as the Intra European fallback fees until December 1997, when higher specific UK cost related fallback fees were introduced. These fees remained at the same levels until April 1999, when reduced fallback fees were introduced for certain additional categories of transaction.” (p. 257) Given that one of the primary justifications for interchange fees is the level of fraud, and that fraud is considerably higher for international transactions than for domestic transactions, that domestic interchange might be set at a higher level than intra-European interchange may appear surprising.

For three-party systems, which are typically charge card systems,¹⁹ there is no visible interchange fee, as a single institution performs both the acquiring and issuing function.²⁰ However, merchant discounts are usually considerably in excess of those of the main four-party platforms, which is one factor that explains the reduced frequency of merchants’ acceptance of three-party cards. To the extent that considerations similar to those of four-party systems exist, three-party systems may have implicit interchange fees, but due to the non-transparent nature of transactions between the acquiring side and the issuing side, such interchange considerations are not visible. The overall merchant fee for three-party platforms is generally higher than for four-party platforms.²¹

Merchant fees for each payment platform are ultimately negotiated with the acquirer. Fees vary depending on the type of transaction (PIN, signature, phone, Internet), the sector of the merchant (travel and leisure sectors may face higher fees than grocery stores), the size of transactions, and, more generally, the risk-levels of the transaction.

Cards sometimes have the potential to give their holders the rights to use multiple products, such as multiple EFT networks (as in the US, where ATM networks developed from a number of smaller regional networks) or where a card could potentially serve either as a credit card or a debit card. A card that includes multiple networks within it is considered multi-homed. In France, for example, the standard debit scheme “Carte Bleu” includes Visa or MasterCard multi-homing on most of its cards. However, this multi-homing is illusory. For a domestic transaction, Carte Bleu will process the transaction while, for an

¹⁸ Note that interchange fees have a default level, but issuers and acquirers can agree on rates bilaterally.

¹⁹ Arguably a form of deferred debit with a (discouraged) credit option.

²⁰ American Express, which is a three-party system, increasingly has co-operation agreements with issuing banks, and these banks receive a variety of payments from American Express that may serve purposes comparable to those of interchange fees. Even so, American Express has remained as the unique acquirer of its transactions.

²¹ One notable exception is the Discover payment platform in the U.S., which is three-party and has lower merchant fees than credit cards.

international transaction, one of the major international four-party systems will serve as the payment platform. In other cases, for instance with many debit cards in the U.S., the “bugs” from multiple payment platforms are simultaneously present on the card, and the card can be processed over multiple systems for the same purchase. For such cards, merchants have the incentive, given the choice, to use the least expensive network for them. At times, certain card issuers have attempted to limit the ability of merchants to make this choice.

2.2 *Types of Card*

The consumer payment conditions vary, depending on the card service that they use. A credit card typically requires payment no more than once a month and, for purchases early in the cycle, can give customers 45 or more days between the day they purchase a product and the day they begin paying for it. If the consumer does not pay the bill in full, then the consumer will pay interest on unpaid balances, usually at an interest rate that significantly exceeds that of competitive bank loans. Consumers who pay their bills completely, in contrast, receive the float for the time between their purchase and their payment.²² For credit card transactions, the cost to issuers of the interest-free period is conditional on:

- The prevailing rate of interest (when interest rates are higher, the cost of the float is higher);
- The length of the interest-free period (shorter times with no interest payment)²³; and;
- The percentage of transactions affected (transactions for customers who are long-term borrowers do not result in a float)

A debit card, in contrast, will be directly linked to a user’s demand depository account (checking account) from which funds will either be deducted immediately after a purchase (direct debit), a couple of days after the purchases (signature debit) or once a month (deferred debit). Long-term credit will not be available to the consumer through the direct card (but could potentially be available through an overdraft facility on the demand depository account). Deferred debit cards provide credit until the monthly payment date. That is, the card holder receives a float, though the average length of time for the float is typically shorter than for a credit card, due to a speedier payment process.²⁴

Card issuers have argued that one source of costs for the interchange fee is the interest free period. This contention is open to question. According to the Cruickshank Report (Cruickshank 2000) “Of the cost categories identified as being supplied by card issuers to retailers, the funding of an interest free period for credit and charge card customers is, by some way, the least justifiable.” (p. 264)

“The supply of credit to holders of credit cards – including the first fifty or so days – is fundamentally not a payment service supplied to retailers. Rather, it is a credit service supplied by credit card issuers to credit card holders. The length and conditions attached to any interest free period are

²² If the appropriate interest rate is 6%, for example, the value of a float that averages 20 days is approximately 0.33% of the transaction value.

²³ Note that this is most properly not based on the maximum number of days between a purchase and the payment but rather the average, purchase-weighted number of days between purchases and payments. If the payment is due 15 days after the closing of a 31 day billing period, and a consumer purchases a constant value of goods each day throughout this time, the average number of days would be 30.5 (15 + 15.5).

²⁴ For deferred debit cards, focusing just on the float for the card is typically inappropriate; as many demand depository accounts provide a float to the bank of a greater value than the float given to the consumer. For PIN direct debit, there is no float and no risk of non-payment as the funds are directly debited from the consumer’s account at the time of the transaction. There is, however, a risk of fraud.

determined by the agreement between the card issuer and the cardholder. Issuers are free to vary the length of this period as part of their competitive offer to cardholders.

“Recovering the costs of offering an interest free period through interchange fees creates a pattern of cross subsidies between participants within a particular card scheme. In general, customers who do not pay off their bills in full each month – notably those customers who have long term debts on their credit cards – do not benefit from any interest free period. However, card payments made by these customers still attract an interchange fee, so that the card issuer involved is paid twice for the transaction – once by the retailer and once by the customers. Thus within credit card schemes, there is a cross subsidy to card issuers with a high proportion of customers with long term debts on their credit cards.

“Recovering the costs of offering an interest free period through interchange fees also distorts customers’ choices between using a credit card and alternative means of making a retail payment. A customer who makes a debit card or cheque payment and thereby goes overdrawn for a short period, does not have the cost of this overdraft paid for by the retailer from whom he bought the goods. The current account supplier is free to offer a temporary interest free overdraft period, but that would be as part of the overall “interest free” period on a credit agreement offered in competition with other suppliers. Similarly, the cost of an “interest free” period on a credit agreement offered by a retailer has to be recovered by the supplier of that credit, not by a third party.” (pp 264-265.)

A number of services can be included with cards that are in addition to the basic “payment” function of a card. For example, some cards provide guarantees of customer satisfaction so that consumers can demand a repayment (from the merchant) if they are unsatisfied with the good or service received, and thus the merchant bears significant risk. With some cards, the card issuer provides guarantees on product longevity for products purchased using the card, provides insurance (such as travel or rental car insurance) or provides best-price guarantees.

A number of other special-purpose cards may exist, such as payment cards issued by a given store and valid only in that store. The focus of this note, however, is on general-purpose payment cards which require broad and complex acceptance networks, not special-purpose cards. Store cards are excluded from this analysis, although they are subject to a variety of competition and consumer protection issues, as shown most recently in the UK Competition Commission’s report “Store Cards Market Investigation” (7 March, 2006).

2.3 *Risks in Card Usage*

Card systems require a costly infrastructure that is designed to verify the customer (or card’s) identity (i.e., reduce fraud), verify that the customer is not exceeding agreed spending limits and provide an authorisation from the card issuer to serve as proof that the transaction was agreed by the issuer.²⁵ Fraud is a significant issue with payment cards, though different payment platforms have different success rates in limiting fraud. “The fraud rate for transactions made with CB interbank cards in France, for example, was only 0.033%, whereas the equivalent figure for the international transactions was 0.417%.”²⁶ For UK cards, fraud losses from abroad account for about 26% of total fraud losses, but less than 5% of transactions, again suggesting a disproportionately high figure of fraud is related to foreign usage. (Cruickshank, p. 260) Many of these fraud losses are actually borne by retailers or acquirers. Overall, Cruickshank estimates that fraud losses borne by UK debit and credit card issuers on UK transactions are “likely to be somewhat less than £75m”, accounting for “less than a tenth of the value of interchange revenues.” The precise allocation of risks arising from card usage and acceptance varies by card type and

²⁵ Transactions without authorization provide little assurance to merchants of receiving funds.

²⁶ Carte Bancaire Newsletter, December 2005, p.2.

country of card origin. For example, in some countries, consumers have limited protection against fraudulent use of their accounts and must pay for a significant share of fraudulent transactions (unless they have insurance). In others, when a card is used fraudulently, the issuing bank is responsible, and not the consumer.

Payment schemes establish criteria that must be met for merchants to be guaranteed of payment. In practice, many transactions do not comply with all the conditions for a payment guarantee. In the UK, such transactions would include payment over the Internet or by mail order. In these instances, losses from disputed or fraudulent transactions would likely end up as the responsibility of the merchant or the merchant acquirer, rather than the issuer, so there would be no cost-based reason to include them in the interchange fee for payment to issuers.

The credit risk inherent in loans should, at least theoretically, be reflected by the interest rate on credit issued through credit cards, so that only those consumers who demand credit actually pay the card's interest rate. A number of consumer protection issues have arisen with interest rates deemed as excessive or usurious. Consequently, many jurisdictions regulate the maximum interest rate on card credit. Credit risk will not be addressed in this note, except in one respect. Credit card companies have sometimes used the risk inherent in credit as a cost-based justification for interchange fees.

3. Structural conditions

Payment platforms exhibit a number of economic features, including:

- Large fixed costs;
- Minor variable costs;
- Adoption externalities; and
- Usage externalities.

The fixed costs of a payment platform include the extensive computer and communications infrastructure that must be put in place by the platform and its banks, as well as the extensive infrastructure put in place through merchant terminals, their intermediaries. At the payment platform level, costs are largely fixed for volume that is based on computer communications.²⁷

Variable costs for the payment platform may include “manual” authorisations, that require intervention of individuals and manual oversight of evolving fraud risks.²⁸

Network externalities have certainly existed in the area of payment cards. These may include adoption and usage externalities. To the extent that at least one of these externalities continues to exist, the market is “two-sided,” though the intensity of the externalities may vary across payment systems, countries and even within countries. The price structure will develop in such a way that both sides have incentives to participate in the market. In particular, two-sided market may require a price structure that pays one side to participate, even if both sides would receive positive benefits from participation absenting any payment at

²⁷ Voice authorisations, however, require increased personnel as volume increases.

²⁸ The features discussed here are intended to focus on the payment platform itself. Constituent financial institutions may have much more significant variable costs, such as those related to fraud. The payment platform itself may typically allocate fraud risks to acquirers and issuers depending on the nature of the payment transaction, but not take responsibility for such risks itself.

all. Rochet and Tirole (2002) call this a “two-sided market”. They state that “the volume of transaction on and the profit of a platform depend not only on the total price charged to the parties to the transaction, but also on its decomposition.” (Rochet and Tirole, 2003a, p. 1018) The decomposition is implemented, in the associations, by an interchange fee in combination with “price coherence”.²⁹

Adoption externalities relate to the fact that a payment platform with more cards issued is relatively more attractive to merchants than one with fewer cards issued. Similarly, a payment system with many merchants registered may be more attractive to consumers than one with fewer merchants. Reaching a minimum scale for success may require years of investment (i.e., loss). Moreover, there is no guarantee of success, even by payment systems that would be successful if they reached sufficient scale.

Box 1. Two-sided markets

Payment cards constitute one example of two-sided markets. Two-sided markets exist when one or more platforms seek to attract end-users by setting appropriate charges to each type of end user. Payment cards satisfy this definition because payment platforms seek to ensure that both types of end-users, consumers and merchants, accept to participate in and use the platform. Rochet and Tirole (2005) define a two-sided market as “one in which the volume of transactions between end-users depends on the structure and not only on the overall level of the fees charged by the platform.” Examples of two-sided markets include:

- Video games;
- Computer operating systems;
- Residential real estate listings; and
- Newspapers.

Video games: For video games, a key challenge of platform producers, such as Sony, Nintendo and Microsoft, is to ensure that games are produced (by developers) that will help to attract players to the platform. Platform owners can choose to provide costly benefits to developers, such as software packages to help develop games, while charging more for games. Or they could do the reverse, and charge developers more for software or rights to develop games, while lowering the price of games.

Computer operating systems: Computer operating systems need both applications to be produced and customers to use those applications. An operating system becomes increasingly attractive as more and more applications are available on it. So operating systems producers may take actions to promote application development. Most operating systems do not seek substantial revenues from software developers, instead focusing on gathering revenue from users (Microsoft) or complementary hardware (Palm and Sun).

Residential real estate listings: Real estate agents and home sellers, more generally, may wish to find platforms for advertising the sales that attract the most buyers. Platforms (such as home sales websites) can be designed in ways that charge buyers or sellers. However, in practice, most such sites ensure that sellers pay even though buyers receive significant benefits from such sites.

Newspapers: Newspapers typically have two revenue sources: advertisers and readers. Historically, advertisers have paid a higher percentage of newspaper production costs than readers. This allows newspapers to lower their costs to readers, ensuring a broader readership that, in turn, makes the platform even more attractive to advertisers. A newspaper with no advertising is significantly more expensive to readers and such publications are relatively rare.

One of the keys to the operation of a successful two-sided platform is that the pricing structure between the two sides of the market can have an impact on the commercial success and viability of a platform. For a given total fee level, the structure of fees can be partitioned in a variety of ways between the end users. One side could even pay the other side to participate. Whether payments are in fact necessary for maintaining a stable platform is a distinct question from whether such payments were

²⁹

Price coherence involves retail prices that are the same for different payment mechanisms.

necessary in the past, when the platform was growing.

The economic literature concerning two-sided markets has grown rapidly in the last 5 years and is still evolving. Some points are clear: increased “intensity” of competition between platforms will not necessarily lead to lower fees for a particular class of end users, and could potentially lead to higher total fee levels across user types. Focusing exclusively on one side of a two-sided market, in the process of competition law enforcement, can lead to conclusions that are unduly critical of pricing behaviour, such as the presence of predation or the presence of “excessive” pricing. While at times, the network and multi-product pricing effects in a two-sided market may be modest, at other times the effects may be more pronounced. Policies may not need to place heavy focus on two-sided markets when volumes of transactions would be broadly similar with quite different fee structures, but may need to place heavier emphasis where the volumes of transactions would be markedly different with different fee structures.

For example, in Germany, a cash payment card “Geldkarte” intended for small transactions, such as transport and parking, was introduced in 1997. Over the course of its introduction, its volume has jumped from 350 thousand transactions in its first year, for an average value per transaction of 11 EUR, to 40 million transactions in 2003 for an average value of 2 EUR. More recently, in France, a cash payment card called Moneo has been introduced. By the end of 2004, the number of cards had fallen from 1.3 million in February, 2004 to 1.2 million.³⁰ The ultimate success of this stored value card is thus unclear.

One implication of adoption externalities is that successful entry may be difficult and slow, because large scale entry may not be easily accomplished. Duplicating the broad acceptance of major cards may be difficult. MasterCard for example estimates that it is accepted at approximately 23 million merchant locations across the world and approximately 1.5 million cash machines.³¹ Once a system has achieved broad acceptance, payment systems may have the ability to raise prices to the two-sided customer for a sustained period of time so that rates of return are considerably in excess of risk-adjusted market rates of return. In particular, given the structure of payment, it is often suggested that payment systems have market power with respect to merchants, who may have practical difficulty from refusing to accept payment cards.

Another implication of adoption externalities is that the rate of return for initial investments in a system should exceed riskless rates of return, as there is a substantial possibility that a de novo system will not succeed. This is not to say, however, that ongoing investments in a mature system would merit an equally high rate of return.

Katz (2001) questions the relevance of network effects related to adoption externalities for mature payment systems. He urges that when consumers and merchants have high switching costs, the mechanisms that may have been important for broadening acceptance by consumers and merchants (such as the honour-all-cards rule and the no-surcharge rule) are no longer as relevant. That is, merchant acceptance will remain broad and consumers will maintain their cards once the network has been established.

Usage externalities exist because consumers and merchants must decide, on an ongoing basis, how intensively to use a given card. Rochet (2003) considers this the primary externality for payment platforms. To the extent that usage externalities are important, network effects may continue to play a role even after adoption has occurred.

³⁰ See Ricou, Olivier (2005) “Internet, commerce et politique” <http://www.ricou.eu.org/commerce-e/commerce-e/commerce-e010.html>, accessed on May 5, 2006.

³¹ MasterCard Incorporated, 2006 Form 10-K (March 16, 2006).

4. Is price/fee performance of card-based payment systems inefficient?

Retail payment systems are a means of transferring value for consumer purchases. Having an appropriate menu of payment options yields substantial benefits for consumers and retailers. But if the right option is not present, transactions that might not otherwise have occurred will either not occur or at least one party of the two-sided customer will be worse off. The transaction costs related to payment can themselves be substantial (particularly as a percentage of retailer profit margin) and, when unnecessarily large, serve as a tax on retail activity ultimately borne largely by the consumer.

Governments place high importance on assuring the integrity and efficiency of payment systems. One reason that a number of competition authorities and central banks have taken action in the area of card payments is a conviction that card payment systems are inefficient in substantial ways and that alternatives to the present systems will yield better outcomes for consumers and retailers. Ultimately, if some high-cost payment systems, such as a check system, have artificially low prices a broad policy towards payment would ideally take this into account, for example by suggesting that when a lower-cost system replaces a higher-cost system, society is better off, even if merchants face a higher charge for the low-cost system.³² However, policies that appropriately and simultaneously treat multiple payment systems (i) are extremely rare, (ii) require broad regulatory authority that is not typically held by a competition authority or even many financial regulators and (iii) would be politically difficult to implement. Broad solutions across multiple payment types may not be feasible in practice.

While in many circumstances, competition between competing providers could be relied on to achieve better outcomes, the two-sided pricing in card markets makes the impacts of competition less automatic because costs may, perhaps appropriately, not be passed through into prices. Economic literature is ambiguous about whether competition between payment systems will result in (i) better or worse allocations of payment across systems, (ii) lower or higher merchant fees (iii) lower or higher profits to card issuers. That is, competition may not serve its usual role, even when vigorous.

This section considers some of the aspects of payment cards that have been suggested by some governments, courts and observers as problematic and addresses some of the counterarguments against these claims.³³

4.1 *No-surcharge and no-discount rule*

Historically, many payment cards have had a rule that if a merchant accepts a card, that merchant cannot surcharge customers who use the card, nor can it offer a discount to customers who do not use a card (e.g., a cash discount). The first rule is called a no-surcharge rule, while the second is called a no-discount rule.³⁴ Increasingly these rules have been challenged by competition authorities.³⁵

The most immediate impact of such rules is that they tend to promote price coherence: the nominal price is the same for consumers whatever payment instruments they use. This coherence may have proved particularly important to consumers as they were considering whether to adopt payment cards, as they were not charged an additional fee for using them. The coherence is also important to ongoing usage of cards, as

³² For example, a law may require that financial institutions exchange checks at par or do not charge consumers for use of checks.

³³ The issues addressed are necessarily selective and not intended as a full exposition of either findings or counterarguments.

³⁴ Consumers may perceive large differences between a surcharge and a discount.

³⁵ One of these rules can exist while the other does not. For example, in the U.S., there is a no-surcharge rule in place, but discounts are permitted.

consumers would likely be less inclined to use a credit card over a debit card if they knew that they would have to pay a price, say, 1.5% higher as a result of using the credit card. However, an unfortunate impact of such rules is that they create a situation in which merchant costs differ for different products (e.g., a coat bought with a credit card and a coat bought with cash) but the consumer prices do not reflect cost differences. This mandatory price coherence is inconsistent with the general principle that, in a market system, prices should be free to reflect costs.

Pricing by payment type would lead to a reduced provision of certain payment services. Rochet and Tirole (2002, p. 562) pointed out that in the case of initial under-provision, welfare would be reduced by lifting the price coherence rules, while in the case of overprovision, welfare would be increased by lifting price coherence rules. Schwartz and Vincent (2006) find that no surcharge rules will lead to overall welfare decreases if the ratio of cash to card payment is sufficiently small and will lead to consumer welfare decreases if cardholder rebates or rewards are not feasible.³⁶

Many countries have required relaxation of price coherence requirements. For example, the Reserve Bank of Australia (RBA) eliminated the no-surcharge rule for four-party card schemes in 2003 and obtained American Express and Diners Club's agreement to remove their no-surcharge and anti-steering rules. The UK, Netherlands and Sweden have eliminated no-surcharge rules. In Canada, the no-surcharge rule for Interac was eliminated by Consent Order, following an investigation by the Competition Bureau.³⁷ The Office of Free Competition in Finland sought to prohibit no-surcharge and no-discount rules but was unsuccessful in maintaining this view with the Competition Council and the Supreme Administrative Court.³⁸

Such relaxation may appear to have limited effects, due to the limited number of merchants that may actually put surcharges or discounts into practice. However, the ability to impose surcharges or grant discounts may give merchants a better ability to apply pressure to lower merchant fees. Moreover, even a low adoption rate of surcharging may improve consumer incentives to use more costly cards, such as credit cards, only when they place a value on (a) the option of using credit (compared to debit) and (b) rewards (such as frequent flyer miles) that exceeds the total cost difference between the two modes of payment.

On 9 August, 2001, the European Commission issued a decision related to a number of features of the notified rules and regulations of the Visa scheme, including international and EU rules.³⁹ The decision considered the no-discrimination rule that prevented differential pricing between payments by Visa card and other forms of payment and stated that the rule had no appreciable effect on competition, so was consistent with competition laws. The decision was issued after three national EU competition authorities had abolished no discrimination rules in a national context. The countries where the rules had been abolished were the Netherlands, Sweden and the UK. Market surveys were carried out in two of these countries (the Netherlands and Sweden) these surveys found that what the European Commission considered as "relatively few" merchants actually took advantage of these rules. In particular, about 5% of retailers in Sweden and about 10% in the Netherlands took advantage of the rules. The surveys found that those retailers who did not introduce a charge for card usage; there was a concern about the cardholder reaction to such a charge.⁴⁰ The European Commission stated that the empirical evidence led it to conclude

³⁶ Schwartz and Vincent (2006) include the feature that end-user's demand for merchants' products is elastic. This feature is not present in many other models. It means that higher prices of a merchant (e.g., from the costs incurred through credit card transactions) lead to lower levels of total purchases.

³⁷ Director of Investigation and Research v. Bank of Montreal et al., CT-1995-002, June 20, 1996.

³⁸ Office of Free Competition "The Contractual Terms of Credit Card Companies", August 1997.

³⁹ OJ L 293, 10.11.2001, p. 24-41.

⁴⁰ The European Commission also notes that most merchants surveyed felt that the ability to surcharge had not had any effect on their merchant fees.

that the no-discrimination rule “did not have an appreciable effect on competition”. The survey evidence, however, is not fully convincing about the role of no-discrimination rules. Views among small, typically ill-informed retailers about whether no-discrimination rules have had an effect on merchant fees have questionable relevance to an assessment of whether such rules do, in fact, have an impact, particularly given that in a number of countries, such retailers face a “blended rate” on their credit card transactions such that multiple schemes (e.g., Visa and MasterCard) are charged at the same rate by the merchants card processor. The fact that a number of retailers did adopt surcharges suggests that the rules did affect retailer behaviour. In its decision, the European Commission can be considered to have endorsed a rule that prevents prices from reflecting differential costs and which, as suggested below, can lead to higher cost systems dominating lower cost systems, thus distorting the competitive process by making more resource-intensive cards appear equal, in the eyes of consumers, to less resource-intensive cards.

Frankel notes that in a recent study of credit card interchange fee trends in 10 countries (or EU cross-border), in “eight of these, interchange fees are declining or stable. In five of the eight, merchants have been or are permitted to surcharge card use, or surcharges are being debated. In each of the other three stable or declining fee locations, regulators have intervened or are investigating interchange fees and/or surcharges. Fees are increasing only in the United States and Canada, where surcharging is not permitted and there is no active regulatory intervention.” (Frankel 2005 p. 60)

Simon (2005) states that “The power to surcharge does not have to be exercised to be a significant factor in negotiations over merchant service fees – merchants may threaten to surcharge and thereby obtain a lower merchant service fee. As such, the observed level of surcharging cannot be considered an accurate indicator of the effect of the regulation.” (p. 377)

4.2 *When retail pricing does not incorporate costs of different payment mechanisms:*

4.2.1 *Higher-cost systems may dominate more efficient and lower-cost systems.*

When retail pricing does not differentiate between the costs of different payment mechanisms, consumers may be led to choose the payment mechanism with the highest total cost to the “two-sided customer”. The two-sided customer is combination of the merchant and consumer. The costs (typically to the merchant) can be balanced against the benefits (typically to the customer) to yield the net costs of a given payment option. Looking at this “two-sided customer” helps to address the concern expressed by Rochet and Tirole (2003, RNE) that focusing on costs in just one side of the payment transaction (such as the merchant side) could lead to inappropriate actions that limit the ability of a payment system to ensure that both merchants and consumers use the system.

In the two-sided market, merchant fees may be higher for one product (such as a credit card) that gives the consumer some benefit for using the card. Many credit cards, for example, provide frequent flyer miles in return for card spending, and these frequent flyer miles have a positive value to the consumer. Given that lower-cost forms of payment provide no financial reward to the consumer, the consumer prefers the payment mechanism that yields the highest cost to the two-sided customer.

The Table I. below is a simplified example that illustrates this point.⁴¹ A consumer is purchasing a good that costs 100 currency units. If the consumer pays with cash, there is no merchant fee. If the consumer pays with a debit card, there is a 0.4 merchant fee, but no rewards are given to the consumer.⁴² Finally, if the consumer pays with a frequent-flyer mile affiliated credit card, the consumer receives a

⁴¹ The figures are illustrative and not drawn from any particular country.

⁴² This debit is assumed to be a direct debit transaction. For deferred debit, customers would receive some benefit from the period in which they have received an interest free loan.

benefit assumed to have a monetary value of 0.5 while the merchant fee is 2.0. The consumer will therefore prefer the credit card, even though two lower-cost forms of payment exist and would yield lower costs to the two-side customer.

Table 1. Comparing payment systems and consumer incentives to use them

	Value of reward to consumer (e.g., frequent flyer miles)	Merchant fee	Net two-sided customer cost	Card company revenue
Cash	0	0	0	0
Debit card	0	0.4	0.4	0.4
Credit card	0.5	2.0	1.5	1.5

Governor Macfarlane of the RBA has argued that pricing systems like that in Table I. lead to expensive payment solutions driving out cheaper payment solutions, creating a Gresham's Law of Payments.⁴³ "Instead of the bad currency driving out the good, we have the high-cost means of payment driving out the low-cost one. To take the most obvious example, a credit card offers the same service to a merchant – irrevocable payment – as a debit card, yet costs the merchant a lot more. To the cardholder, the credit card offers more – about 50 days free credit – yet it costs less, with the cardholder often receiving payment for using it. Clearly, the second condition for Gresham's Law is met, namely that the price signals to the decision-maker do not reflect the underlying costs, that is the "user pays" principle is not being applied. This tendency for competition to favour the high-cost product seems to be a feature of card-based systems around the world and explains the increasing attention given to the system by competition regulators." (Macfarlane, 2005)

Macfarlane (2005) suggests that competition between issuers has driven U.S. payment schemes (the four-party schemes) to raise their interchange fees in order to convince banks to issue one scheme's cards instead of the other's. Rates for one major scheme rose from about 1.3% to above 1.6% (and merchant fees roughly followed).⁴⁴ Similarly, in the U.S., the signature debit cards have a considerably higher interchange fees than the PIN debit cards, approximately 1.2% versus an average rate for PIN that was initially less than 0.3% but which has since risen above 0.4%. Between 1993 and 2002, the scheme-based debit share (that is, the most expensive scheme) rose from having a market share a little above 45% to more than 60%. In Australia, credit card payments per capita have risen dramatically between 1995 and 2006 (from below 15 to about 60), with interchange fees almost 1% during most of the period, considerably in excess of the debit EFTPOS (Electronic Funds Transfer from Point of Sale) fee.⁴⁵

"We thus observe banks promoting offline MasterCard/Visa debit card usage (for which they receive relatively high interchange fees) and discouraging online PIN-debit transactions (for which they

⁴³ Gresham's law states that "Bad currency drives out good." The origin of the observation was that when coins were minted from valuable metals, users would shave off some of the metal and seek to pay with coins that were somewhat lighter than the original coin. This led to a situation in which inferior coins were circulating and they drove out the good coins. The key point was that the purchasing power of the inferior coins was equivalent to that of the coins in mint condition.

⁴⁴ Charts showing the evolution of fees in the U.S. are shown in his talk, as well as charts of fee evolution and market share for scheme and direct debit alternatives in the U.S. and Australia.

⁴⁵ Between 1995 and 2004, the compound annual growth rate of EFTPOS transactions was 15.3%, compared to 18.5% for credit cards. So the lower-cost system grew at a slower rate than the higher-cost system.

receive relatively low interchange fees), despite the lower fraud rates and more rapid transaction processing provided by the use of online PIN-based networks.” (Frankel and Shampine, 2006)⁴⁶

Many observers suggest that fees for certain card transactions are unduly high. For example, the RBA has found that credit card costs in Australia were about 1.1 percentage points higher than costs of cash, prior to a recent reform.⁴⁷ Often discussions of the “high” cost of cards assume that cash and check payments are costless. If the social costs of card usage are lower than cash, for example, then the impact of policies that deter consumers from using cards may lead to higher social costs for the same transactions.⁴⁸

4.2.2 *Cross-subsidies will develop at the retail level between low-cost forms of payment and high-cost forms, with users of low-cost forms of payment paying more due to the presence of users with high costs forms.*

The existence of surcharging would lead to lower prices being charged to users of low-cost forms of payment. In a situation with no surcharging, however, a situation develops that closely resembles a cross subsidy (though may not meet the precise economic definition of a cross-subsidy.) “When card-based transactions are more costly to merchants than are non-card-based transactions, non-card users are hurt by card use because merchants have incentives to raise retail prices to reflect their higher costs due to some consumers’ using relatively expensive payment means.” (Katz, 2001 p. 41)

Non-card based transactions will likely occur at a higher price than otherwise when price coherence is in place. This is particularly perverse because low-income persons are disproportionately likely not to have cards while higher-income persons are disproportionately likely to have cards, leading to a situation in which low-income pay higher prices than otherwise and high-income persons pay lower prices than otherwise. Thus the ultimate effect is regressive.⁴⁹

4.3 *For many types of retailing, individual retailers have a very limited ability to turn down cards, particularly those of the main schemes.*

An individual retailer cannot easily refuse to accept the cards of major schemes, because doing so would lead many consumers to shop at competing retailers, losing otherwise profitable business. As John Vickers has said, “there is an element of must-take.” (Vickers 2005, p. 234.) Competition between retailers means that broad acceptance is not evidence that retailers as a whole benefit from card acceptance from

⁴⁶ Evans and Schmalensee argue that “Banks are willing to offer “unprofitable” PIN debit because they make money from the overall relationship – which is the same reason they offer free checking. But without profits that come from signature debit and its higher interchange fee, they would almost certainly not have promoted debit as much as they have in recent years. They might have raised other fees or lowered the rate they pay on deposits to compensate for the costs of offering PIN debit transactions.” (Evans and Schmalensee, 2005, p. 244) It must also be remembered that all debit has the potential to reduce cash usage (such as that delivered through automated cash machines or over the counter), reducing banks costs of cash operation.

⁴⁷ At the time of the study, interchange fees were approximately 0.95%.

⁴⁸ Such discussions are highly complex and generally beyond the scope of this paper. However, one important point is that social costs should be broadly construed, if an attempt is made to calculate them. One point concerning cash that is rarely addressed properly is that it provides a form of income to the central bank (or state) through seignorage that may reduce the extent of distortionary taxes, with electronic money and debit potentially reducing seignorage by between 0.29 and 0.66 in one study of European effects (Boeschoten and Hebbink, “Electronic Money, currency demand and seignorage loss in the G10 countries” BNB-Staff Reports, 1996.).

⁴⁹ David Evans has argued that similar cross-subsidies are common in many areas. For example, “All customers end up paying higher prices as a result of retailers offering parking, tailoring, escalators, convenient store hours, gift-wrapping, and many other amenities that are used by only some customers.” (David S. Evans, “Bank Interchange Fees Balance Dual Demand,” American Banker, January 26, 2001.) However, such services are offered individually, not as a uniform requirement across all merchants.

one system (such as credit cards) compared to another system. Vickers states that “individual retailers’ willingness to accept cards is not a good measure of overall retailer (or social) benefit from card acceptance.” (Vickers, 2005 p. 235) The British Retailers Council (BRC) has stated that “...no retailer (and, so far as the BRC is aware, no major merchant in any sector) has chosen to accept cards issued under one of the major credit or debit schemes and not the other.”⁵⁰ The BRC “has told the OFT that the withdrawal by merchants from payment card schemes is not a credible option because, in some ways, the major card schemes have become ‘essential facilities’.”⁵¹

This can be expressed as a problem with merchant fees generally and is not just limited to the four-party schemes but also includes three-party schemes. While the vast majority of consumers with a three-party card also have a four-party card, the consumer rewards from the three-party cards may lead their holders to prefer using them to the potentially lower-reward four-party cards. While many retailers do refuse three-party cards, there are many who accept them, particularly in some sectors, such as the travel sector, in large part because they know that refusing the three-party cards will lead to the loss of profitable customers.

In the hotel sector, for example, when a hotel is not at full occupancy, most of the room revenue from an additional customer is profit. Consider the hotel operator’s reasoning concerning different modes of payment. Checks are often not desired as payment mechanisms because of the inherently transient nature of the customer and the resulting enhanced non-payment risks. Cash is often not a feasible option, as many hotel guests do not carry sufficient funds to pay for a hotel stay. When considering whether to accept a three-party platform, paying a 5% fee in return for a profit that amounts to, say, 70% of the transaction value is likely worthwhile. In order for a three-party refusal to be profitable, the hotel would need to assess a probability of approximately 90% that the consumers with the three-party card would choose to use a card from another system.⁵²

The preceding example suggests that cards with a small market share may still have significant market power, in the sense that a given retailer may feel unable to refuse to accept the cards. As Katz (2001) states, “By itself, the finding that credit and charge cards issued on the American Express or Diners Club networks comprise small shares of total cards or support small shares of total card-based transactions does not prove that these systems lack market power in the sense relevant for the analysis of no-surcharge rules. For example, if business travellers using American Express corporate cards were required to use those cards when travelling for business purposes in order to qualify for reimbursement by their employers, then this requirement might generate market power for American Express with respect to merchants, particularly merchants catering to business travellers, such as airlines, hotels, and restaurants. Visa also argues that American Express cardholder rewards programmes could have similar effects for other consumers.” (Katz 2001, p. 51)

⁵⁰ Office of Fair Trading Decision No. CA98/05/05 Investigation of the multilateral interchange fees provided for in the UK domestic rules of Mastercard UK Members Forum Limited (formerly known as MasterCard/Europay UK Limited) 6 September 2005, Case CP/0090/00/S, p. 78.

⁵¹ Office of Fair Trading (2005) op. cit., p 81.

⁵² Suppose that a hotel charges 100 for a room, it accepts four-party cards for which there is a 2% fee and it does not accept checks. Imagine that the marginal cost of a room rental is 30. Then if it has a customer for the room who pays by a four-party card, the hotel earns 68 in profit. In contrast, if it has a customer who pays by a three-party card, the hotel earns 65 in profit. If the hotel believes that refusing three-party cards will not affect customer movement 95.5% or more of the time, it may be profitable to refuse them. However, if the hotel believes that more than 1 out of every 20 customers would be deterred, it is profitable to accept the three-party card, despite the significantly higher merchant fee.

4.4 *Bank profits are supra-competitive*

Vickers states that “if rebates to cardholders move less than one-for-one with the interchange fee, raising the interchange fee will tend to increase the aggregate profit of the banks. In that case, the banks would have a natural commercial incentive to achieve and maintain high interchange fees. One reason why high interchange fees might not be rebated 100 percent to cardholders is that the issuing market might be expected to be imperfectly competitive, and less competitive than the acquiring market, given that issuing services are characterised by extensive product differentiation and the buyers (cardholders) are individuals, many of whom have proportionately high search and switching costs (compared with those of many retailers). Moreover, there may be stickiness in giving rebates, as distinct from lower annual fees, to cardholders.” (Vickers 2005, p. 234) As Vickers notes, Rochet and Tirole (2002) assume that member banks’ profits increase with the interchange fee. So their incentive is to set interchange fee at “the highest level that is consistent with merchants accepting the card.” (p.588).

The idea that bank profits on transactions may be supra-competitive essentially amounts to a claim that prices for card services substantially exceed the relevant risk-adjusted rate of return. Consistent with economic theory, to the extent that supra-competitive profits exist, many of them may be “competed away”. For example, supra-competitive profits might explain why U.S. households received 5.23 billion credit cards offers by mail in 2004, despite low response rates of 0.4% in 2004.⁵³ The high cost of acquiring new cardholders may reduce the extent of supra-competitive profits but may also consist of wasteful activity.⁵⁴ According to a study by the OFT of UK payment systems, “the average small business charge of around 40p per direct debit transaction compares with a typical BACS charge [the fee paid by the acquiring institution to the payment clearing network for the transactions] of between 1p and 2p.”⁵⁵ (OFT, 2003 p.66) While there is certainly a large difference between the price and cost in such cases, banks may be subject to many costs in addition to the BACS charge when processing a direct debit transaction.

Profitability analysis is subject to many caveats. In particular, evidence of high profits is not generally a sufficient condition to establish violations of competition law or insufficient competition. One of the most careful public analyses of profitability in payment cards is that of the recent European Commission Interim Report I on Payment Cards.⁵⁶ The report suggests that, across the European Union, “credit card issuers had a weighted average profit-to-cost ratio of 65% in 2004, while debit card issuers had a weighted average profit ratio of 47%.” (p. 76) this is not a rate of return analysis, although a card specific rate of return analysis might be quite difficult to perform. Cruickshank (2000) examined wider profitability of retail UK banks, focusing on returns related to personal account and small and medium-sized businesses. He found that banks’ personal and small and medium enterprise operations yielded profits significantly in

⁵³ Frankel and Shampine (2006)

⁵⁴ While U.S. households may receive an excessive number of offers, with many of them undifferentiated from others, many foreign households may suffer from a dearth of offers.

⁵⁵ Office of Fair Trading (2003) UK Payment Systems: An OFT Study of Clearing Systems and Review of Plastic Card Networks, Report May 2003, p. 66. <http://www.of.gov.uk/NR/rdonlyres/10DB2458-FBD9-4B5C-9EE7-CEB7ACA472BB/0/of658.pdf>

⁵⁶ European Commission, “Interim Report I Payment Cards: Sector Inquiry under Article 17 Regulation 1/2003 on retail banking.” 12 April 2006.
http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/financial_services/public_consultation.html
accessed on 21 April, 2006.

excess of the risk-adjusted market rate of return. Cruickshank (2000) examines UK banking profits from 1989 to 1999.⁵⁷ His findings are reported in more detail in an Appendix A.

4.4 *Entry by new systems or system members is slow, uncertain and often restricted*

New schemes may provide beneficial competition to existing ones. While at times competition between schemes may have led to higher net two-sided customer fees, at times entry seems to have been associated with lower net two-sided customer fees.⁵⁸ Entry by new schemes is typically slow and difficult.⁵⁹ To the extent that competitive forces are not driving down prices at the moment, entry by new platforms could potentially play a role to help drive down prices.

Many platforms are formed by associations. But joining the association can, at times, be a difficult matter. For the platforms that are based on associations, such as Visa, MasterCard, and many domestic debit schemes, entry by new firms is restricted. Entry rules can include rules that an association member (with the right to use the association platform) must be a regulated financial institution (such as a bank or credit union), that all acquirers must have an issuing role and that applications must be approved by the board of the platform.⁶⁰ Rules such as these appear to have the objective of ensuring that members must be banks. While associations have a legitimate interest in ensuring that new members do not impose financial risks on the existing members (that would have to be borne by the existing members in case of bankruptcy), many large corporations (such as major retailers) have sufficient resources that they could certainly post a bond or take out insurance that would be sufficient to ensure that existing members were not placed at risk. There is no apparently legitimate reason for restricting membership to financial institutions. There may be a rationale for ensuring that members are able to internalise interests of issuers and acquirers, if indeed the two-sided nature of these markets is critical. But then it is difficult to understand why issuers would not be required to be acquirers as well as acquirers being required to serve as issuers.

4.5 *Interchange fees*

While the system of interchange fees for four-party payment systems exists around the world, there are important differences from one country to another. For credit cards, the systems are relatively similar, perhaps reflecting the broad reach of Visa and MasterCard. The domestic interchange fees can vary substantially from one country to another, however. Interchange fees are being challenged or investigated in many countries and jurisdictions, including Australia, Colombia, the European Commission, Mexico, New Zealand, Poland, Portugal, Norway, Sweden, Brazil, Hungary and Spain the United Kingdom and the United States (including at the state level, as in Kentucky and Washington State).⁶¹ While defenders of

⁵⁷ Examining overall retail banking profits in countries where large percentages of cardholders carry cards from a limited number of institutions that are distinct from their depository account banks would provide limited information about supra-competitive profits, as a relatively few banks and financial institutions issue the majority of credit cards.

⁵⁸ On the one hand, the main association's entry into U.S. signature debit, for example, seems to have led to higher fees for debit than were charged by those previously offering debit, this being an example of cost raising entry. On the other hand, the U.S. Discover card entered in 1985 and has lower merchant fees than the main four-party or charge cards. It also returns significant monetary bonuses to its users, amounting to about 1% of purchases. Thus entry can have both cost lowering and cost increasing features.

⁵⁹ Even after 17 years of operation, in 2002 the Discover card, with its seemingly superior financial benefits to merchants and customers has only a 4% market share. (Evans and Schmalensee, 2005, p. 15)

⁶⁰ "Membership in MasterCard International and its affiliates is generally open only to banks and other regulated and supervised financial institutions." (MasterCard Incorporated, 2006 Form 10-K (March 16, 2006))

⁶¹ MasterCard Incorporated, 2006 Form 10-K (March 16, 2006).

interchange argue that they may be essential for ensuring that appropriate incentives are in place to ensure that both consumers and merchants will adopt and use the system, there are a number of countries where interchange fees do not exist and debit systems have prospered. (These are Netherlands, Finland and Denmark.) Moreover, in Denmark, interchange fees for domestic card payments are prohibited by law.⁶²

Card associations have in the past been alleged to violate the *per se* rule against price fixing in setting of the interchange fee. In the Nabanco case, the National Bancard Corporation (NaBanco) alleged that the interchange fee constituted a price-fixing agreement in violation of section 1 of the Sherman Act.⁶³ Nabanco allegations suggested that the interchange fee was a *per se* price fix, and that even if that were not so, it was illegal by rule of reason analysis, because it placed banks that acquired merchant accounts at a disadvantage to those that both acquired and issued. NaBanco suggested that an integrated merchant-acquirer could have an advantage arising from the fact that for transactions involving the integrated bank on two sides of a transaction, the interchange fee would be neutral, and so, for acquiring, the integrated merchant-acquirer could offer lower merchant fees than non-integrated banks. Visa argued that collective setting of prices should be evaluated on the rule of reason based on the efficiencies that might be created from such a collective decision. Visa “portrayed the association as a joint venture of banks. The joint venture wanted to maximise the use of Visa by both cardholders and merchants. Visa asserted that the purposed of the interchange fee was to provide a “mechanism to distribute and share the costs of the joint venture in relation to prospective benefits, thereby encouraging members to provide the Visa service to a competitively maximum extent on both the ‘cardholder’ and ‘merchant’ sides of the business.” It also argued that the interchange fee was necessary for the joint venture to offer credit card services. The alternative to having some interchange fee (even zero) would be a chaotic system involving literally thousands of bilateral negotiations among issuing and acquiring banks, with the viability of the system in question. Unlike classic price-fixing, where ending collusion leads to higher output and lower prices, the outcome would probably involve lower output and possibly higher overall prices.” (Evans and Schmalensee, 2005, p. 287.) The U.S. Court of Appeals for the Eleventh Circuit held that the interchange fee should be evaluated under rule of reason and that the district court “plausibly and logically could conclude that the [interchange fee] on balance is pro-competitive because it was necessary to achieve stability and thus ensure the one element vital to the survival of the Visa system—universality of acceptance.”

In the European Commission case on Visa’s multilateral interchange fee, a complainant (EuroCommerce) considered the interchange fee “a price fixing cartel and therefore a hard-core infringement of competition law”.⁶⁴ The Commission concluded that the multilateral interchange fee 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 Visa issuing and acquiring markets.”

Interchange fees for debit card systems exhibit greater variety than for credit cards, largely as a result of these fees’ origins in domestic banking arrangements and the cards’ origins (frequently) as cash machine cards. In Finland and New Zealand, interchange fees do not exist for debit cards. Historically, in the U.S., interchange fees for debit were also set to 0, though this changed after Visa acquired one of the largest debit payment platforms. Some would assert that the change away from 0 interchange fees for debit in the U.S. arose from Visa’s behaviour after it acquired the debit platform.⁶⁵

⁶² See European Commission, “Interim Report I Payment Cards: Sector Inquiry under Article 17 Regulation 1/2003 on retail banking.” 12 April 2006, p. 45.

⁶³ *National Bancard Corp. v. Visa U.S.A., Inc.*, 596 F. Supp 1231 (S.D. Fla 1984), *aff’d*, 779 F.2d 592 (11th Cir. 1986).

⁶⁴ OJ L318, 22.11.2002, p. 28.

⁶⁵ See Constantine (2005) and *in Re Visa Check* litigation.

The direction of interchange fee payments is almost universally from the acquirer to the card issuer.⁶⁶ The fee is paid for access to the network of point of sale terminals. When the bargaining power of merchants is significant, however, the interchange fee may, to some extent, then be passed on to merchants, as occurred in Australia under the EFTPOS system.

Cruickshank states that “Allowing such freedom to set prices across the market is a reasonable approach for a new entrant – as Visa was in the 1960s – or a relatively small supplier, but is indefensible for a well-established player with market power.” (Cruickshank 2000 p. 266)

A number of decisions related to interchange fee arrangements have occurred. Among the most prominent are:

- Carte Bancaire of France;
- European Commission;
- MasterCard of UK;
- RBA in Australia;
- Competition Tribunal of Spain.

Carte Bancaire of France

At the time of the Carte Bancaire investigation of 1988 by the Conseil de la Concurrence, the Carte Bancaire system had a percentage interchange fee of 0.8 per cent and a lower rate of 0.4 per cent for certain kinds of merchants. In the decision, the Conseil concluded that fixing the interchange rate was a restriction of competition, preventing the acquiring banks from negotiating fees with merchants, by providing a “floor” of fees.⁶⁷ While the Conseil concluded that the determination of an interchange fee was needed for a well-functioning system, it also concluded that the existing fee was not based on “objective” criteria. Moreover, the system provided limited incentives for banks or the system as a whole to reduce fraud. As of May 1, 1990, Carte Bancaire introduced a new interchange fee schedule with three primary components:

- A fixed fee to cover processing costs (0.7 FF);
- A proportional fee of 0.21 per cent of the transaction amount to cover costs and investment in common security measures; and
- A payment for the issuer’s payment guarantee (a percentage of the transaction on a variable scale based on the fraud rate for cards of the issuing bank).

This scheme was accepted by the Conseil on October 30, 1990.

European Commission

The European Commission took a decision on 24 July 2002 that Visa’s modified multilateral interchange fee (MIF) met the conditions for an exemption under Article 81(3) of the EC Treaty.⁶⁸ This

⁶⁶ However, in Australia, the debit interchange fee is paid in the opposite direction, from the issuer to the acquirer.

⁶⁷ Décision n° 90-D-41 du 30 octobre 1990, le Conseil de la concurrence.

⁶⁸ OJ L 318, 22.11.2002, p. 17-36.

exemption was given with respect to the default MIF for cross-border transactions after Visa modified its scheme. In the modified scheme, Visa reduced the level of its intra-regional MIF for card payments in the Visa EU Region by introducing:

1. a fixed rate per transaction MIF for debit cards, not to exceed a weighted average of EUR 0.28
2. a phased reduction in its ad valorem MIFs per transaction as applied to credit and deferred debit cards, not to exceed a weighted average of 0.7%.

Visa estimated that the combined effect of the changes on interchange revenue would be a reduction of “more than 20% over the five-year period”.

“Under the modified scheme, Visa will use three categories of issuers’ costs involved in supplying Visa payment services as an objective criterion against which to assess the Visa intra-regional MIFs currently paid by acquirers to issuers on POS transactions. These three categories are: (1) the cost of processing transactions, (2) the cost of the free funding period for cardholders and (3) the cost of providing the ‘payment guarantee’.” Some observers generally in favour of the European Commission’s approach have questioned whether the cost of the free funding period for cardholders should be included within the set of permitted costs, given that some other forms of payment, such as cash, cannot provide such an option.

Visa stated that it would provide regular, audited cost studies to estimate the level of these costs, and that the MIFs would not exceed costs apart from “exceptional circumstances.”

MasterCard of UK

On 1 March, 2000 MasterCard notified an agreement that set fallback multilateral interchange fees and would apply to transactions made using UK issued cards. This led to an investigation by the Office of Fair Trading and, ultimately, a decision on 6 September 2005 finding that the “agreement has restricted competition in two ways. First, it gave rise to a collective agreement on the level of the multilateral interchange fee (essentially, a collective agreement on price). Secondly, it resulted in the unjustified recovery of certain costs (‘extraneous costs’) incurred by MasterCard UK Members Forum members and other MasterCard licensees through the multilateral interchange fee.” (OFT 2005 op. cit., p. 6) The extraneous costs identified in the decision included “the costs of providing an interest-free period and some of the costs of a payment guarantee against default” (OFT 2005 op. cit., p 197. The decision of the OFT was appealed by MasterCard UK Members Forum Limited, MasterCard International Incorporated/ MasterCard Europe SPRL and the Royal Bank of Scotland Group; and Visa and the British Retail Consortium have been given the right to intervene in the appeal proceedings. An oral hearing is scheduled for September 2006.

The OFT defined relevant markets as:

- The market for the provision of card transaction services between issuers and acquirers for the purchases made by way of MasterCard branded consumer credit and charge cards in the UK;
- The market for the provision of merchant acquiring services by acquirers to merchants for purchases made by way of MasterCard branded consumer credit and charge cards in the UK;
- The market for the provision of branded credit and charge card issuing services by issuers to cardholders in the UK.

It found that most merchants (98% or more) faced a blended rate for MasterCard and Visa together. In response to concerns that the markets above should have been broader than MasterCard, one observation of the OFT was that in response to a reduction in Visa fees, merchants who paid separate fees for Visa and MasterCard did not drop MasterCard in order to accept Visa exclusively. That is, there was no substitution towards the lower fee card in response to price changes. The OFT also found that low debit card interchange fees did not act to restrain MasterCard fees. The OFT stated that the fact that the MasterCard (MMF) Multilateral Interchange Fee (MIF) “is set at a level between five and eight times greater than the Visa debit card MIF for an equivalent transaction indicates that the Visa debit card MIF does not constrain the MMF MIF.” (OFT 2005 op. cit., p. 81)

RBA in Australia

The Payment Systems (Regulation) Act of 1998 gave the Reserve Bank of Australia (RBA) the formal powers to regulate payment systems in Australia and to require information from participants in payment systems. The RBA and the Australian Competition and Consumer Commission (ACCC) conducted a joint study of payment systems, culminating in a report on payment systems in 2000. In 2001, the RBA designated the credit card systems as payment systems. In 2002, the RBA stated that “Co-operative behaviour between competitors which involves the collective setting of prices is rarely permitted in market economies. Prima facie, such behaviour is anti-competitive and, where it is allowed, it typically requires some form of dispensation by competition authorities on the basis that there are offsetting benefits to the public.” In 2003, Visa and MasterCard were required to follow a standard for the calculation of interchange fees that was cost-based and led to a reduction in the fee from approximately 0.95% to 0.55%.⁶⁹ (Lowe, 2005 p.272) The lower interchange fees started on November 1, 2003. The merchant service fees have fallen by about 0.45 percentage points since that time.

One subject of concern among some industry observers has been that these changes were not applied to American Express, despite the fact that it now has relationships with banks in which banks promote American Express products and American Express makes payments to those banks. The observers’ argument is that the decreased rates of profitability on four-party card products will lead banks to increasingly focus on the American Express products, with their considerably higher merchant fees. Since 2003, American Express and Diners Club have increased their share of transactions from around 14 ½ % to around 16 ½ %.⁷⁰ At the same time, however, the average merchant fee for American Express has fallen from around 2.48% at the beginning of 2003 to 2.30 % in December 2005.⁷¹ While it is preliminary to speak of final impacts from the changes, one result does appear to be a significant reduction in total paid merchant fees which, based on the economic proposition that lower costs lead to lower prices, will presumably benefit consumers overall. Card prices for consumers have likely increased somewhat, but not as much as the decline in fees. Bank revenues from four-party interchange fees have declined, but there is no evidence that card usage has declined and credit growth has been lower while debit growth has been higher than in the recent past.⁷² Chang et al (2005) state that there is no evidence that retail prices have declined as a result of the lower merchant fees, however it is likely that the data is simply insufficient to address this question.

⁶⁹ The permissible costs were the costs of processing card transactions, fraud and fraud prevention, authorisation costs and costs associated with funding the interest free period. The last of these was the one cost that was not directly merchant related or efficiency related.

⁷⁰ See RBA Bulletin, Table C2.

⁷¹ See RBA *Bulletin*, Table C3.

⁷² See Lowe, Philip (2006b) “Opening Statement to House of Representatives Standing Committee on Economics, Finance and Public Administration” Speech 15 May, 2006 http://www.rba.gov.au/Speeches/2006/sp_ag_150506.html accessed on May 15, 2006.

The RBA did not regulate fees that American Express or Diners Club might give to issuing banks because, even though such fees may resemble interchange fees, the fact that American Express and Diners Club are, respectively, their own acquirers means that competition among acquirers could not be relied upon to reduce merchant fees. Thus such regulation would have had limited effect. Moreover, it would have been difficult to regulate all of three-party systems' payments to issuing banks, as interchange fees might have been disguised as marketing fees or other fees, thus requiring a considerably more extensive set of regulations than for four-party systems. For reasons presumably, at least in part, related to elimination of no-surcharge rules, anti-steering rules and the reduction in merchant fees on the four-party systems, American Express merchant fees have indeed fallen since Visa and MasterCard fees were lowered, though not to the same extent. These were the main recent changes in Australia related to credit cards.

For debit cards, there is also a process of reform, though this has advanced more slowly. After consultation with the RBA, the banks took a proposal to the competition authority that would eliminate interchange fees for PIN-based debit. This proposal was accepted by the ACCC, but then rejected by the Australian Competition Tribunal⁷³. After the rejection, the RBA designated the PIN-based debit card system as subject to its authority in September 2004. It has introduced proposals that would likely see the interchange fee for PIN-based debit fall from 20 cents to 5 cents per transaction.⁷⁴ With regard to signature debit, the RBA has released proposals that would see rates fall from a percentage-based fee that averages 40 cents to a flat fee of approximately 15 cents.⁷⁵

Spain

"In Spain, the Competition Tribunal issued a decision in April 2005 denying the interchange fee exemption applications of two of the three domestic credit and debit card processing systems and beginning the process to revoke the exemption it had previously granted to the third such system. The interchange fees set by these three processors apply to MasterCard transactions in Spain and consequently, MasterCard has appealed this decision. In addition, the Tribunal expressed views as to the appropriate manner for setting domestic interchange fees which, if implemented, would result in substantial reductions in credit and debit card interchange fees in Spain. In December 2005, the processors agreed to change the manner in which they set interchange fees, and the new fees are currently being assessed by the Spanish competition authorities to determine if they qualify for an exemption." (MasterCard Incorporated, 2006 Form 10-K (March 16, 2006))

5. Are non-price rules of card payment systems problematic?

The previous discussion focused on price-related features of payment cards that have, at times, been argued to suggest imperfections in the domain of cards from the perspective of competition law and policy. This section focuses on those features of card payment systems that have often been a focus of competition policy. These include:

- Honour-all-cards rule
- No steering rule
- Governance structure

⁷³ Australian Competition Tribunal, File Nos 7 and 9 of 2003 Re EFTPOS Interchange Fees Agreement 25 May, 2004.

⁷⁴ Note that this fee, in contrast to most other interchange fees in the world, is paid by issuers to acquirers.

⁷⁵ In addition, tying of Visa credit acceptance to Visa debit acceptance would be prohibited.

- Membership rules
 - Exclusivity
 - Duality

5.1 *Honour-all-cards rule*

Certain payment platforms may introduce competing payment technologies and platforms but issue them with the same brand. If this occurs, they can seek to require that merchants “honour all cards” issued by the brand and, where cards are multi-homed (that is, have a potential to be used on multiple platforms) may even seek to place their products as higher priority products than those of competitors. The honour all cards rule consists of a number of ties between arguably distinct products. The ties can include:

- Requiring that both credit and debit cards be accepted by a merchant that chooses to accept one of them; and
- Requiring that both domestic and international cards be accepted by a merchant that chooses to accept one.

Merchants have argued that, in practice, in some countries, they are unable to refuse credit cards from major associations or other suppliers. In consequence, an honour all cards rule has the effect of a tie between a “must have” credit card and a non-essential card (such as an association debit card that merchants might seek to reject) and may lead merchants to accept debit cards with “fixed, supra-competitive and extortionate” rates.⁷⁶

The associations have an interest in ensuring that a person with their branded card can use that card in any store that displays acceptance of that brand of card. This adds value to consumers and helps to ensure consumer subscription and use of cards.

The honour-all-cards rules have been found problematic from an antitrust perspective in at least one major jurisdiction, but have been upheld in others.

In the Visa Check/MasterMoney litigation in the U.S., for example, a class action lawsuit was brought against Visa U.S.A. Inc. and MasterCard International, Inc. by a variety of U.S. retailers, including Wal-Mart and many other large nationwide retailers. The plaintiffs alleged that Visa and MasterCard achieved a position of dominance in the national market for general purpose credit cards or general purpose credit cards and charge cards and then sought to require merchants to accept debit cards with exceptionally high costs by linking acceptance of those debit cards to acceptance of the credit cards.⁷⁷ That is, merchants were required to “honour all cards” even though card products differed substantially. Visa and MasterCard, in short, developed a number of alternative lines of payment to credit cards. These included both “on-line” point of sale (POS) debit cards (Interlink and Maestro, respectively) and “off-line” POS debit cards (Visa Check and MasterMoney, respectively). On-line cards were secured by a personal identification number that consumers were required to enter at the point of transaction, while off-line card purchases were secured by signatures and are called “signature debit” cards. While the risks to card issuers of off-line debit cards were much lower than for credit cards, due to less credit risk, merchant fees did not reflect these lower risks and for many years were equivalent for a Visa credit card and a Visa Check card, as well as for

⁷⁶ In re Visa Check MasterMoney Antitrust Litigation, Second amended consolidated class action complaint and jury demand. CV-96-5238, ¶93.

⁷⁷ Charge cards would include three-party cards such as American Express, Diners Club and Carte Blanche.

a MasterCard credit card and a MasterMoney card.⁷⁸ In the U.S., many different networks existed for on-line debit, largely originating from regionally developed networks. When retailers sought to refuse association off-line debit cards while accepting association credit cards, they were informed that they would lose all rights to take an association's card if they rejected certain cards. The difference in fees for using different types of cards was dramatic. According to the plaintiffs, for a \$ 100 transaction at a non-supermarket retailer with the most advanced electronic processing equipment, the interchange fees in table 2 would apply: Table 2. Merchant interchange fees for \$100 transaction, 1996

Card	Card type	Fee	Calculation
Visa Credit	Credit	\$1.25	1.25% of transaction
Visa Check	Off-line debit	\$1.10	1.04% of transaction + \$0.06
MasterCard Credit	Credit	\$1.31	1.31% of transaction amount
MasterMoney	Off-line debit	\$1.31	1.31% of transaction amount
NYCE	On-line debit	\$0.075	\$0.075 per transaction
MAC	On-line debit	\$0.065	\$0.065 per transaction
MOST	On-line debit	\$0.05	\$0.05 per transaction
Pulse	On-line debit	\$0.05	\$0.05 per transaction
Shazam	On-line debit	\$0.05	\$0.05 per transaction
Honor	On-line debit	\$0.05	\$0.05 per transaction
BankMate	On-line debit	\$0.05	\$0.05 per transaction
Explore	On-line debit	\$0.075	\$0.075 per transaction
Maestro	On-line debit	\$0.095	\$0.095 per transaction

Source: In re Visa Check MasterMoney Antitrust Litigation, Second amended consolidated class action complaint and jury demand. CV-96-5238, ¶69.

Based on non-discrimination rules, retailers claimed they were not permitted to steer their customers to forms of payment that they would prefer. Moreover, some banks took actions to remove “multi-homing” features from the off-line debit cards that would have linked them to the cheaper on-line networks.

Ultimately, the litigation resulted in a settlement in which Visa and MasterCard dropped their honour-all-cards rule in the U.S. However, it remains in effect elsewhere.

In contrast, the European Commission has held that the honour-all-cards rule is not restrictive of competition. “The fact that under the honour-all-cards rule, merchants are obliged to accept all valid cards with a certain brand, regardless of the type of card and regardless of the merchant fee, cannot be said to be restrictive of competition. The fact that the fees that acquiring banks may charge to merchants may be different does not demonstrate that different types of Visa cards are unrelated products. Moreover, the merchant fee is decided by merchant acquirers, not laid down by Visa International, and in many cases merchant fees are negotiated on a case-by-case basis. 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. It has also to be taken into account that the type of Visa card issued may vary from issuer to issuer and in particular from one country to another. Clearly, 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.

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Fees for the Visa Check card were lowered relative to the Visa credit card in 1995, but still remained considerably in excess of on-line debit cards.

Finally, the Visa International honour-all-cards rule does not oblige merchants to accept future types of Visa card, since merchants are free at any time to stop accepting Visa.”⁷⁹

The honour-all-cards rule, even when applied to seemingly comparable products (domestically issued Visa, foreign-issued Visa) may create distortions. There are at least two reasons why retailers might reasonably wish to treat domestic and foreign credit cards differently. One reason is that the rules for rights to a refund depend on the rules in the issuing country, not the rules in the acquiring country. Some issuing country payment schemes have a rule that provides for relatively generous protections for card users that can be subject to abuse. For example, a card user may stay in a hotel (overseas) that is not aware of such generous provisions and then return home, challenge the bill (seeking a chargeback) and potentially pay nothing for the hotel stay. This might lead merchants to seek to reject foreign cards of an international scheme.

Merchants might also seek to reject domestically-issued credit cards. Given that most domestic credit card holders also have domestic debit cards, the merchant might wish to require the domestic customers to use their domestic debit card, with accompanying lower merchant fees, while seeking to accept the foreign-issued credit cards, as holders of the foreign-issued credit cards likely do not have a debit card that could be processed through the domestic debit card scheme.

A balancing of these interests of retailers against the benefits to consumers of having universally accepted cards would be necessary were any changes to be the honour-all-cards rule to be implemented.

5.2 *No steering rule*

Many card payment systems include no steering rules within their merchant conditions. These rules prevent merchants from informing consumers that the merchant has a preference for one form of card over another. Such rules are particularly important given that many consumers have multiple cards. Such consumers are sometimes considered to “multi-home” because they have multiple payment options available. Were merchants able to select the consumer’s card for which they had the greatest preference, they would often choose the card with the lowest merchant fee.⁸⁰ Steering may be unappealing to many merchants when it is not a common practice and customers may be irritated by requests to use one card over another. On the other hand, was a consumer to hold a single “supercard” with multiple identifiers from all the systems to which they were subscribed, a merchant choice over payment system would likely be less offensive to the consumer.

5.3 *Governance Structure*

The governance structure of the main four-party systems has been the source of many competition law interventions in the area of cards. Legal exposure resulted from the governance structure in which card associations are owned by their member banks and pricing decisions are taken by boards representing their member banks, often with a proportionately higher representation for card issuers than acquirers. In part because of this legal exposure, MasterCard Incorporated is changing its governance structure. According to a regulatory filing of MasterCard,

“Many of the legal and regulatory challenges [MasterCard]... face[s] are in part directed at our current ownership and governance structure, in which [MasterCard] ... customers—[MasterCard] ... member financial institutions—own all of [MasterCard] ... common stock and are involved in

⁷⁹ OJ L 293, 10.11.2001, p. 37.

⁸⁰ This is particularly true when consumers do not receive the full value of the difference in merchant fees between a lower fee card and a higher fee card.

[MasterCard] ... governance by having representatives serve on [MasterCard] ... global and regional boards of directors. While [MasterCard] ... strongly dispute[s] these challenges, [MasterCard] ... believe[s] that a more open ownership and governance structure following the transactions described below under “Proposed New Ownership and Governance Structure” should leave [MasterCard] ... less prone to challenges and provide [MasterCard] ... with additional defenses to the challenges [MasterCard] ... may face by ensuring that [MasterCard] ... members own a minority of the equity rights in [MasterCard] ... and have no voting rights, except over a limited range of matters that are not competitively sensitive; transitioning to a board of directors that includes a significant majority of directors who are independent of [MasterCard] ... and of [MasterCard] ... members; and limiting the continued participation of [MasterCard] ... members in governance at a regional level to advisory bodies only or, in the case of Europe, to a regional board that is overseen by [MasterCard’s] ... independent board of directors.” (MasterCard Incorporated, 2006 Form 10-K (March 16, 2006))⁸¹

5.3.1 *Membership rules*

Association membership rules can have the effect of limiting entry to the association. For example, associations may charge fees that are excessively high for new members and may discriminate against non-financial institutions, effectively limiting membership to institutions with demand depository accounts (checking accounts). In the Canadian Competition Bureau’s Application for an Order related to Interac, for example, the Competition Bureau suggested that Interac’s Charter members “put in place a structure and membership criteria that discriminate against non-financial institutions, including third-party processors and retailers, and against non-Charter members.”⁸² In some countries, rules can be somewhat flexible and allow some non-bank depository institutions to issue cards, even if they must use a bank as their intermediary. For example, a stock brokerage company (Merill Lynch) has issued debit cards that access deposits held in the brokerage, via a bank (Maryland Bank) and is, in fact, one of the 10 largest issuers of debit cards.⁸³

5.3.2 *Exclusivity*

At times, financial institutions have coalesced around single platforms for certain purposes within a jurisdiction (as with debit cards in many countries) so that there has been only one platform of a given payment type in operation. This is not necessarily inefficient and many jurisdictions with a single platform for a given type of payment (e.g., debit) have lower merchant fees and overall transaction costs than jurisdictions with multiple, competing platforms. In such circumstances, exclusivity requirements within a payment class will not typically arise, except potentially when there is an attempt of entry by a new system.

⁸¹ MasterCard International states that “Following the ownership and governance transactions, investors in the IPO are expected to own 61,535,098 shares of Class A common stock representing 46% of our equity and 82% of our general voting power (or 66,150,230 shares representing 49% of our equity and 83% of our general voting power if the underwriters exercise their option to purchase additional shares in full), The MasterCard Foundation is expected to own 13,500,047 shares of Class A common stock representing 10% of our equity and 18% of our general voting power (or 17% of our general voting power if the underwriters exercise their option to purchase additional shares in full) and our existing stockholders are expected to own 59,965,325 shares of Class B common stock representing 44% of our equity (or 55,350,193 shares representing 41% of our equity if the underwriters exercise their option to purchase additional shares in full) and shares of Class M common stock that entitle them to elect up to three of our directors and approve specified significant corporate actions but are otherwise non-voting.” MasterCard Incorporated, 2006 Form 10-K (March 16, 2006)

⁸² See Competition Bureau (1995) “Director Seeks Consent Order for Interac from Competition Tribunal” press release, <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=736&lg=e>, last accessed April 20, 2006.

⁸³ Evans and Schmalensee (2005) p. 241.

Credit and charge cards constitute a type of payment platform; however where in most OECD members there are multiple platforms. In many jurisdictions, exclusivity provisions have developed that limited the ability of issuers to issue cards from at least one or more other brands. Particularly with respect to credit and charge cards, there have been significant efforts by certain platforms to maintain a membership of issuers that is wholly dedicated to one brand. Certain MasterCard and Visa associations, for example, have at times excluded their members from issuing each other's cards as well as issuing cards from American Express and Discover. However, in some jurisdictions "issuing duality" has been permitted, if not required, which has allowed banks to simultaneously issue cards of multiple brands. Increasingly, issuers of the four-party system cards are also permitted to include American Express within their issuing portfolios. In the U.S., the Department of Justice brought an action⁸⁴ alleging that

"Visa and MasterCard have thwarted competition from American Express and Discover through exclusivity rules forbidding members of the association from issuing credit cards on competing networks. Since the penalty for issuing American Express or Discover cards is forfeiture of the association member's right to issue Visa or MasterCard cards, the government claims that these "rules raise the cost to a member bank of issuing American Express or Discover cards to prohibitively high levels and make it practically impossible for American Express and Discover to convince banks ... to issue cards of their networks."⁸⁵

The defendants argued that "exclusionary rules actually enhance competition between the four systems because they keep the systems separate. They argue that if "duality", however defined, actually does cause reduced incentives to compete at the network level, triality or quadrality will only make things worse."

Duality does not occur everywhere. In Canada, for example, card issuers are "non-dual," that is, they can issue MasterCard or Visa payment cards but not both. In the U.S., Visa and MasterCard debit was non-dual as well, as a result of Visa's historical debit exclusivity rule. Following the litigation with the U.S. Department of Justice, Visa's debit exclusivity rule was no longer enforceable. "However Visa enacted a bylaw that imposes a fee on its 100 largest issuers of debit cards in the United States if they reduce their Visa debit volume by more than 10% which, if enforced, may prevent ...[MasterCard] from acquiring business from current Visa customers."⁸⁶

5.3.3 *Duality*

Duality is a particular form of exclusivity that means that members of one brand can also be members of another, but not more than one other. The U.S. Department of Justice suggested a distinction between issuing duality and governance duality.⁸⁷ Under issuing duality, a financial institution that issues one brand of card (e.g., Visa) may also issue another brand of card (e.g., MasterCard). Under governance duality, a governance scheme permits institutions to have "formal decision-making authority in one system while issuing a significant percentage of its credit and charge cards on a rival system." In *U.S.A. v. Visa U.S.A., Visa International and MasterCard International*, The U.S. Department of Justice and its expert expressed concern about the possible commonality of interests among MasterCard and Visa governors because for many governors of one payment system, their portfolio of issued cards often included significant portions of cards from the other payment system. Moreover, board membership was voted from the member banks and some institutions had governors in both associations. Moreover, in any case, the shareholders

⁸⁴ United States of America v. Visa U.S.A., Inc., Visa International Corp., and MasterCard International, Incorporated.

⁸⁵ Decision, 98 Civ. 7076 (BSJ), U.S. District Court, S.D. of N.Y..

⁸⁶ MasterCard Incorporated, 2006 Form 10-K (March 16, 2006).

⁸⁷ United States of America v. Visa U.S.A., Inc., Visa International Corp., and MasterCard International, Incorporated.

overlapped extensively, because many member issuers held card portfolios that were relatively evenly distributed across the two brands. Thus, while the U.S. Department of Justice argued that permitting issuers to offer multiple card brands was valuable and would tend to enhance output and competition to provide new features, the U.S. Department of Justice also argued that only issuers with a predominant commitment to one brand be permitted to serve on the boards for that brand.

The boards of two large payment platforms (Visa and MasterCard) historically have had members from card-issuing banks.⁸⁸ Because of dual issuing banks (who would issue both Visa and MasterCard products) a large share of banking membership was common between the two organizations. In terms of governance, there was a large convergence of interests. The U.S. Department of Justice claimed that this limited certain incentives for innovation and competition between the brands and that, while dual issuance would be beneficial, dual governance would be harmful. In fact, prior to the existence of dual issuance, card associations themselves had argued that it would harm competition. However, the court found that the evidence presented for harm arising from dual governance was insufficient to establish the claim.

6. Would any changes be beneficial?

Governments have instituted a variety of different rules, regulations and agreements with a view to reducing some of the perceived competitive and efficiency problems of credit and debit cards. In principle, an approach should identify a serious market failure or distributional rationale for intervention and then introduce an approach for addressing it that will improve the situation. Given that the ideal approach might not be feasible for a variety of legal, regulatory or political reasons, an appropriate standard is likely that the approach will improve the situation substantially, not necessarily that the approach chosen would yield the greatest improvement possible.

The legal and regulatory options available to governments differ as do the assessed competition and efficiency problems of card payment systems. Public authorities are often reluctant to regulate or promote changes in a sector that has developed, in some countries, with very little government intervention. Consequently, approaches to the sector have varied considerably across the OECD. Notable options include:

- No action;
- Regulation or rulings designed to restrict the competitive tendency for higher-cost, inefficient systems to dominate lower-cost, more efficient systems, to avoid transfers between cardholders and non-cardholders or other purposes;
 - Changing fees;
 - Changing non-fee terms of card payment contracts;
- Permitting joint activities by merchants;
- Promoting entry of new technologies that might pressure incumbent systems to change their pricing structure in a way that benefits more efficient payment schemes.

⁸⁸ At the time of the NaBanco litigation, governors were often from acquirers.

6.1 *No action*

A number of commentators suggest that no action may be the most judicious course at the moment. Tirole and Rochet suggest that prior to taking action; there should be (i) a theoretical identification of a significant market failure that is empirically validated and (ii) a clear identification of the least distortionary way to fix the market failure with confidence that it will not create a worse outcome than the existing situation.⁸⁹ They suggest that neither of these two conditions has been satisfied because high levels of debate remain and high levels of uncertainty exist about effects of potential policy approaches. As a result, they would suggest that no action is the most judicious course of action.

6.2 *Actions designed to restrict the competitive tendency for higher-cost, inefficient systems to dominate lower-cost, more efficient systems, to avoid transfers between cardholders and non-cardholders or other purposes*

6.2.1 *Changed fees*

After concluding that serious harm is created by certain payment card arrangements, some governments have sought the introduction of more cost-based fees and charges. While many observers suggest that regulated fees could unduly limit behaviour in two-sided markets, there is some evidence that the demise of associations predicted by certain of those who opposed regulations has not occurred and that overall transaction costs may be significantly lower than they otherwise would be.

Nonetheless, a number of potential criticisms may apply in general to price regulation in card payments. Guerrin-Calvert and Ordober (2005) have stated “Price regulation – particularly price regulation that sets fees of fee caps based on some but not all measures of the costs of service – is unwarranted, inherently difficult to implement in a manner that does not distort decisions, and prone to create significant inefficiencies and harm to an otherwise workably competitive marketplace.”

6.2.2 *Regulated fees*

In Australia, for example, in 2003, MasterCard, Visa and Bankcard were required to lower their interchange fees from about 0.95 % to about 0.55 % by the RBA. They were also required to eliminate their no-surcharge rules.⁹⁰ The result has been that the average merchant service fee for these cards has fallen from about 1.40% to about 0.95%.⁹¹ American Express and Diners Club did not have their fees regulated. However, after the reduction in interchange fees for the four-party platforms, American Express did reduce its average merchant fees from about 2.48% to about 2.30%. The RBA has recently announced further changes in fee oversight for debit cards that will likely result in charges of the EFTPOS system (typically paid from issuers to acquirers) to fall from about 20 cents to about 4 to 5 cents while the fees for Visa debit will fall from about 40 cents per transaction to about 15.

Rochet and Tirole (2003b) have argued that pure cost-based regulation of interchange fees is inappropriate because of the existence of a two-sided market. They suggest that while there may be no reason to believe that payment schemes will set socially optimal interchange fees (they could be higher or lower than socially optimal interchange fees) that is not, in and of itself, a reason to regulate. In particular, it is not a reason to introduce cost regulation. They suggest that payment schemes face the challenge of

⁸⁹ “An Economic Analysis of the Determination of Interchange Fees in Payment Card Systems, Review of Network Economics,” June 2003.

⁹⁰ American Express and Diners Club were not subject to the interchange fee rule and made commitments to eliminate their no-surcharge rules.

⁹¹ RAB *Bulletin*, Table C3.

ensuring that both cardholders and merchants join the network and that the markets can function only if both sides of the network are appropriately balanced, in particular by taking into account demand elasticities on both sides of the market.

An alternative, that could be more consistent with the alleged two-sided nature of the market, would be a regulation based both on cost and demand, comparable to Ramsey pricing, in which payments are made as a function of the appropriately defined price-sensitivity of payers.⁹² However, such regulation would require a depth of knowledge that is typically lacking at the government level about various payment card options and rival payment options, such as checks and cash. While such knowledge of demand elasticities could likely be developed, implementation of such regulation would nonetheless be difficult.

Chang et al. (2005) has argued that the Australian action was followed by an increase in the value of transactions undertaken with more expensive credit cards (American Express and Diners Club). Others have observed that American Express would likely have begun issuing cards through banks in Australia whether or not interchange rates had fallen so that the share change for American Express would likely have occurred in any case, as American Express has begun issuing cards through banks and has issuing arrangements with approximately 100 banks globally.

Chang et al. (2005) also suggests that there is no evidence that the reduction in interchange fees led to any reduction in retail prices. In combination with the increased consumer cost for credit cards (through annual fees and the like), critics suggest that the Australian action has not had benefits for consumers. (Visa Counsel, ABA Antitrust Law Spring Meeting, 2006).

These criticisms of the Australian actions are likely premature and potentially inaccurate. Rough calculations suggest that the reduction in aggregate merchant fees for a high percentage of credit card transactions is much greater than the aggregate change in fees for charge cardholders and the small percentage of transactions (about 2%) that have switched from association transactions to charge transactions. Even were the merchant fees decrease balanced fully by cardholder price increases, the reforms could be successful if they appropriately altered incentives facing users of payment instruments and brought those more into line with the costs of those instruments. Moreover, to the extent that credit and charge growth is more limited than it was previously, this would be consistent with claims that these forms of payment were overused prior to the implementation of regulations that brought incentives more into line with costs.

Katz (2001) argues that the common focus on interchange fees may be too limited. One reason for this is that the central network authority may collect fees from both acquirers and issuers. These “switch” fees are in addition to the standard interchange fee. Given the existence of payments through a central network authority, if interchange fees are regulated or eliminated while other payments remain in place, a network may duplicate the effect of interchange fees through appropriately adjusted switch payments. (Katz 2005 p. 123) Thus, as a pragmatic matter, regulations that focus exclusively on interchange fees may ultimately be subject to evasion.

Finally, critics have suggested that regulations of interchange fees result in an asymmetric regulation for four-party-systems and three-party systems, in effect giving an advantage to the systems that have the highest payment system resource costs. Moreover, critics have suggested that as American Express makes interchange-like payments to its partner banks, if there is reason to regulate, there is reason to regulate

⁹² Rochet and Tirole (2003) JEE derived a number of conditions that characterized competition between different payment platforms and which, at least for linear demand, surprisingly may coincide with Ramsey pricing.

those interchange-like payments. The RBA decided, at least for the moment, against regulating the American Express payments to its partner issuing banks.

As Assistant Governor Lowe recently stated:⁹³

“First, we judged that regulating payments to the partner banks would have little effect on American Express’s merchant service fees. While these arrangements look similar to the traditional four-party schemes, one important difference remains – that is, American Express is still the sole acquirer of its transactions. This lack of competition for acquiring American Express transactions means that if regulation required American Express to make smaller payments to its partner banks, there would be very little direct pressure on it to lower its merchant fees. This stands in stark contrast to what happened when interchange fees were cut in the other schemes. There, strong competition on the acquiring side of the market meant that the lower interchange fees flowed through very quickly into lower merchant fees. The same would simply not have happened in the American Express scheme.

“The second reason is that it is unlikely that the banks’ incentive to issue American Express cards would have been affected by the Reserve Bank requiring American Express to lower its interchange payments to its partner banks. Given the nature of the contracts between American Express and the issuing banks, lower interchange payments could have been offset with other forms of marketing and product support payments. In principle, this issue could have been addressed by regulating the totality of payments to issuing banks, including marketing payments. In turn, no doubt there would have been calls by some for similar regulation of MasterCard and Visa. Our view, and I think one that is widely shared, is that such extensive regulation is not in the public interest.” (Lowe, 2006)

6.2.3 *Zero interchange fees*

A zero interchange fee might be considered a regulated price that happens to be functionally identical to system without an interchange fee. Some observers have suggested that a non-zero interchange fee is not necessary to the maintenance of a payment system. Balto (2000) has advocated a zero interchange fee. He argues that costs could be recouped directly from consumers.

According to Visa, without an interchange fee, “the scale of Visa’s operations would be greatly reduced and so would its competitive impact. The product offered to both classes of user would be different and inferior; cardholders would get access to a smaller network of merchants and merchants to a smaller pool of cardholders”.⁹⁴

In Canada, the most popular payment method used (Interac) has reached its position without charging an interchange fee. In Denmark, more than 80% of transactions are accounted for by debit cards that settle at par. “In the United States, the Interlink network was the largest PIN-debit network while operating on a par basis. Visa acquired Interlink and subsequently imposed an interchange fee on its transactions. Visa has increased its fees a number of times in recent years.” (Frankel and Shampine, 2006) EuroCommerce has suggested that the German ec-Karte scheme, claimed to be a four-party system, functions without a merchant interchange fee. Lloyd Constantine has stated that, based on Visa analyses unsealed in the Visa Check litigation, Visa predicted “not only that unless Visa intervened, mature at-par PIN debit networks would eliminate signature debit with its credit card interchange fees, but also the competition posed by

⁹³ Note that Assistant Governor Philip Lowe is from the Reserve Bank of Australia and is distinct from Philip Lowe, the Director General of DG Competition. All quotes in this note attributed to “Lowe” refer to Assistant Governor Lowe of the Reserve Bank of Australia.

⁹⁴ As reported in the Commission Decision for case No COMP/29.373 – Visa International – Multilateral Interchange Fee. OJ L 318, 22.11.2002, p. 27.

mature at-par debit networks would reduce credit card revenues for Visa and MasterCard by an amount in 1991 dollars variously estimated by Visa to be in the range of \$701 million to \$3.5 billion, annually.” (Constantine, 2005)

Constantine suggests that in response to these threats from PIN-debit, “Visa and MasterCard’s predatory assault included the suppression of PIN pad installation; the acquisition of the largest PIN debit network, Interlink, and its conversion from a thriving at-par network to a lever for forcing other PIN networks to abandon their at-par structures; and the disintermediation by MasterCard of a nascent national network being formed by the regional networks, through Maestro, which MasterCard virtually abandoned in the United States (although it thrives in other regions of the world). Banks were paid to abandon the regional debit networks, and the six largest debit-issuing banks were initially targeted so that their exit from the regional debit networks would create a “domino” or “snowball” effect with 100 additional key debit-issuing banks exiting the networks as well.” (Constantine, 2005, p. 160-161)⁹⁵

6.2.4 *Meeting the Farrell Standard: Merchant indifference*

Farrell (2006) has recently proposed a policy standard that would help to ensure that appropriate payment system choices will be made.⁹⁶ He suggests that “competition can flourish only if the customer tends to choose the best among the offers made to it; This normally (in markets with simple customers) goes almost without saying, but because of an inherent asymmetry in team spirit between merchant and cardholder, payment instruments’ fee structures often bias the choice of payment instrument by that imperfect team, the two-sided customer.” Rather than focusing on welfare tests, he focuses on the principle of ensuring that customers have the appropriate incentives to make good choices among the options present. He suggests that, in the case of payment cards, cardholders’ incentives matter most in choosing between payment options, so the key to having good choices made is for the consumer to face a price structure that yields good choices. “Aligning cardholder incentives for choice of payment instrument with the (joint) interests of the two-sided customer means making the merchant side indifferent about the payment instrument used. That is, it requires that the merchant’s total acceptance costs, including merchant-side processing costs and merchant discounts as well as less-tangible convenience and security benefits, should be equal across payment instruments.”⁹⁷ (Farrell, 2006, p. 32)

Farrell states that if the merchant indifference criterion does not hold at the same time for all payment instruments, “it is most important that it roughly hold for those pairs that are close substitutes for cardholders.” He also states that “this criterion seeks to facilitate (privately) optimal choice by two-sided customers for payment instruments, from among the offers available to them. Unless marginal profits happen to be equal, it does not coincide with allocatively efficient choice among those offers, the focus of most of the recent literature. Nor does it involve regulation of overall fee levels, as a broad regulatory intervention might. In that sense, while it could be described as a (two-sided) customer welfare standard

⁹⁵ A variety of allegations are reviewed in the summary judgment motion of merchants to the In re Visa Check district court (see <http://www.inrevisacheckmastermoneyantitrust litigation.com>). The court awarded summary judgment on numerous merchant claims prior to trial.

⁹⁶ Farrell, Joseph, “Efficiency and Competition between Payment Instruments,” Review of Network Economics, March 2006. http://www.rnejournal.com/articles/farrell_march06.pdf

⁹⁷ The merchant indifference criterion can be restated from the perspective of the customer (card-user), in what could be called the enlightened customer criterion. If the merchant is indifferent, that means that the differential costs for the merchant are reflected in the customer’s calculations of impacts of alternate payment options, combined with the customer’s own differential value. (For example, for certain transactions, a customer might value the ability to delay payment for months, and thus place a higher value on credit than debit.) In order for the customer to make good choices about which payment system to use, from the perspective of the two sides in the transaction, the customer must then experience all costs of the two-sided customer, i.e., take into account, in their decisions of what payment systems to use, the full costs to the two-sided customer (merchant+customer).

given the offers (including fee levels) made by competing payment instruments, it is not a thoroughgoing customer welfare standard, which presumably would control those fee levels.” (Farrell, 2006, p. 33)

This criterion focuses on merchant fees, not interchange fees. However, it can be related to interchange fees for a merchant that faces the same merchant processing, convenience and security benefits with payment systems X and Y: if payment system X has an interchange fee that is passed through “so that interchange ‘moves’ the payment instrument’s merchant fees”, then the criterion would be satisfied if payment system X’s interchange fees changed to a level that would yield a merchant fee for X that made the merchant indifferent between Y and X. For example, if payment system X, with an interchange fee of 1.6%, had a merchant fee of 2% (and acquirers received 0.4%), and payment system Y, with an interchange fee of 0.2%, had a merchant fee of 0.5% (and acquirers receive 0.3%), then the indifference criterion could be met if X’s interchange fee could be adjusted to 0.1%, resulting in a 0.5% merchant fee. Alternatively, the criterion would be met if Y’s interchange fee could be adjusted to 1.7%, resulting in a 2% merchant fee.⁹⁸

This standard does not require cost-based interchange, but in certain circumstances may be suggestive of that approach towards interchange. For example, suppose that merchants view card-based instruments as “equivalent but for pricing”. That is, suppose that a merchant regards a debit card as equivalent, from its perspective, to a credit card. Or the merchant regards a signature debit card as equivalent to a PIN debit card. Then the merchant indifference criterion would suggest equal merchant fees. In short, the interchange fee plus that marginal resource cost of acquisition plus the marginal markup of the acquirers should be equal across the two forms of payment. Assuming that acquiring would be highly competitive (and have equal absolute markups) then the two forms of payment would have interchange equal to some constant minus the cost of acquiring. Setting the constant equal to the system marginal costs would satisfy the merchant indifference criterion. “But generally, the merchant indifference criterion does not support cost-based interchange in principle; rather, it offers a benchmark by which to assess whether it might be pragmatically better than a status quo.”

Making the merchant indifference criterion apply to all payment systems might be an ideal, but one that is practically very difficult to implement in most jurisdictions, for a combination of reasons related to legal systems, diffuse regulatory authority and lack of legal authority to oversee one or more of the n total payment systems in operation.⁹⁹

One approach to approximating the merchant indifference criterion might be to adjust interchange fees for those systems that have interchange fees. In certain regulatory and legal structures, this may be the best and most feasible way to bring payment systems closer to the ideal espoused by the merchant indifference criterion. Another alternative may be to address merchant fees directly. For example, if merchants were required to set prices differently for payment types based on reasonable estimates of merchant costs for each payment type, as might be feasible in a world of increasingly electronic transactions with bills being produced electronically, then credit card users would, effectively, pay more than debit card users, assuming that the merchant fees for credit cards were higher than those for debit cards. Whether through discounting from the highest cost system or surcharging from the lowest cost system, differential pricing for different payment systems would reduce, if not eliminate, the distortions in

⁹⁸ Farrell suggests that reasoning like this “should be interpreted in a broad or average sense when comparisons against instrument j’s and instrument k’s merchant fees would yield different answers, or when merchants differ in the non-price values they attach to the use of different payment instruments.” (p.33)

⁹⁹ The merchant indifference criterion focuses on *relative* fees. Thus with n systems, one of the fees would not need to be overseen by any regulation, as long as other fees were set with respect to that one fee. This is particularly relevant for cash, for which merchants may not experience any particularly significant fee, either positive or negative, and for which a fee could not easily be regulated. Given this, it might be natural for cash to serve as the “benchmark” payment system for purposes of relative comparisons.

the current pricing scheme that can lead many consumers to prefer higher-expense payment methods over lower-expense methods.

The approach of cost-reflective pricing is shown in table 3 for the example of surcharging. Assume, for the moment, that merchant costs for different payment mechanisms consist exclusively of the merchant fee.¹⁰⁰ In this framework, the consumer is charged a slightly higher price for credit card use over debit card use, which in turn is charged at a higher price than cash use. The higher merchant fees for certain payment systems are thus counter-balanced by higher revenues for those systems, so that the merchant is indifferent between the different options. The merchant receives net revenue of 100 no matter what payment system is used.¹⁰¹

Table 3. Comparing payment systems and consumer incentives to use them

	Consumer price with surcharging	Value of reward to consumer (e.g., frequent flyer miles)	Merchant fee	Net merchant revenue	Net two-sided customer cost	Card company revenue
Cash	100	0	0	100	0	0
Debit card	100.4	0	0.4	100	0.4	0.4
Credit card	102	0.5	2.0	100	1.5	1.5*
Charge card	103	0.7	3.0	100	2.3	2.3*

* These card company revenue figures reflect gross figures and not margins. To obtain margins, the costs of the benefits to the customer would have to be reflected in them.

Cost-reflective pricing would potentially have to be mandatory in order to be effective. This is because, in absence of mandatory pricing differentials, merchants face a prisoner's dilemma: they may have a preference for differential pricing, but individual merchants are unlikely to introduce differential pricing, because it will irritate some customers and lead to customer loss.¹⁰² Mandatory cost-reflective pricing would resolve the prisoner's dilemma problem in a way that would allow changes in merchant fees to be reflected in consumer prices, thus creating a form of competition between payment systems for consumer usage that would tend to promote growth of low-cost systems and reduce size of high-cost systems.¹⁰³ However, cost-reflective pricing would have implementation costs and these would need to be balanced against potential resource-gains from their introduction.

Cost-reflective pricing could either be implemented as surcharging or discounting. In practice, surcharging might have substantially different consumer effects from discounting, despite the equivalence

¹⁰⁰ In fact, merchants may have differential costs for different payment methods. Cash, for example, might have costs greater than 0 due to the costs of dealing with cash, the necessity of making additional trips to the bank from increased cash usage, additional filling of coin and currency in cash registers, etc. (But note that the relevant costs for cash usage are those related to marginal increases in cash usage, rather than from cash itself.)

¹⁰¹ For the sake of simplicity, this example does not consider differences in merchant-side processing, convenience and security benefits. However, these could easily be included as well. These would be unlikely to narrow the consumer price-difference needed between debit and credit (1.6%), as merchants may face very similar processing, convenience and security costs for both. But they might narrow the difference between credit and cash, for example.

¹⁰² Some sectors could potentially be left out of this pricing scheme, if introduction of such a mechanism would prove too costly in those sectors, such as businesses where a high percentage of bills are prepared by hand, such as taxis or restaurants.

¹⁰³ The relative cost differences would take into account an estimate of differing merchant processing, convenience and safety benefits.

of prices to consumers, because of different consumer perceptions. A surcharge could be perceived as something more important to avoid than absence of a discount.^{104 105}

Cost reflective pricing would eliminate or substantially reduce the “cross-subsidization” that occurs when, with uniform pricing for different payment methods, non-credit card users pay a higher price than they otherwise would and credit card users pay a lower price. Critics of cost-reflective pricing would argue that, precisely because it would eliminate cross-subsidization, it would lead to a reduction in the tools available to payment schemes for ensuring both sides of the market (the consumer and merchant) would participate in the platform.

6.2.5 *Mandatory non-blending*

Many merchants in a significant number of OECD countries receive merchant charges that are “blended”. This means that charges for MasterCard and Visa are identical, even if the interchange fees for the two firms are different. This blending reduces potential merchant sensitivity to price changes in one platform’s interchange fees and may seriously distort incentives by platforms to lower their merchant fees. One possible way to ensure that blending did not occur would be to require the separate billing and reporting of card payments by card brand. Such separation would enhance merchant knowledge of pricing differences between alternative card platforms, helping to ensure that prices to merchants reflect costs.

6.3 *Changed non-fee terms*

Non-fee terms of payment systems consist primarily of terms governing behaviour at the merchant-acquisition interface, the card interface and the networks interface with acquirers and issuers.

6.3.1 *Merchant interface*

At the merchant interface, prominent non-fee issues include rules such as:

- Honour all cards
- No-steering
- Interchange fee transparency

6.3.2 *Honour-all-cards*

The honour-all-cards rule requires that merchants indicating they will accept cards of a given brand would be required to accept all cards of that brand. However, some four-party associations expanded the rule so that accepting their credit cards meant not only that all instances of the credit card would have been accepted, but that also their other products (such as debit cards) would have to be accepted. To the extent the honour-all-cards rules apply to cards with “different characteristics”, this rule could be judged inappropriate. After the *In re Check Visa MasterMoney* litigation, Visa and MasterCard in the U.S. were required to permit merchants to accept Visa or MasterCard cards of one type (e.g., credit) while rejecting

¹⁰⁴ That is, the way a price scheme for payment is “framed” could have important consequences on consumer usage, despite equivalence between different prices. (See Kahnemann and Tversky (1979) “Prospect theory: an analysis of decision under risk.” *Econometrica* 47: 263-291.)

¹⁰⁵ Some observers would likely suggest that cash is more expensive, for society as a whole, than would be reflected in these costs. While this may be the case, consumers are increasingly charged a fee to access cash, as with automated bank machine charges that are increasingly present in many jurisdictions. A full discussion of comparable costs for different payment mechanisms is outside the scope of this paper.

the other (e.g., debit). The Payment Systems Board of the RBA has recently required that Visa and MasterCard likewise de-link merchant acceptance of credit and debit products, as well as requiring the inclusion of clear visual and electronic indicators to distinguish credit and debit products.

6.3.3 *No-steering*

Merchants are typically not permitted to discriminate or steer customers towards certain payment instruments or away from certain payment instruments. These limits are imposed through the agreement that merchants must sign in order to have a right to accept cards. While many merchants would like to have the ability to steer customers to less expensive forms of payment (e.g. from charge to debit), they are forbidden from pursuing such tactics. Rochet and Tirole suggest that steering would put a downward pressure on merchant fees. (Rochet and Tirole, 2003, p. 1008) Card associations might suggest that repeated attempts to steer customers away from a card brand might ultimately stigmatize the card brand for a customer and lead to rejection of that payment method by customers. Thus, from their perspective, steering could reduce the value of the brand they are creating and, consequently, reduce their incentives to invest in the brand. Actions to eliminate anti-steering rules would need to appropriately weigh the pros and cons.

In the system currently predominant in which merchants do not have differential prices for different payment mechanisms, they do face differential merchant fees. Given that merchant fees are relatively high for credit and charge card charges, while much lower for debit cards, many merchants would prefer to receive debit card payments if given a choice between credit/charge and debit cards. However, were they to refuse credit cards, many potential customers would, in practice, be excluded from payment. Notably, international customers would often have difficulty in making payment, as they would often lack a debit card that was compatible with domestic debit card programs. It would therefore be reasonable for many merchants to seek to receive debit payments over domestic debit systems (thus potentially refusing credit/charge cards issued domestically) while receiving credit/charge payments from foreigners who do not have domestically compatible debit cards. Current merchant rules prevent such choices being made or encouraged by merchants.

6.3.4 *Cost information*

Not only do issuers limit the incentives that merchants can provide to consumers for use of less costly means of payment, they may also limit the extent to which information about card transaction costs (apart from the merchant fee) can be provided. In particular, interchange fees are often classified as confidential by card associations.

The European Commission, in its exemption decision for Visa multilateral interchange fees, required increased transparency, stating that “Visa will change its EU Regional Operating Regulations so as to allow member banks to disclose to merchants both the level of the Visa EU intra-regional MIFs in force and the relative percentages of the three cost categories, should merchants request such information. Merchants are to be made aware of the possibility to request this information from their banks.”¹⁰⁶

6.3.5 *Card physical features*

The physical features of a card, both visual and non-visual, can have a decisive influence on the ability of a merchant to steer and on different payment systems to be effectively multi-homed. Rules that have been brought into doubt have included the way that cards are presented visually and whether they include electronically encoded information on multiple payment networks that a cardholder might use on

¹⁰⁶ OJ L 318, 22.11.2002, p. 21.

them. As a result of the *In re Check Visa and MasterCard* case, MasterCard and Visa were required, in the U.S., to have clearly distinct brands for debit and non-debit products. Card associations are alleged to have discouraged the placement of alternative payment network brands on their debit cards, in order to increase usage of their brand's debit card. Encouraging the placement of alternative payment systems on a single physical card can promote competition between payment systems, and give merchants an enhanced ability to steer. Steering, in turn, could give merchants an increased ability to respond to merchant fee differences between cards.

6.3.6 *Network-financial institution interface*

Payment networks often have membership rules that restrict those who can issue cards or acquire transactions. Restrictions have often limited members to authorized financial institutions or banks. One effect of such rules is to ensure that members do not have mixed incentives (e.g., large merchants might seek to become members and acquire their own transactions). Their voting rules often give high weight to issuers. The impact of such rules can be of interest. In particular if, as suggested below, merchants have a better incentive to introduce a low-cost transaction system than banks, merchant membership and representation could have salutary effects.

6.4 *Joint activity by merchants*

One of the primary barriers to the development of new payment instruments is the difficulty of ensuring broad merchant acceptance of a new payment system, including appropriate terminal sets. One method of helping to ensure broad merchant participation might be to permit merchants to form a joint venture for the development of a new retail payment instrument or for other purposes of joint coordination. A venture formed by merchants would have fundamentally different economic incentives from those of existing four-party systems (where the incentive is to maximize bank profits) and three-party systems (where the incentive is primarily to maximize payment system profits). The existing card systems generate high profits through high fees on card use. Merchants, however, have a broad interest in introducing systems that have low fees and that do not maximize bank or system profits. In fact, in one country where merchants controlled the acquisition system (Australia) interchange fees were paid from issuer to acquirer for EFTPOS transactions.¹⁰⁷

Activity by merchants to form an acquisition network, for example, could completely change the terms of negotiations between merchants and card payment networks. Moreover, if an acquisition network was combined with the creation of a new card payment system, the merchants might have the potential to create a broad-reaching network with fundamentally different incentives from those of the existing networks.

Merchants have expressed concern that antitrust laws might be used against them in case they formed a joint venture. For example, if merchants formed a joint venture that created a card with zero interchange and then refused to accept any other card with zero interchange, merchants are concerned that antitrust laws would be used against them. Moreover, during the period in which such a joint venture might be set up, existing card companies might try to "buy off" large merchants, who would undoubtedly form the base of such a venture, through various offers, potentially including lower interchange fees.¹⁰⁸ When appropriate, competition authorities might consider making explicit public statements that such ventures, if properly structured, would not violate competition laws.

¹⁰⁷ EFTPOS refers to "electronic funds transfer at the point of sale".

¹⁰⁸ It is already the case that merchant fees are significantly lower for large merchants using state of the art terminals than for small merchants.

At least one official of an antitrust authority has indicated her personal belief that merchants could probably form a joint venture to create a payment network “in a way that did not violate the antitrust laws.”

¹⁰⁹ Competition authorities concerned with existing card payment practices could take actions that would promote the creation of competing networks with fundamentally different incentives from those of existing payment networks. This would require competition authorities and, more broadly, legal systems to consider whether joint action by merchants (perhaps the most likely alternative source of coalescence for a payment system) in the area of payment would be legal and, in particular, whether merchants could:

- Form a joint venture that would be the unique provider of acquisition or terminal services for them;
- Agree on developing, commercializing and promoting a new payment instrument;
- Agree on an interchange fee for a new payment instrument;
- Agree to maximum fees for alternative payment instruments;
- Agree to boycott alternative payment instruments; and
- Agree on a discount-by-form-of-payment or surcharge-by-form-of-payment that would be based on average costs to merchants of each payment type.

6.5 *New technologies*

Nascent technologies exist for the Internet and mobile phones that may permit consumers to make payments without a card platform. Ensuring that new technology providers have access to appropriate consumer account information, and potentially to consumer accounts, may be important for ensuring that new technologies can successfully enter the marketplace with broad service offerings. That is, for example, it might be valuable to potential new technologies for them to have the ability to check balances and directly debit a consumer’s bank account, if the consumer has given permission for this to occur. There may be a further value in ensuring that new technology providers have different ownership incentives from the banks. For example, if new technologies cooperated with retailers to ensure broad retailer acceptance, that would promote competition between systems with different incentives.

Finland has offered banking services over mobile phones since 1996. Initially, mobile banking services (such as credit transfers) were operated by SMS. Now Internet phone (Wireless Application Protocol or WAP) schemes have been developed. Phone users can transfer funds to a payment scheme and then use their mobile phone to request payments from their scheme to selected retailers. Alternatively, payments may be made by contacting a phone number or sending a SMS to indicate a product request. Charges for such services are then included on the user’s phone bill. This approach has been used for vending machines, parking and public transport.

7. **If government intervention occurs, what part of government should intervene?**

Government action to influence those aspects of card payment systems that are of competition policy concern has occurred in a variety of forms.¹¹⁰ Most typically, it can occur through antitrust interventions or

¹⁰⁹ http://www.kansascityfed.org/PUBLICAT/PSR/Proceedings/2005/Regulatory_Gen_Discuss.pdf

¹¹⁰ Government actions have also focused on a variety of other actions of card companies, especially credit card companies, such as maximum interest rates, clear disclosure notices, debt collection and so forth.

through potentially broader regulatory actions. The most appropriate approach likely depends on a combination of factors that vary from one jurisdiction to another:

- Nature and severity of potential problem
- Origin of problem
- Legal standards
- Regulatory powers
- Potential for improvement from feasible policy solutions
- Relative impacts on future investments and innovations

John Vickers has stated, “In part because of this possible substantive overlap, one cannot say that the competition policy approach is generally better or worse than the regulatory approach. But it has advantages, provided it is effective, for example by avoiding the need for particular legislative or regulatory provisions or structures.”

In many jurisdictions, there is no clear regulator with an ability to oversee card payments and creating such a regulator may require new legislation, as occurred in Australia. In many jurisdictions, there is a perception that competition law can address actions taken by joint ventures (four-party systems) rather than three-party systems, despite the fact that certain three-party systems have merchant fees that suggest more use of market power than for four-party systems. Moreover, competition law may be more narrow in its treatment of issues and more subject to challenge. But when regulators do not exist or are, for various reasons, unable or unwilling to take action, activity by competition authorities may be the most feasible route for improving perceived market imperfections.

In Australia, the central bank has extensive regulatory powers over payment that arise from the creation of a Payment Systems Board, as part of the central bank, that has powers to identify a payment system and regulate it. The Payment Systems Board has addressed credit card interchange fees, as of 2003, and will have addressed debit card interchange and non-fee limits with rules coming into effect by the end of 2006. The central bank and competition authority have worked jointly, first to prepare a report examining payment cards, then with the development of solutions. The Australian competition authority initially investigated the debit card sector and dealt with proposals for reform of the EFTPOS system, but when the Payment Systems Board designated EFTPOS as falling within its jurisdiction, the competition authority ceased its independent activity in that area.. The Payment Systems Board has a greater ability to adopt an integrated approach across payment systems than does a competition authority, and has the principle that conduct is to be evaluated with respect to “competition, efficiency and financial stability.” (Simon, 2005)

One advantage of regulatory approaches is that regulators have a greater potential to be “forward looking”¹¹¹. That is, antitrust law requires a perceived breach of the law in order to motivate action. Many activities in the area of payment systems may not constitute a breach of law, despite market deficiencies. Consequently, competition authorities may not have an ability to act. In contrast to competition authorities, regulators may act in absence of a breach. Such flexibility could, generally, lead to excessive action were authority to be misused but also could be the only feasible way to deal with harmful conduct that is not illegal.

¹¹¹ Simon, 2005.

In many jurisdictions, competition authorities have taken the most pronounced action in this area, often in absence of a duly-authorized regulator. A common solution proposed has been the adoption of a cost-based standard for interchange. Critics have suggested that a “regulation” such as this does not make sense in a two-sided market. In essence, claim the critics, such regulations amount to dividing costs between the customer and merchant (the two-sided customer) and thus artificially limiting the ability of payment systems to give incentives that may be needed to promote merchant acceptance or consumer use. In the U.S., private enforcement has achieved both a large financial settlement (in favour of merchants) and significant changes in the honour-all-cards rule.¹¹²

8. Conclusion

This paper has sought to address many of the issues currently important in payment cards. The purpose of the paper is not to provide an exhaustive overview,¹¹³ but rather to provide a collection of information that will be useful for policy makers.

Points emerging from the paper suggest that, in the area of general purpose retail payment cards:

- A substantial market failure exists because relative costs for different payment mechanisms are rarely reflected in consumer prices paid;
- A consequence of this market failure is that free market competition likely results in a disproportionately high usage of high-cost payment systems;
- Market power is exercised by card issuers against merchants;
- Customers who purchase without cards (often low income) are likely providing an implicit “subsidy” to card users;

There is substantial debate about whether harm from these features of payment cards is sufficient to justify action by competition authorities, financial regulators or private parties. However, governments have increasingly been moving towards some type of intervention, whether limited or broad. Such action could include a focus on:

- Fee regulation
 - Surcharges/discounts: ensuring that consumer prices can or do reflect cost differences
 - Cost-based regulation: limiting fees to some form of cost recovery
 - Relative cost-based regulation: ensuring that consumers face incentives that will lead them to use lower-cost forms of payment when appropriate
 - Ramsey pricing: ensuring that prices reflect relative levels of demand between different classes of customer
- Non-fee terms

¹¹² See *In re Visa Check / MasterMoney*.

¹¹³ Many important issues have not been addressed in this paper due to space constraints, such as the impact of networks’ refusal to permit bypass and the networks refusal, in certain circumstances, to be on multi-homed cards.

- Honour-all-cards: Preventing cards of one payment type from being bundled with cards of another type
- No steering: Enabling retailers to steer their customers to their preferred modes of payment
- Eliminating blending: Ensuring that retailers face distinct fees for different payment card systems
- Governance
 - Increased ability of non-banks to play a role in issuing or acquiring

Less regulatory approaches to perceived problems with the payment card market would include focusing on permitting and enabling new forms of competition and competitors with fundamentally different incentives to those of the current main payment schemes. For overall, it must be remembered that retail payment schemes have a simple basic purpose, transferring value from one entity (the customer) to another (the merchant). Fundamentally, there is no reason that banks should be involved in organising this transfer, except that banks tend to serve as the storage centre of value for customers, as a combination of customer preferences and regulations. In the long run, however, other intermediaries could develop. There is no inevitability to the use of cards, for example, as opposed to other means of secure customer identification.

- Consideration should be given to permitting merchants to form payment ventures, acquisition joint ventures or other negotiating ventures, as this could promote competition or negotiations between parties with fundamentally different incentives;
- Consideration should be given to methods of promoting entry by potential new technologies

If existing card schemes seek to disarm potential new forms of payment that pose threats to their profit streams, competition authorities should be particularly vigilant to ensure that new payment systems can develop without being taken over or co-opted, as it may be through new systems that dramatic innovation may occur; in the long-run, such innovation may provide the best prospect of resolving concerns that show no sign of abating in the short run.

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APPENDIX A. CRUICKSHANK REVIEW EVALUATION OF BANKING PROFITABILITY

“Persistently high rates of profitability across an economic market signal that the market is less than fully competitive. To establish if rates are ‘too high’, it is first necessary to establish a comparator: the level of expected profitability if competition in the market were working effectively. This is by no means straightforward and all methodologies have their problems.”

“As a result, the Review has used several different methodologies to try to establish if the relevant economic markets have been (or will be) exhibiting levels of profitability that are significantly above expectations if competition were working properly. In particular, the Review has analysed accounting data and compared accounting rates of profitability against an accounting norm; and it has analysed market information and compared that to a market based norm.”

“The profitability of many banking markets is very sensitive to the business cycle. When providers earn a significant proportion of their income from providing credit to their customers (through personal loans, business loans, mortgages, credit cards, or overdrafts on current accounts, for instance), the profitability of the market inevitably depends to a large degree on the incidence of bad debt, when customers fail to repay the loan or the interest. Bad debt rates in turn depend on the UK’s wider economic health. Accounting conventions also mean that the timing of a loan default does not coincide exactly with its impact on accounting profits.”

“All this means that profitability must be measured across the business cycle to gain any insights into the relative profitability of these activities compared with the rest of the economy.”

Cruickshank used two main measures of profitability: market returns (returns to shareholder equity or internal rates of return) and accounting returns.

Market Returns

“A way of measuring the actual returns to shareholders is to track the performance of a nominal investment in relevant sub sector firms of the FT All Share index over a specific period. An investor buying shares (weighted by market capitalisation) in UK banks at the share price quoted at the end of December 1988, reinvesting any dividends in the same portfolio, and selling them at the end of December 1998, would have seen every £1.00 invested translated into £11.07. Holding the shares from December 1988 until December 1999 would yield £12.96.”

“It is not possible to measure the expected return to shareholders in an effectively competitive banking market. Comparisons have to be made with returns in other markets, and corrections made to account for fundamental differences between the two sectors. Two significant adjustments are needed, to account for the difference in non diversable risks (beta adjustment) and the effectiveness of competition in the comparator market.”

“The return to shareholders of the FT All Share market expresses the riskiness of the stock market as whole (ie beta of 1), subject to average competitive pressure on prices across the UK economy. The return to shareholders in this market (including the banking sub sector), over the same period

(December 1988 to December 1998), was £4.43 for a £1.00 investment. From December 1988 to December 1999 it was £5.50.”

“At least part of the difference between the returns to banking sector shareholders (£11.07) and the stock market (£4.43) will result from the difference in undiversable risk between banking stock and the stock market as a whole. In 1989 the beta of banking sector was 0.95. This had risen to 1.58 by 1998. Using the Capital Asset Pricing Model (CAPM) methodology, it is possible to calculate the additional return required to compensate investors for the divergence of the banking beta from the stock market as a whole. This correction produces an expected return in 1998 of £5.13 for a stock following the performance of the stock market as a whole (including the banking sub sector), but with the banking sector’s beta. For December 1988 to December 1999 it was £6.80.”

“However, if banking markets are less effectively competitive than the rest of the economy, then it makes sense to compare their results to the stock market as a whole, excluding the banking sector. With this adjustment, (and including a consequential adjustment to relative betas) the expected return for an investment with the same beta as the banking sector and the same average effectiveness of competition of the whole economy minus banking, is £4.44 for the period December 1988 to December 1998, and £5.95 for the period December 1998 to December 1999.”

Internal Rate of Return

“Another method of looking at the return to shareholders is to calculate the internal rate of return (IRR) of the income returned to shareholders as dividends and any capital gain made on selling the shares, for an investment made at a certain time. The value of this income flow is measured by calculating the discount rate that would be necessary to reduce its net present value to zero. This discount rate is the internal rate of return (IRR) of that investment.”

“This analysis was carried out on the big four banks. It yielded an average IRR of 24 per cent per annum over the 12 years 1987 to 1999. The equivalent result for the stock market as a whole, correcting for difference in risk (beta), was 20 per cent. Removing the sample banks from the market produced an IRR of 19 per cent. On this basis, investors in a portfolio of the big four banks made on average 5 percentage points per year more than an investment of equivalent risk in the stock market as a whole. Over the 12 year period this represents an excess return of around 65 per cent. Moving the start date forward to 1989 increases both the annual excess return and the total excess return for the 10 year period.”

Accounting Returns

“The accounting methodology suggests that total returns to date for the firms in the sample (from 1989 to the end of 1999) have been neutral to excessive over the period. Within the sample there is considerable variation. More importantly, on a forward looking basis, all firms in the sample are now and - with a few exceptions - have been for a number of years, earning returns considerably higher than their cost of equity. However, there is some uncertainty attached to the 11 year result, caused by the divergence between economic measures and accounting measures. It is clear nonetheless that taken as a group, if the firms’ current level of profitability continues for any length of time the returns over the cycle will become unambiguously excessive. The measures of market returns give a much clearer indication that returns to shareholders have been excessive over the period 1988 to 1999.”

“The accounting measures of both profit and profitability...are based on accounting conventions. Without affecting the company’s actual performance, these numbers can change significantly just by using different conventions and ways of measuring. The CAPM derived comparator would not

change. So before drawing any final conclusion about what the accounting results mean, it is necessary to make sure that the conclusions are based on real measures rather than mere accounting conventions.”

“One of the more serious weaknesses of accounting measures of profitability is that at any point the real measure of operational costs and asset values may be misstated in the accounts, if operational expenditure and investment are not measured on an economic basis. This means that the measure of shareholders’ funds will not reflect the net economic value of the firm. As a result, both the measure of profit (income less operational costs) and profitability (profit divided by shareholders funds) may not reflect economic reality.”

“For example, expenditure in the form of economic investment may be accounted for as operational expenditure. This will tend to depress the measurement of profits in the year it occurs, and lead to an understatement of the assets used. In this year both profits and profitability will be understated. In subsequent years profit will be overstated, shareholders’ funds understated, and profitability overstated. This continues until the economic value of the asset created falls to zero. A similar kind of error arises if the depreciation of an asset in the accounts does not actually match the economic loss of value of that asset. Too fast a depreciation means that profits and profitability are first understated, then overstated; too slow and the reverse occurs.”

“Over time, the total amount of accounting profit does not change, but the year in which it arises does. So errors in the quantum of profits through time cancel out. Measures of profitability do not, however. The more that investments are treated as current expenditure, or that assets are depreciated too quickly, the higher the accounting rate of profit compared to the profitability actually returned to shareholders. This is because of the timing error in actual profits (which could be returned to shareholders or invested in the expansion of the business) and in under estimating the capital actually tied up producing the goods or services. How significant this is depends on the degree to which the balance sheet does not reflect the economic measure of assets and liabilities at any time, and the extent of the timing error between when real profits actually arise and the time they apparently arise in the accounts.”

None of these estimates breaks down profits by area of activity, which would be most desirable for gathering information on card profitability in order to judge whether profitability was super competitive. However, Cruickshank cautiously estimates, based on apportioning equity in proportion to regulatory requirements, that pre-tax rates of return on equity were 30% for the UK personal banking services, into which issuing card services would be included.¹¹⁴ (Cruickshank, p. 24)

¹¹⁴

Rates of return for corporate activity are considerably lower, as this market is more national or international in scope.

NOTE DE RÉFÉRENCE

1. Introduction

Ces dernières années, les cartes de débit et de crédit se sont de plus en plus substituées aux chèques et aux espèces en tant qu'instruments de paiement de masse. En 2002, à l'échelle internationale, les cartes de paiement généralistes ont été utilisées pour acheter des biens et des services d'une valeur de 2700 milliards USD¹. A mesure que le secteur des cartes de paiement gagnait en importance et en maturité, le droit ou la politique de la concurrence se sont de plus en plus intéressés à ce domaine. Les autorités de la concurrence et autorités de tutelle des services financiers ont réalisé des enquêtes et pris des mesures concernant les problèmes de concurrence. L'intérêt accru des pouvoirs publics pour les cartes de paiement a été en grande partie motivé par :

- la perception de défaillances de ce marché pouvant conduire à une utilisation excessive de modes de paiements très coûteux,
- des plaintes liées au fait qu'un pouvoir de marché puisse s'exercer dans certains domaines, de nombreux commerçants affirmant ne pas pouvoir raisonnablement refuser certaines cartes,
- des pratiques courantes au sein du secteur, notamment :
 - des prises de décision communes de la part de concurrents ;
 - des mesures d'exclusivité ;
 - la présence d'actionnaires historiquement identiques d'une plateforme à l'autre.

Cette note entend (1) évoquer le pouvoir de marché et de détermination des prix éventuellement associé aux cartes de paiement comme les cartes de débit et de crédit, (2) examiner les pratiques découlant des règlements (ou des règles internes) qui concernent, dans certains cas, l'exploitation des réseaux de cartes et (3) réfléchir aux méthodes qui permettront de renforcer les mécanismes concurrentiels entre les différentes cartes de paiement. Elle n'entend pas faire un tour complet des problèmes de concurrence que pose le secteur des cartes de paiement mais s'attache plutôt à donner un aperçu à la fois succinct et pratique des divers problèmes qui peuvent se poser à la politique de la concurrence et des solutions envisageables.

Plusieurs aspects sont particulièrement saillants :

- Il existe une défaillance importante du marché dans la mesure où les écarts de coûts existant entre les divers mécanismes de paiement se répercutent rarement sur les prix payés par les consommateurs,
- Il s'ensuit notamment que la libre concurrence peut aboutir à une utilisation disproportionnée des systèmes de paiement à coûts élevés,
- En matière de politique de la concurrence, il peut y avoir un problème lié à la fois aux modalités de calcul des commissions interbancaires de règlement différé (« interchange fees » ou

¹ Voir Evans et Schmalensee, 2005, p. 2.

« commissions interbancaires ») et - thème plus rarement traité - aux commissions d'utilisation par les commerçants (« merchant fees » ou « commissions commerçants »)²,

- Les clients qui règlent leurs achats par d'autres moyens de paiement sont susceptibles de « subventionner » implicitement les utilisateurs de cartes³,
- Les utilisateurs de cartes auxquelles s'appliquent de faibles commissions commerçants (comme les utilisateurs de cartes de débit) sont susceptibles de « subventionner » implicitement les utilisateurs de cartes à commissions élevées (tels les utilisateurs de cartes de crédit);
- Il faudrait peut-être préciser que les commerçants peuvent former des entreprises communes de paiement ou d'acquisition, voire toute autre structure de négociation, dans la mesure où cela serait susceptible de renforcer la concurrence ou de promouvoir les négociations entre des parties ayant des incitations fondamentalement différentes,
- Il faudrait envisager des méthodes permettant de promouvoir l'entrée d'éventuelles technologies nouvelles,
- Il faudrait envisager des méthodes pour supprimer la défaillance actuelle du marché découlant du fait que les consommateurs sont inutilement incités à opter pour les modes de paiement les plus onéreux au détriment des moins coûteux.

Alors que coexistent un grand nombre de mécanismes de paiement de masse, cette note traite principalement de ceux qui ont suscité le plus vif intérêt du fait de problèmes de concurrence : les cartes de débit et les cartes de crédit⁴. L'interconnexion des infrastructures en arrière plan des paiements par carte, a été, dans certains cas, coordonnée par des banques par le biais de coentreprises (comme Visa et MasterCard). Ainsi ont été mis en place des systèmes dits « quadripartites », autrement dit faisant intervenir quatre parties : le consommateur, la banque émettrice du consommateur (assurant l'émission de la carte de crédit), la banque acquéreuse (qui acquiert les transactions commerçants) et le commerçant (détaillant). Dans d'autres cas, une seule partie se trouve au centre de l'infrastructure (comme American Express ou Diners Card), créant un système « tripartite », dont les trois composantes sont le consommateur, l'émetteur de la carte/la société de traitement (intégrant les activités de banque émettrice et de banque acquéreuse) et le commerçant (détaillant).

Les cartes ne représentent que l'un des ensembles d'instruments de paiement de masse, les autres étant principalement les espèces et les chèques⁵. Ces instruments de paiement induisent différents coûts et avantages pour le consommateur et pour le commerçant et impliquent également des disparités importantes en matière de coûts et d'avantages tant technologiques que collectifs. De nombreux pays ont imposé la

² Les « merchant fees » (commissions d'utilisation par les commerçants) sont souvent appelées « merchant discounts » (prélèvements appliqués aux commerçants). Cela étant, comme la commission correspond généralement à une déduction des fonds perçus par le commerçant et que l'on parle de commissions interbancaires, le terme de « commissions d'utilisation par les commerçants » ou « commissions commerçants » sera de préférence utilisé dans cette note.

³ Alors que la définition technique de la notion de subvention peut ne pas sembler appropriée, l'équivalence entre les subventions et les structures de paiement effectivement appliquées dans la pratique est évidente. En effet, les utilisateurs qui ne règlent pas par carte paient plus cher qu'ils ne le feraient dans le cas contraire, tandis que les utilisateurs réglant par carte paient moins cher que si les commerçants répercutaient sur eux les commissions qu'ils versent du fait de l'utilisation de la carte.

⁴ Cette note s'intéresse principalement aux cartes généralistes et ne traite pas, par exemple, des cartes privatives mono-enseigne.

⁵ Dans l'un des pays de l'OCDE au moins, les chèques ne sont plus utilisés.

gratuité des espèces et des chèques dont le coût d'utilisation n'est pas facturé par les banques à leurs clients, en dépit du fait que ces modes de paiement ont bel et bien un coût, mais les efforts consentis pour imposer une réglementation similaire aux cartes de paiement sont limités⁶.

Cette note ne traite pas des virements électroniques, des frais financiers éventuellement usuraires, des paiements par l'Internet, des autorisations de prélèvement mensuel ni des paiements électroniques à grande échelle⁷.

La table ronde :

- donnera des références sur le fonctionnement des systèmes de cartes de paiement,
- analysera les principales caractéristiques du secteur des cartes de paiement, y compris le fait que les cartes de paiement présentent des aspects propres au « dualisme » de certains marchés,
- examinera si les commissions appliquées et les prix pratiqués permettent de promouvoir une utilisation efficace de ces cartes,
- examinera s'il existe certains problèmes liés aux aspects non tarifaires des paiements par carte,
- identifiera les principes d'intervention qui ont été préconisés,
- étudiera quelle composante des pouvoirs publics, peut, éventuellement, intervenir le plus utilement pour traiter des problèmes de concurrence liés aux cartes de paiement.

2. Références

Une carte est essentiellement un moyen d'attester avec certitude que le consommateur ou son représentant paiera le commerçant pour les biens et services acquis. Le commerçant souhaite, de son côté, obtenir une garantie de paiement au moyen d'un mécanisme minimisant ses coûts directs et indirects, comme les commissions qui lui sont applicables et les frais liés au temps de traitement de la transaction. Les consommateurs apprécient de pouvoir accéder à leur guise à leurs comptes bancaires ou au crédit sans avoir à porter sur eux des espèces ou des chèques. Les cartes peuvent être utilisées sous leur forme physique, mais les numéros d'identification du compte figurant sur la carte bancaire peuvent également servir à régler une transaction, comme c'est le cas sur l'Internet, sans le support physique de la carte. Les commerçants utilisent un terminal ou d'autres moyens pour authentifier le compte et s'assurer du paiement avant la finalisation de la transaction. Ils apprécient les cartes de paiement pour de nombreuses raisons, notamment la sécurité relative du paiement (par rapport aux chèques), sa rapidité et l'aspect de « crédit éclair » offert par certaines cartes, le consommateur étant en mesure, avec certaines cartes de crédit ou à débit différé, d'effectuer un achat même sans disposer de fonds suffisants au moment de la transaction⁸.

⁶ Le recouvrement des coûts s'effectue souvent par le biais de commissions bancaires et autres commissions spécifiques. Les règles relatives au traitement des chèques ont ainsi imposé une compensation sans surcoût dans certains pays. Avant leur mise en œuvre, certaines banques appliquaient aux autres banques des commissions élevées au titre du traitement des chèques.

⁷ Cette note ne traite pas non plus des paiements sur l'Internet, comme la téléprestation de services et le commerce électronique auxquels l'OCDE a consacré d'autres travaux comme le document intitulé « *Online payment systems for e-commerce* » DSTI/ICCP/IE(2004)18/FINAL.

⁸ La carte de crédit donne au client la possibilité de contracter instantanément un prêt et incite donc les clients qui seraient dissuadés de procéder à un achat particulier en raison du temps qu'il leur faudrait pour faire la demande de prêt correspondante d'aller au bout d'une transaction dont ils se seraient abstenus dans le cas contraire.

Pour traiter de la politique de la concurrence en matière de cartes de paiement, il est nécessaire de connaître :

- les différentes étapes que suppose l'utilisation d'une carte,
- les différents types de cartes existants,
- les risques inhérents à chaque type de carte (du point de vue des procédures de paiement).

Comme les plateformes de paiement coordonnent de nombreuses pratiques commerciales des membres qui les composent, par le biais de la tarification et des règles qu'elles imposent, des questions se posent souvent quant à leurs éventuels effets anticoncurrentiels. « Pour les pouvoirs publics qui définissent cette politique, toute la difficulté consiste à décider, d'après les informations dont ils disposent, si la politique de prix et les règles appliquées par un réseau sont susceptibles de faire progresser ou de freiner les gains d'efficacité économique » (Hunt 2003, p. 81).

2.1 Les différentes étapes de l'utilisation des cartes et les parties concernées

Le secteur des cartes de paiement compte des milliers de banques et autres prestataires de services financiers qui assurent le traitement des paiements en qualité d'intermédiaires entre plusieurs millions de commerçants et plusieurs milliards de titulaires de carte. Les cartes de paiement induisent des externalités de réseau : plus les commerçants qui les acceptent sont nombreux, plus les consommateurs les apprécient et réciproquement. Pour résoudre le problème du paiement, une solution peut être que chaque émetteur négocie des contrats bilatéraux avec chaque acquéreur de transactions. Une autre solution possible, bien plus courante celle-ci, est la création d'une coentreprise réunissant émetteurs et acquéreurs qui fixe les règles applicables à l'ensemble du système, notamment les conditions de tarification. Cette solution implique de mettre en place une plateforme de paiement. Ces plateformes peuvent contribuer à minimiser les coûts de transaction que risquent d'induire, dans le cas contraire, des contrats conclus bilatéralement, mais elles impliquent aussi une coordination des principales pratiques commerciales qui peut avoir pour effet de pénaliser, de manière anticoncurrentielle, les commerçants et les consommateurs, sinon les deux en même temps.

L'authentification du compte et l'autorisation de la transaction s'effectuent en plusieurs étapes qui supposent une communication entre différents ordinateurs via des lignes dédiées et sécurisées de transmission des données, mais également le traitement de documents physiques (par exemple, en cas de signature) ou d'appels téléphoniques (par exemple, pour autoriser des paiements à caractère exceptionnel).

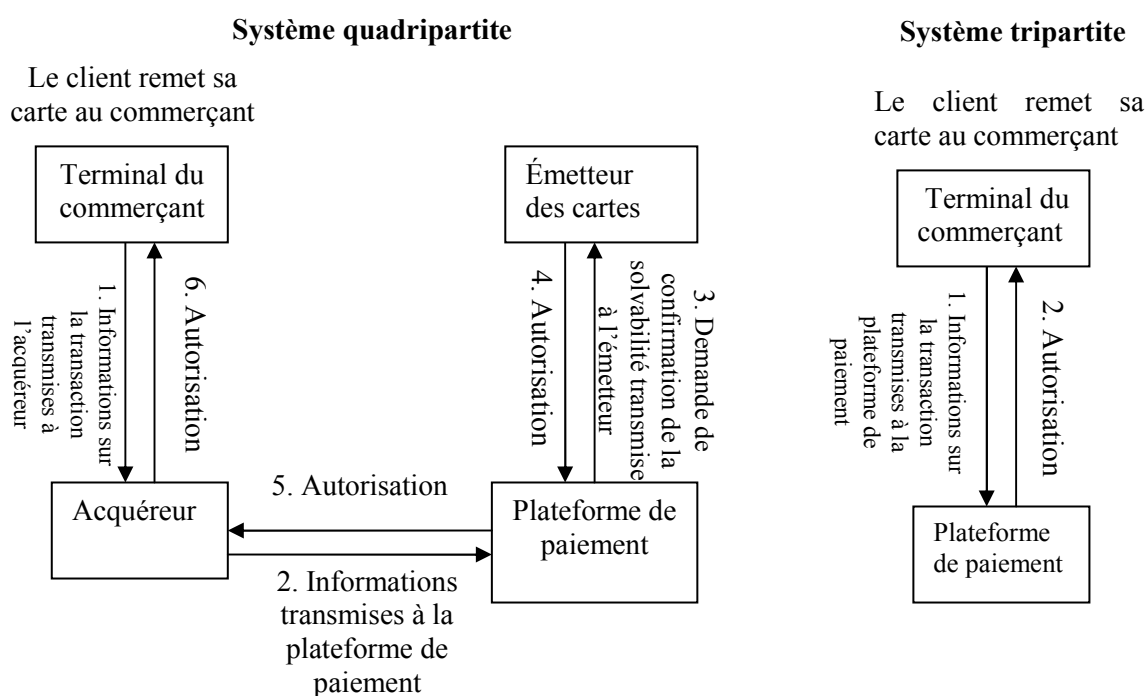
Dans un système quadripartite, le commerçant conclut généralement un contrat avec une société extérieure qui « acquiert » la transaction⁹. Il communique à l'acquéreur, au moyen d'un terminal, le montant de la transaction et les informations relatives à la carte du consommateur. L'acquéreur consulte alors la plateforme de paiement qui, consulte à son tour l'émetteur pour vérifier que le consommateur dispose des fonds suffisants pour régler la transaction¹⁰. Si ces fonds sont disponibles, la transaction peut être autorisée sur le champ mais l'émetteur peut aussi demander une confirmation téléphonique avant de délivrer l'autorisation. Les étapes de cette procédure d'autorisation sont illustrées au graphique 1 ci-dessous. Les plateformes de paiement fonctionnant dans le cadre d'un système quadripartite sont

⁹ Les quatre parties en présence sont le client, le commerçant, l'émetteur et l'acquéreur.

¹⁰ Lorsque l'acquéreur est également émetteur, on peut théoriquement se passer de plateforme de paiement bien que, pour les plateformes sur lesquelles la participation est très diffuse et qui présentent des concentrations différentes d'acquéreurs et d'émetteurs, cela est peu probable. Cela étant, sur les marchés très concentrés, il est courant de se passer d'une telle plateforme.

notamment Visa, MasterCard et JCB pour les cartes de crédit, et pour les cartes à débit immédiat, il existe de nombreux réseaux de « cartes de débit », en grande partie nationaux ou régionaux, effectuant des « transferts électroniques de fonds » et qui sont généralement connectés à des guichets automatiques de banque (GAB)¹¹.

Graphique 1. Systèmes multipartites



Dans un système tripartite, la procédure est similaire, mais les étapes sont moins nombreuses¹². Comme précédemment, le commerçant conclut généralement un contrat avec une société extérieure qui « acquiert » la transaction. Au moyen d'un terminal, le commerçant communique le montant de la transaction à l'acquéreur et les informations relatives à la carte du consommateur au processeur du terminal de paiement qui transmet alors directement à la plateforme de paiement les données relatives au client et à la transaction. La plateforme de paiement intervient à la fois comme acquéreur et comme émetteur. Si les fonds sont disponibles, la transaction peut être autorisée sur le champ ou bien l'émetteur peut demander une confirmation téléphonique avant de délivrer l'autorisation. Les étapes de cette procédure d'autorisation sont illustrées au graphique 1 ci-dessus. Au nombre des plateformes de paiement suivant le modèle tripartite, on compte notamment American Express et Diners Club.

Lorsqu'il accepte une carte, le commerçant ne perçoit généralement pas la valeur nominale de la transaction. Pour lui, les cartes de crédit s'accompagnent souvent de frais de traitement nettement plus

¹¹ En fait, le processus d'intermédiation peut être bien plus complexe, les commerçants faisant appel à une société de traitement connectée de son côté à un acquéreur (une banque par exemple) ou à une plateforme de paiement intégrée. Nombre de banques choisissent de sous-traiter de nombreuses fonctions ayant trait à l'acquisition et au traitement des paiements. Les commerçants importants ont souvent une ligne téléphonique ouverte en permanence tandis que les petits commerçants peuvent préférer n'ouvrir la ligne qu'à chaque transaction.

¹² Les trois parties en présence sont le consommateur, le commerçant et la société faisant à elle seule fonction d'acquéreur et d'émetteur.

importants que les cartes de débit, car la « commission commerçant » applicable au premier type de carte est supérieure à celle applicable au second. A titre d'exemple, elle peut ainsi être de 2 % pour les cartes de crédit et de 0.5 % pour les cartes de débit. Si ces pourcentages peuvent sembler anodins, les commissions cumulées versées à l'arrivée par les commerçants ne le sont pas : si la commission commerçant est de 1 % pour tous les paiements par carte et que le montant total des achats réglés par carte partout dans le monde s'élève à 27 000 milliards USD, le total des commissions versées par les commerçants représente alors 27 milliards USD par an¹³.

Pour le client, que les commissions appliquées au commerçant varient d'une carte à l'autre ne semble faire aucune différence, du point de vue du coût de l'achat, alors que les avantages à la marge peuvent être plus importants s'il règle au moyen d'une carte de crédit plutôt qu'au moyen d'une carte de débit à code PIN (*Personal Identification Number* ou code d'identification personnel)¹⁴. Avec une carte de crédit, le client peut ainsi bénéficier des programmes de fidélité de compagnies aériennes, effectuer des dons automatiques à des institutions à but non lucratif ou se voir éventuellement créditer des remises pouvant représenter jusqu'à 1 % des achats effectués (comme le permet la carte Discover aux États-Unis)¹⁵. Ces incitations peuvent l'amener à régler de préférence ses achats au moyen d'une carte de crédit.

En ce qui concerne les systèmes quadripartites, une « commission interbancaire », dite encore « commission d'interchange », est généralement versée par l'acquéreur à l'émetteur, le taux de cette commission étant généralement fixé selon les règles de la plateforme de paiement. La commission interbancaire peut être assez importante. Au Royaume-Uni, elle était ainsi de 1.1 % pour les cartes de crédit en 2000 (Cruickshank, 2000, Tableau D3.6). Le produit des commissions interbancaires peut être utilisé par la banque émettrice pour consentir des avantages aux titulaires de carte, comme des points de fidélité de compagnie aérienne, qu'elle ne pourrait financer autrement. Cette commission est généralement bien moins élevée pour les cartes de débit que pour les cartes de crédit. Elle est généralement fixée, pour les transactions nationales, par les groupements nationaux de plateformes de paiement dont les principaux membres sont des banques.

Pour une transaction type réalisée au moyen d'une carte de crédit d'un système quadripartite, en supposant que le client paie 100.0 à l'émetteur de la carte, celui-ci verse alors 98.3 à l'acquéreur de la transaction (et conserve 1.7 à titre de commission interbancaire) et l'acquéreur verse à son tour 98.0 au commerçant. La commission commerçant s'élève dans cet exemple à 2.0.

Exemple de transaction effectuée au moyen d'une carte de crédit : flux des paiements¹⁶

Paiement du client à l'émetteur	100
Paiement de l'émetteur à l'acquéreur	98.3
Paiement de l'acquéreur au commerçant	98

¹³ Le chiffre avancé peut sembler prudent. Selon Hunt (2003, p. 81), « aux États-Unis, 1.5 % de la valeur de toutes les transactions réglées avec des cartes généralistes revient aux émetteurs sous forme de commissions interbancaires – ce qui représente un montant de quelque 23 milliards USD par an (voir le rapport Nilson, février 2002, n° 758) ».

¹⁴ Avec une carte de débit à code PIN, le client saisit son numéro d'identification personnel, souvent un code à quatre chiffres, pour renforcer encore la sécurité de la transaction.

¹⁵ Les cartes de débit à signature peuvent aussi rétribuer les achats effectués.

¹⁶ Ces chiffres sont donnés à titre d'exemple. Le *British Retail Consortium*, dans sa collaboration à l'étude menée par Cruickshank, estime que la commission de service au commerçant s'élève en moyenne à 1.16 % par transaction, 86 % de ce montant revenant à l'émetteur sous forme de commission interbancaire (Cruickshank 2000, p 258).

Pour une carte de débit, c'est la même structure de paiement qui s'applique généralement, bien que le niveau de la commission interbancaire soit souvent nettement inférieur à celui applicable aux cartes de crédit. Pour les besoins de notre démonstration, il serait de 0.4. De la même façon le niveau de la commission commerçant est plus faible pour les cartes de débit que pour les cartes de crédit, et serait de 0.5 dans notre exemple contre 2.0 dans l'exemple précédent.

Exemple de transaction effectuée au moyen d'une carte de débit : flux des paiements ¹⁷

Paiement du client à l'émetteur	100
Paiement de l'émetteur à l'acquéreur	99.6
Paiement de l'acquéreur au commerçant	99.5

La commission interbancaire varie notablement d'un pays à l'autre et d'une activité commerciale à l'autre. Les grands émetteurs de cartes ne communiquent pas de données fiables, précises et comparables sur les commissions interbancaires. Cela étant, certaines informations comparatives peuvent être compilées à partir de sources publiques. L'étude menée par Cruickshank évalue la commission moyenne applicable aux cartes de débit à 0.64 GBP au Royaume-Uni, soit environ 0.2 % de la valeur d'une transaction moyenne de 31 GBP alors que « la commission interbancaire moyenne applicable aux cartes de crédit est de 0.542 GBP, soit guère plus de 1.1 % de la valeur d'une transaction moyenne de 48 GBP » (p. 256). Cette commission de 1.1 % contraste avec la commission interbancaire applicable aux transactions transnationales en Europe. « Le taux majoré appliqué par MasterCard aux transactions électroniques est de 0.95 % et le taux d'autorisation électronique appliqué par Visa dans ce cas de 0.70 %. » (Vickers, 2005 p. 233). Comme pour les cartes de crédit, la commission interbancaire applicable aux cartes de débit peut être très variable. Cruickshank fait état d'une commission de 0.38 GBP pour les cartes de débit de Switch contre 0.92 GBP pour Visa (p.259). Aux États-Unis, « une transaction par carte de débit à signature d'un montant de 40 USD génère une commission interbancaire de 0.60 USD, soit 1.5 % du montant environ, contre 0.18 USD environ, soit 0.5 %, pour une transaction de même montant réglée par carte de débit à code PIN (*ATM and Debit News 2002*, cité par Hunt, 2003).

De plus, la commission interbancaire peut varier de manière curieuse. Les taux par défaut des commissions interbancaires fixées par les systèmes de paiement étaient estimés couvrir plus de 90 % des coûts de transaction selon l'étude menée par Cruickshank¹⁸ (p. 256). D'après Cruickshank, Europay (devenu MasterCard) a précisé que « le taux par défaut des commissions interbancaires applicable aux paiements intra européens sont restés constants durant la période de référence. Au Royaume-Uni, les commissions interbancaires par défaut applicables aux paiements intérieurs étaient fixées au même niveau que les commissions par défaut applicables aux paiements intra européens jusqu'en décembre 1997, moment où les commissions par défaut calculées en fonction des coûts ont été relevées en raison de coûts spécifiques au Royaume-Uni. Ces commissions sont restées au même niveau jusqu'en avril 1999, moment où elles ont été abaissées pour certaines catégories supplémentaires de transaction » (p. 257). L'une des principaux arguments avancés pour justifier le taux des commissions interbancaires étant le niveau de fraude et la fraude étant considérablement plus importante pour les paiements internationaux que pour les paiements nationaux, il peut paraître surprenant que les commissions interbancaires nationales soient plus élevées que les commissions appliquées aux transactions intra européennes.

¹⁷ Ces chiffres sont donnés à titre d'exemple.

¹⁸ Notons que la commission interbancaire inclut un niveau de commission par défaut, mais que les émetteurs et les acquéreurs peuvent aussi convenir bilatéralement du taux applicable.

Pour les systèmes tripartites, qui sont généralement des systèmes de cartes accréditives¹⁹, il n'y a pas de commission interbancaire apparente puisqu'un seul et même établissement assume la fonction d'acquéreur et la fonction d'émetteur²⁰. Cependant, la commission commerçant est souvent bien supérieure à celle appliquée par les principales plateformes quadripartites, ce qui explique pourquoi elles sont bien moins souvent acceptées par les commerçants. Toutes choses égales par ailleurs, les systèmes tripartites peuvent aussi pratiquer des commissions interbancaires implicites, mais, en raison du manque de transparence des transactions entre le côté acquéreur et le côté émetteur, ces éléments interbancaires ne sont pas apparents. Globalement, la commission commerçant est plus élevée dans les systèmes tripartites que dans les systèmes quadripartites²¹.

Pour chaque plateforme de paiement, la commission commerçant est négociée en dernier ressort avec l'acquéreur. Elle dépend du type de transaction (code PIN, signature, par téléphone, par l'Internet), du secteur d'activité du commerçant (les secteurs des voyages et des loisirs peuvent se voir appliquer des commissions plus élevées que les épiceries par exemple), du montant des transactions et plus généralement du risque associé à la transaction.

Les cartes peuvent parfois procurer à leurs porteurs le droit d'utiliser de multiples produits, plusieurs réseaux de transferts électroniques de fonds par exemple (comme aux États-Unis où les réseaux de DAB/GAB se sont développés à partir de petits réseaux régionaux) ou servir au choix de carte de crédit ou de carte de débit. Une carte multiréseaux est considérée comme une carte à hébergement multiple. Ainsi en France, par exemple, le dispositif standard de carte de débit « Carte Bleue » inclut l'hébergement multiple de Visa ou MasterCard sur la plupart de ses cartes. Cet hébergement est cependant illusoire, car pour une transaction nationale, c'est Carte Bleue qui va traiter la transaction tandis que pour une transaction internationale, ce sera l'un des grands systèmes quadripartites internationaux qui servira de plateforme de paiement. Dans d'autres cas, par exemple comme pour de nombreuses cartes de débit aux États-Unis, une même carte peut contenir simultanément les « puces » de plusieurs plateformes de paiement et, pour un même achat, la carte peut être traitée au choix par l'un ou l'autre des systèmes. Avec ce type de cartes, les commerçants sont incités, puisqu'ils ont le choix, à utiliser le réseau qui leur coûte le moins cher. Parfois, certains émetteurs de cartes ont tenté de limiter cette possibilité de choix.

2.2 Types de cartes

Pour le client, les conditions de paiement varient en fonction du service de carte utilisé. Avec une carte de crédit, le paiement s'effectue généralement une fois par mois tout au plus et, pour les achats effectués au début du cycle, le client peut disposer de 45 jours ou plus entre la date où il achète un produit et la date où il commence à le payer. Si le client ne paie pas toute la somme due, il verse alors des intérêts sur les soldes débiteurs, intérêts dont le taux est généralement nettement supérieur à celui des prêts bancaires compétitifs. Les clients versant l'intégralité du montant disposent, pour leur part, de fonds en instance de paiement, ou flottant, pendant la durée comprise entre la date d'achat et la date de paiement²². Pour les transactions par carte de crédit, le coût de la période de franchise d'intérêt encouru par les émetteurs dépend :

¹⁹ Il s'agirait d'une forme de débit différé comportant une option de crédit (découragée).

²⁰ American Express, qui est un système tripartite, conclut de plus en plus d'accords de coopération avec des banques émettrices qui perçoivent divers paiements de sa part à des fins qui peuvent être assimilables à celles visées par la commission interbancaire. Même en ce cas, American Express reste l'unique acquéreur des transactions réglées au moyen de sa carte.

²¹ La plateforme de paiement Discover aux États-Unis, système tripartite qui applique des commissions commerçants moins élevées que les cartes de crédit, constitue à ce titre une exception notable.

²² Si le taux d'intérêt appliqué est de 6 %, par exemple, la valeur d'un flottant d'une moyenne de 20 jours est d'environ 0.33 % de la valeur de la transaction.

- des taux d'intérêt en vigueur (quand les taux augmentent, le coût du flottant aussi),
- de la durée de la période de franchise d'intérêt (si cette période est plus courte)²³,
- du pourcentage des transactions concernées (les transactions effectuées par les clients qui empruntent à long terme n'engendrent pas de flottant)

En revanche, la carte de débit est directement adossée au compte de dépôt à vue de l'utilisateur (compte chèques) sur lequel les fonds sont soit immédiatement débités après l'achat (débit immédiat), soit quelques jours après (débit avec signature) soit une fois par mois (débit différé). Les cartes à débit immédiat n'offrent aux clients aucune possibilité de crédit à long terme (dont ils pourraient éventuellement bénéficier au moyen d'une autorisation de découvert sur leur compte de dépôt à vue). Les cartes à débit différé procurent un crédit jusqu'à la date de débit mensuelle. Le porteur de la carte bénéficie ainsi d'un flottant dont la durée moyenne est généralement inférieure à celle du flottant découlant d'une carte de crédit, en raison du mode de traitement plus rapide du paiement²⁴.

Les émetteurs de carte ont fait valoir que l'une des sources de coûts justifiant leur commission interbancaire est la période de franchise d'intérêt. Cette affirmation est contestable. Selon le rapport Cruickshank (Cruickshank 2000), « au nombre des catégories de coûts imputées par les émetteurs de carte aux commerçants, le coût du financement de la période de franchise d'intérêt offerte aux clients réglant au moyen de cartes de crédit et de cartes accréditives est, à certains égards, la moins justifiable de toutes » (p. 264).

« L'octroi d'un crédit aux porteurs de cartes de crédit – notamment les cinquante premiers jours environ – ne constitue fondamentalement pas un service de paiement fourni aux commerçants. Il s'agit bien plutôt d'un service de crédit fourni par les émetteurs de cartes de crédit aux porteurs de ce type de cartes. La durée de l'éventuelle période de franchise d'intérêt et les conditions qui y sont associées sont fixées conventionnellement entre l'émetteur et le porteur de la carte. Les émetteurs peuvent moduler la durée de cette période à leur guise, dans le cadre d'une offre concurrentielle accordée au titulaire de la carte.

Le recouvrement des coûts découlant de l'offre d'une période de franchise d'intérêt par le biais de la commission interbancaire crée un canevas de subventions croisées entre les participants d'un même dispositif de carte. De façon générale, les clients qui ne règlent pas l'intégralité de leurs factures chaque mois – notamment ceux qui empruntent à long terme au moyen de leur carte de crédit – ne bénéficient d'aucune période de franchise d'intérêt. Pour autant, la commission interbancaire s'applique toujours aux paiements par carte effectués par ces clients de sorte que l'émetteur de la carte est rétribué deux fois pour la transaction – une fois par le commerçant et une fois par le client. Par conséquent, il existe, au sein des dispositifs de cartes de crédit, un système de subventions croisées au profit des émetteurs dont une fraction élevée des clients emprunte à long terme au moyen de leur carte de crédit.

²³ Notons que cela n'est pas fonction à proprement parler du nombre maximum de jours écoulés entre l'achat et le paiement mais plutôt du nombre moyen de jours, pondéré du montant de l'achat, écoulés entre la date d'achat et la date de paiement. Si le paiement est échu 15 jours après la clôture d'une période d'encaissement de 31 jours, et qu'un client acquiert chaque jour une valeur constante de biens pendant ce délai, le nombre de jours moyen serait de 30.5 (15 + 15.5).

²⁴ En ce qui concerne les cartes à débit différé, ne tenir compte que du flottant attaché à la carte n'a généralement pas de sens ; de nombreux comptes de dépôt à vue procurant à la banque un flottant plus intéressant que celui dont bénéficie le client. Les cartes à débit immédiat à code PIN ne procurent, quant à elles, aucun flottant et ne présentent aucun risque de contrepartie, les fonds étant immédiatement débités sur le compte du client au moment de la transaction. Le risque de fraude, en revanche, est bien présent.

Le recouvrement des coûts découlant de l'offre d'une période de franchise d'intérêt par le biais de la commission interbancaire biaise également le choix du client entre le recours à la carte de crédit ou l'utilisation d'autres moyens lui permettant de régler ses achats au détail. Le client qui règle par carte de débit ou par chèque et qui se trouve de ce fait à découvert pour une courte période, ne fait pas supporter le coût de ce découvert au commerçant auprès duquel il a fait ses achats. L'établissement teneur du compte courant est libre de lui accorder une période de découvert sans frais, mais cette disposition entre normalement dans la période globale de « franchise d'intérêt » prévue par une convention de crédit proposée en concurrence avec les autres prestataires. De même, le coût d'une période « de franchise d'intérêt » offerte par un commerçant en vertu d'une convention de crédit doit être absorbé par le fournisseur dudit crédit, et non par un tiers » (pp. 264-265).

Outre la fonction élémentaire de « paiement » qui lui est inhérente, une carte de paiement peut inclure un certain nombre de services. Certaines cartes sont ainsi assorties d'une garantie de satisfaction du client autorisant le client à demander (au commerçant) le remboursement de son achat s'il n'est pas satisfait du bien ou du service reçu, le commerçant assumant de ce fait un risque important. Avec certaines cartes, l'émetteur propose une garantie de longue durée pour les produits achetés au moyen de la carte, procure une assurance (assurance voyage ou location de voiture par exemple) ou encore une garantie du « meilleur prix ».

Il peut également exister d'autres cartes spécialisées, comme les cartes de paiement privatives mono enseigne qui ne sont valables que dans les magasins de ladite enseigne. Cette note s'intéresse toutefois principalement aux cartes de paiement généralistes qui supposent des réseaux d'acceptation importants et complexes et ne traite pas de ce type de cartes. Ces cartes n'en soulèvent pas moins de nombreux problèmes en matière de concurrence et de protection des consommateurs, comme l'a tout récemment montré l'étude de la Commission de la concurrence britannique intitulée « *Store Cards Market Investigation* » (datée du 7 mars 2006).

2.3 Risques liés à l'utilisation des cartes de paiement

Les systèmes de carte nécessitent une infrastructure coûteuse servant à authentifier l'identité du client (ou de la carte) (et à réduire la fraude), à vérifier que le client ne dépasse pas le plafond de dépenses autorisée et à délivrer l'autorisation de l'émetteur de la carte qui attestera qu'il a bien approuvé la transaction²⁵. La fraude est un problème important associé aux cartes de paiement, bien que les résultats en matière de lutte contre la fraude soient variables d'une plateforme à l'autre. « Le taux de fraude associé aux transactions réglées avec les cartes interbancaires CB en France n'était ainsi que de 0.033 %, contre 0.417 % pour les transactions internationales »²⁶. Au Royaume-Uni, les pertes attribuables à la fraude transnationale représentent 26 % du total des pertes dues à la fraude, mais moins de 5 % des transactions, ce qui donne là encore à penser que la fraude est disproportionnellement liée à l'utilisation internationale des cartes (Cruickshank, p. 260). Une grande partie des pertes imputables à la fraude sont assumées dans la pratique par les commerçants et les acquéreurs. Globalement, Cruickshank estime que les pertes liées à la fraude subies par les émetteurs britanniques de cartes de débit et de crédit dans le cadre de transactions effectuées au Royaume-Uni représentent « probablement un peu moins de 75 millions GBP », soit « moins d'1/10^e de la valeur du produit de la commission interbancaire ». La répartition précise des risques liés à l'utilisation et à l'acceptation des cartes dépend du type de carte et du pays d'origine de la carte. Ainsi, dans certains pays, les consommateurs sont peu protégés contre l'utilisation frauduleuse de leurs comptes et doivent assumer une fraction importante des transactions frauduleuses (sauf s'ils ont souscrit une

²⁵ Les transactions effectuées sans demande d'autorisation offrent une garantie moins importante aux commerçants de percevoir les fonds.

²⁶ La Lettre des Cartes Bancaires, décembre 2005, p.2.

assurance à ce titre). Dans d'autres, en cas d'utilisation frauduleuse de la carte, c'est la banque émettrice et non le client, qui en assume la responsabilité.

Les dispositifs de carte de paiement déterminent des critères que les commerçants doivent remplir pour que le paiement leur soit garanti. Dans la pratique, de nombreuses transactions ne remplissent pas toutes les conditions requises pour faire jouer la garantie de paiement. Il en va ainsi, au Royaume-Uni, pour les paiements par l'Internet et les achats par correspondance notamment. Dans ce cas, les pertes dues à des transactions contestées ou frauduleuses sont finalement imputées au commerçant ou à l'acquéreur du commerçant et non à l'émetteur, et rien ne justifie donc, du point de vue des coûts, de les inclure dans le calcul de la commission interbancaire à verser aux émetteurs.

Le risque de crédit inhérent aux prêts devrait, du moins théoriquement, être répercuté sur le taux d'intérêt applicable au crédit consenti au moyen des cartes de crédit, de sorte que seuls les clients sollicitant un crédit payent dans les faits le taux d'intérêt associé à la carte. Or un certain nombre de problèmes relatifs à la protection des consommateurs se posent du fait de l'application de taux d'intérêt excessifs ou usuraires. Par conséquent, de nombreux pays imposent un plafonnement du taux d'intérêt applicable aux cartes de crédit. Le risque de crédit n'est pas traité ici, sauf sous un seul aspect. Les sociétés de carte de crédit invoquent en effet parfois ce risque pour justifier les modalités de calcul de la commission bancaire en fonction des coûts.

3. Conditions structurelles

Les plateformes de paiement présentent plusieurs points communs sur le plan économique, notamment :

- d'importants frais fixes,
- des coûts variables mineurs,
- des externalités d'adoption,
- des externalités d'utilisation.

Les frais fixes des plateformes de paiement sont notamment imputables à l'importante infrastructure informatique et de communication dont la plateforme et les banques affiliées doivent être dotées, ainsi qu'à la mise en place de l'importante infrastructure constituée par les terminaux aux points de vente qui leur servent d'intermédiaires. Au niveau de la plateforme de paiement, les coûts se rapportant aux volumes traités par voie informatique sont largement fixes²⁷.

Les coûts variables de la plateforme de paiement peuvent inclure le coût des autorisations « manuelles » nécessitant l'intervention de personnel et ainsi que le coût du suivi manuel de l'évolution des risques de fraude²⁸.

Des externalités de réseau sont assurément à l'œuvre dans le domaine des cartes de paiement. Il peut notamment s'agir d'externalités d'adoption et d'externalités d'utilisation. Dans la mesure où l'une de ces

²⁷ Avec les autorisations vocales, en revanche, l'augmentation des volumes induit une augmentation des effectifs.

²⁸ Les aspects évoqués ici concernent principalement la plateforme de paiement proprement dite. Les établissements financiers affiliés peuvent assumer des frais variables bien plus importants, comme ceux découlant de la fraude. La plateforme de paiement elle-même permet généralement de ventiler le risque de fraude entre les acquéreurs et les émetteurs selon la transaction qui fait l'objet du paiement, mais elle n'assume pas elle-même les risques.

externalités au moins perdure, le marché est dit « dual », bien que l'intensité de ces externalités puisse varier d'un système de paiement et d'un pays à l'autre, voire au sein d'un même pays. La structure des prix évoluera de façon que les deux côtés du marché soient incités à y participer. Un marché dual peut notamment impliquer une structure de prix conçue pour rétribuer la participation de l'une des deux parties, quand bien même il serait avantageux pour les deux parties d'y participer en l'absence de toute rétribution. Ce sont Rochet et Tirole (2002) qui qualifient ce phénomène de « marché dual ». Ils expliquent que « le volume de transactions sur une plateforme et le bénéfice réalisé par la plateforme ne dépend pas seulement du prix total facturé aux différentes parties à la transaction, mais aussi de sa composition (Rochet et Tirole, 2003a, p. 1018). Au sein des groupements, ce prix est constitué de la commission interbancaire, s'accompagnant d'une « cohérence des prix »²⁹.

Les externalités d'adoption sont engendrées par le fait que plus les cartes émises par une plateforme de paiement sont nombreuses, plus la plateforme en question attire de commerçants. De même, un système de paiement comptant de nombreux commerçants affiliés peut attirer plus de clients qu'un système accepté par un plus petit nombre de commerçants. Atteindre la dimension minimum pour réussir peut nécessiter des années d'investissements (autrement dit, de pertes). De plus, le succès n'est jamais garanti, même pour les systèmes de paiement qui auraient pu réussir, à supposer qu'ils aient atteint une dimension suffisante.

Encadré 1 Les marchés duals

Les cartes de paiement constituent un exemple de marché dual. Le marché est dit dual lorsqu'une ou plusieurs plateformes cherche à attirer des utilisateurs en appliquant des frais adaptés à chaque type d'utilisateurs finaux. Les cartes de paiement correspondent à cette définition car les plateformes de paiement cherchent à assurer que les deux types d'utilisateurs finaux, les clients et les commerçants, acceptent de participer à la plateforme et de l'utiliser. Rochet et Tirole (2005) appellent marché dual « un marché dans lequel le volume de transactions entre les utilisateurs dépend de la structure des prix et pas seulement du niveau général des commissions facturées par la plateforme ». Parmi les autres exemples de marchés de ce type, citons :

- les jeux vidéo,
- les systèmes d'exploitation,
- les listes de biens immobiliers résidentiels,
- la presse écrite.

Jeux vidéo : Pour les jeux vidéo, l'une des principales difficultés des fabricants de plateformes, comme Sony, Nintendo et Microsoft, est d'assurer que des jeux sont conçus (par les développeurs) afin d'attirer des joueurs sur la plateforme. Les propriétaires de la plateforme peuvent choisir de concéder d'importants avantages aux développeurs, comme des logiciels, pour les aider à développer leurs jeux, et de répercuter ce surcoût sur le prix des jeux ou faire l'inverse et faire payer plus cher aux développeurs les logiciels ou les droits de développement des jeux et vendre les jeux moins chers.

Systèmes d'exploitation : Les systèmes d'exploitation nécessitent à la fois que des applications soient produites et des clients pour utiliser ces applications. Plus un système d'exploitation compte d'applications, plus il attire d'utilisateurs. Les fabricants peuvent donc prendre des mesures pour promouvoir la mise au point des applications. La plupart d'entre eux ne cherchent pas à tirer de recettes importantes du côté des développeurs, mais plutôt du côté des utilisateurs (Microsoft) ou grâce aux périphériques (Palm et Sun).

Listes de biens immobiliers résidentiels : Agents immobiliers et vendeurs peuvent souhaiter, de façon plus générale, trouver une plateforme pour assurer la publicité des biens à vendre et attirer le plus d'acheteurs. Ces plateformes (comme les sites immobiliers sur Internet) peuvent être conçues pour répercuter les coûts soit sur les acheteurs soit sur les vendeurs. Cela étant, dans la pratique, la plupart de ces sites s'assurent que les vendeurs assument ces coûts quand bien même les acheteurs retirent

²⁹

La cohérence du prix concerne notamment les prix de détail qui ne varient pas selon le mécanisme de paiement utilisé.

d'importants avantages de leur utilisation.

Presse écrite : La presse écrite dispose généralement de deux sources de revenus : les annonceurs publicitaires et les lecteurs. Historiquement, les annonceurs payent une fraction plus importante des coûts de production que les lecteurs. Cela permet à la presse de réduire les frais pour le lecteur et de s'assurer ainsi un lectorat important, ce qui accroît d'autant l'attrait de la plateforme pour les annonceurs. Un organe de presse dénué de publicité coûte nettement plus cher aux lecteurs, ce qui explique la relative rareté de ce type de publication.

L'un des principaux facteurs de réussite de l'exploitation d'une plateforme duale est que la structure des prix entre les deux côtés du marché peut avoir un impact sur son succès commercial et sa viabilité. Pour un total donné de commissions, la structure des commissions peut se répartir de manière extrêmement variable entre les différents utilisateurs. L'un des deux côtés du marché peut même être amené à rétribuer l'autre pour sa participation. Se demander d'une part si ces paiements sont nécessaires dans la pratique pour assurer la stabilité de la plateforme et se demander d'autre part s'ils étaient nécessaires dans le passé, lorsque la plateforme était en phase de développement, sont deux questions bien distinctes.

Le nombre de publications économiques consacrées aux marchés duaux a rapidement augmenté ces 5 dernières années et cette tendance se poursuit. Certains aspects de la question sont clairs : « l'intensification » de la concurrence entre les plateformes n'entraînera pas obligatoirement une baisse des prix pour une catégorie donnée d'utilisateurs, et elle peut même entraîner une augmentation du prix total facturé aux utilisateurs. Du point de vue de l'application du droit de la concurrence, ne s'intéresser qu'à l'un des deux côtés du marché peut conduire à émettre des critiques infondées quant à la pratique tarifaire, dénonçant par exemple la présence de prix d'éviction ou de prix « abusifs ». Les effets de réseau et les effets induits par les réseaux multiproduits qui se font sentir sur les prix peuvent être modestes sur tel marché dual, plus prononcés sur tel autre. Les politiques en vigueur ne sont donc pas tenues de s'intéresser aux marchés duaux quand les volumes de transactions restent largement identiques quelle que soit la structure de prix, mais elles doivent en revanche y regarder de plus près dès lors que les volumes de transactions varient nettement selon la structure de prix adoptée.

En Allemagne, par exemple, la « *Geldkarte* », carte destinée aux micropaiements comme l'achat d'un titre de transport ou le paiement du stationnement, a été lancée en 1997. Lors de son lancement, le volume des transactions réglées avec cette carte est passé de 350 000 transactions d'une valeur moyenne de 11 EUR la première année à 40 millions de transactions d'une valeur moyenne de 2 EUR en 2003. Plus récemment, en France, le système de porte-monnaie électronique Moneo a été lancé. Le nombre de cartes Moneo a reculé de 1.3 million en février 2004 à 1.2 million fin 2004³⁰. Le succès des cartes prépayées n'est donc pas garanti.

L'existence d'externalités d'adoption implique qu'il peut être difficile de réussir son entrée sur le marché, l'entrée à grande échelle n'y étant pas aisée. Il peut être difficile à un nouveau venu de bénéficier du niveau d'acceptation important obtenu par les grandes cartes. MasterCard estime par exemple que ses cartes sont acceptées par quelque 23 millions de commerçants dans le monde et environ 1.5 million de DAB³¹. Une fois qu'il est largement accepté, un système peut augmenter durablement les prix qu'il applique au client dual en vue d'obtenir des taux de rendement considérablement supérieurs aux taux de rendement du marché, corrigés des risques. Au vu notamment de leur structure de paiements, on peut généralement penser que les systèmes de paiement exercent un pouvoir de marché vis-à-vis des commerçants, qui peuvent difficilement refuser, dans la pratique, leurs cartes.

L'existence d'externalités d'adoption implique aussi que le taux de rendement de la première mise de fonds engagée dans un système doit dépasser le taux de rendement corrigé des risques, dans la mesure où le risque d'échec de tout nouveau système est significatif. Cela ne signifie pas pour autant que les investissements courants réalisés dans un système parvenu à maturité méritent un taux de rendement équivalent.

³⁰ Voir Ricou, Olivier (2005) « Internet, commerce et politique » <http://www.ricou.eu.org/commerce-e/commerce-e/commerce-e010.html>, consulté le 5 mai 2006.

³¹ MasterCard Incorporated, Formulaire 10-K 2006 (16 mars 2006).

Katz (2001) remet en cause la pertinence des effets de réseaux liés aux externalités d'adoption pour les systèmes de paiement parvenus à maturité. Il souligne que lorsque les clients et les commerçants doivent assumer des coûts élevés de changement de fournisseurs, les mécanismes qui ont pu être importants pour renforcer l'acceptation du système par les clients et les commerçants (comme l'obligation d'accepter toutes les cartes imposée aux commerçants et l'interdiction qui leur est faite d'appliquer un supplément à leurs clients payant par carte) n'ont plus la même utilité. En effet, une fois en place, le système continuera d'être largement accepté par les commerçants et les clients conserveront leur carte.

Les externalités d'utilisation sont liées au fait que ce sont les clients et les commerçants qui décident, en permanence, de la fréquence d'utilisation d'une carte donnée. Rochet (2003) estime qu'il s'agit là de la principale externalité des plateformes de paiement. Comme les externalités d'utilisation sont importantes, les effets de réseaux continueront de jouer un rôle même une fois le système adopté.

4. La performance prix/commissions des systèmes de paiement par carte est-elle inefficace?

Les systèmes de paiement de masse sont un moyen de transférer la valeur des achats effectués par les consommateurs. L'existence d'un éventail convenable d'options de paiement induit des avantages importants pour les consommateurs et les commerçants. Cela étant, si l'option qui convient fait défaut, soit les transactions qui n'auraient pas été effectuées au moyen d'un autre système n'auront pas lieu soit l'un des deux côtés au moins de ce marché dual s'en trouvera pénalisé. Les coûts de transaction inhérents au paiement peuvent être eux-mêmes importants (notamment en ce qui concerne la marge bénéficiaire du commerçant) et s'ils sont indûment élevés, constituer une taxe sur les ventes au détail qui sera en grande partie assumée, en dernier ressort, par le consommateur.

Les pouvoirs publics attachent une très grande importance à l'intégrité et l'efficacité des systèmes de paiement. La conviction que les systèmes de paiement par carte sont inefficaces à bien des égards, et non des moindres, et que des solutions de rechange aux systèmes en place seront plus avantageuses pour les clients et les commerçants est l'une des raisons pour lesquelles les autorités de la concurrence et les banques centrales ont pris des mesures dans le domaine des cartes de paiement. En fin de compte, si certains systèmes de paiement onéreux, comme les chèques, s'accompagnent de prix artificiellement peu élevés, une politique de grande ampleur en matière de paiements doit idéalement en tenir compte, par exemple en laissant entendre que lorsqu'un système peu onéreux remplace un système plus coûteux, la collectivité en tire plus grand profit, même si les commerçants se trouvent alors devoir assumer des commissions plus élevées pour le système le moins coûteux³². Cela étant, les politiques qui traitent convenablement et simultanément de multiples systèmes de paiement (i) sont extrêmement rares, (ii) elles impliquent de larges pouvoirs de réglementation dont les autorités de la concurrence, voire nombre d'autorités de tutelle des services financiers, sont généralement dépourvues et (iii) elles seraient difficiles à mettre en œuvre. Dans la pratique, il n'est pas possible d'appliquer des solutions de grande envergure couvrant les multiples catégories de systèmes de paiement.

Alors que dans de nombreux cas, on peut compter sur la concurrence entre prestataires concurrents pour gagner en efficacité, la tarification duale en vigueur sur les marchés des cartes de paiement rend les effets concurrentiels moins systématiques car il peut arriver, peut être à juste titre, que les coûts ne soient pas répercutés sur les prix pratiqués. La littérature économique ne permet pas de savoir avec certitude si la concurrence entre les systèmes de paiement (i) rendra plus ou moins efficace la répartition des paiements telle que la pratiquent les divers systèmes, (ii) entraînera une augmentation ou une baisse des commissions d'utilisation pour les commerçants, (iii) induira une augmentation ou une baisse des bénéfices réalisés par

³²

Par exemple, une loi peut imposer aux établissements financiers l'échange des chèques à leur valeur nominale ainsi que la gratuité de l'utilisation des chèques pour les consommateurs.

les émetteurs de cartes. Autant dire donc qu'en l'occurrence, une concurrence, même vive, peut ne pas remplir son rôle habituel.

Cette section aborde certains aspects des systèmes de cartes de paiement que certains États, tribunaux et observateurs jugent problématiques et examine certaines des objections opposées aux griefs exprimés³³.

4.1 Règle de non-discrimination : interdiction d'imposer un supplément et interdiction d'accorder des remises

Traditionnellement, nombre de cartes de paiement s'accompagnent d'une règle de non-discrimination stipulant que, si le commerçant accepte la carte, il ne peut faire payer un supplément à ses clients au titre de l'utilisation de la carte ni accorder de remises (en espèces par exemple) aux clients utilisant d'autres moyens de paiement. Ces deux interdictions (interdiction d'imposer un supplément et interdiction d'accorder des remises) sont communément appelées règle de non-discrimination³⁴. Cette règle est de plus en plus contestée par les autorités de la concurrence³⁵.

L'impact le plus immédiat de cette règle est qu'elle permet généralement de promouvoir la cohérence des prix : le prix nominal payé par les consommateurs est le même quel que soit l'instrument de paiement utilisé. Cette cohérence peut être particulièrement importante aux yeux des consommateurs envisageant d'adopter une carte de paiement, puisqu'ils ne paieront pas de frais supplémentaires pour l'utiliser. Cette cohérence est également importante en ce qui concerne l'usage courant des cartes : les consommateurs seraient moins enclins à payer avec une carte de crédit plutôt qu'avec une carte de débit s'ils savaient, par exemple, que cela leur serait facturé, disons, 1.5 % de plus. Cela étant, cette règle a eu pour effet malheureux de créer des situations dans lesquelles les coûts des commerçants diffèrent selon les produits (par exemple, le coût est différent selon qu'un manteau est payé avec une carte de crédit ou en espèces) alors que le prix payé par les consommateurs ne reflète pas ces différences de coûts. Cette cohérence des prix obligatoire est contraire au principe général voulant que dans un régime de marché, les prix doivent pouvoir librement refléter les coûts.

Introduire une tarification en fonction du type de paiement entraînerait une diminution de la prestation de certains services de paiement. Rochet et Tirole (2002, p. 562) ont montré qu'en cas de prestation insuffisante d'un service au départ, la suppression des règles assurant la cohérence des prix aurait pour effet de réduire le bien-être, alors qu'en cas de surabondance des prestations, leur suppression le renforcerait. Schwartz et Vincent (2006) concluent de leur côté que l'interdiction d'appliquer un supplément entraîne un amoindrissement global du bien-être si le ratio des paiements en espèces aux paiements par cartes est suffisamment faible et entraîne un amoindrissement du bien-être des consommateurs s'il n'est pas possible de consentir des remises ou de faire bénéficier les titulaires de cartes de certains avantages³⁶.

De nombreux pays ont imposé la suppression des règles assurant la cohérence des prix. Ainsi, la Banque de réserve d'Australie (*Reserve Bank of Australia* ou RBA) a supprimé en 2003, pour les

³³ Les questions traitées sont nécessairement sélectives et ne prétendent pas illustrer de manière exhaustive les conclusions tirées ou les objections soulevées.

³⁴ Les consommateurs peuvent percevoir d'importantes différences entre un supplément appliqué et une remise offerte.

³⁵ L'une des ces règles peut exister sans l'autre. Ainsi, aux États-Unis, l'interdiction d'appliquer un supplément n'existe pas mais les remises sont permises.

³⁶ Schwartz et Vincent (2006) tiennent notamment compte de l'élasticité de la demande des utilisateurs pour les produits du commerçant. Cet aspect est absent de nombreux autres modèles. Il implique que plus les prix du commerçant sont élevés (par exemple du fait des coûts liés aux transactions par carte de crédit) plus le niveau total des achats effectués diminue.

dispositifs de cartes quadripartites, l'interdiction imposée aux commerçants de facturer un supplément et a obtenu l'accord d'American Express et Diners Club pour que ces systèmes suppriment les règles qu'ils imposaient aux commerçants, leur interdisant d'appliquer un supplément ou les obligeant à ne pas orienter le client vers un système de paiement particulier. Le Royaume-Uni, les Pays-Bas et la Suède ont aboli la règle de non-discrimination. Au Canada, l'interdiction d'appliquer un supplément imposée par Interac a été abrogée par une ordonnance d'expédient, à la suite d'une enquête du bureau de la concurrence³⁷. En Finlande, l'Office de la concurrence a tenté de proscrire la règle de non-discrimination, mais n'a pu faire valoir son point de vue auprès du conseil de la concurrence et de la cour suprême administrative³⁸.

L'effet de cette abrogation peut paraître limité du fait du nombre restreint de commerçants qui appliquent effectivement un supplément ou consentent des remises. Cela étant, cette possibilité leur donne un moyen de pression plus important pour faire baisser les commissions qui leur sont facturées. De plus, même si la pratique du supplément reste rare, elle peut inciter davantage les clients à n'utiliser les cartes à coûts élevés, comme les cartes de crédit, que quand ils estiment que la valeur (a) tirée de l'utilisation de la carte de crédit (par rapport à la carte de débit) et (b) des avantages dont ils bénéficient (comme les programmes de fidélité des compagnies aériennes) est supérieure à la différence totale des coûts existant entre ces deux modes de paiement.

Le 9 août 2001, la Commission européenne a pris une décision concernant un certain nombre de caractéristiques présentées par les divers règles et règlements de l'association Visa qui lui ont été notifiés, notamment les règlements applicables à l'échelle internationale et dans les pays de l'Union européenne³⁹. La décision a examiné la règle de non-discrimination qui interdit d'appliquer des prix différents aux clients qui paient par carte Visa et à ceux qui utilisent d'autres moyens de paiement, concluant que cette règle n'a pas d'effet sensible sur la concurrence et n'est donc pas contraire au droit de la concurrence. Cette décision a été rendue publique après que les autorités de la concurrence de trois pays de l'UE (les Pays-Bas, la Suède et le Royaume-Uni) ont abrogé cette règle au niveau national. Des études de marché qui ont été réalisées dans deux d'entre eux (les Pays-Bas et la Suède) ont conclu que, selon la formule employée par la Commission européenne, « seul un nombre relativement restreint de commerçants (environ 5 % en Suède et 10 % au Pays-Bas notamment) mettent à profit cette règle dans la pratique ». Ces études concluaient que les commerçants qui n'utilisent pas la possibilité qu'ils ont de facturer un supplément avaient exprimé la crainte d'une réaction négative des titulaires de cartes à cette pratique⁴⁰. La Commission européenne a déclaré que les données empiriques recueillies montrent que la règle de non-discrimination « n'a pas d'effet sensible sur la concurrence ». Les données recueillies dans le cadre des études ne sont toutefois pas pleinement convaincantes en ce qui concerne l'impact de la règle de non-discrimination. Les opinions exprimées par les petits commerçants, généralement mal informés, sur l'effet de cette règle sur les commissions commerçants ne permettent pas d'apprécier objectivement si cette règle a un effet dans la pratique du fait notamment que dans de nombreux pays, les commerçants concernés se voient appliquer un « taux unitaire » pour les transactions réglées par carte de crédit de sorte que l'utilisation de plusieurs dispositifs (par exemple Visa et MasterCard) leur est facturée au même taux par la société de traitement des paiements par carte. Le fait qu'un certain nombre de commerçants utilisent la possibilité qu'ils ont de facturer un supplément donne à penser que cette règle a une incidence sur leur comportement. Dans sa décision, on peut considérer que la Commission européenne a confirmé la validité d'une règle qui empêche de répercuter les différences de coûts sur les prix et qui, comme on le verra, peut entraîner une domination

³⁷ Directeur des enquêtes et recherches c. Banque de Montréal et al., Tribunal de la concurrence-1995-2002, 20 juin 1996.

³⁸ Bureau de la concurrence « *The Contractual Terms of Credit Card Companies* », août 1997.

³⁹ JO L 293, 10.11.2001, p. 24-41.

⁴⁰ La Commission européenne relève également que la plupart des commerçants interrogés déclarent que l'abolition de la règle de non-discrimination n'a pas eu d'effet sur les frais qu'ils paient à leur banque « acquéreur ».

des systèmes à coûts élevés sur les systèmes à moindres coûts, faussant le processus concurrentiel dans la mesure où les consommateurs risquent de considérer que les cartes utilisant le plus de ressources sont équivalentes à celles qui en utilisent moins.

Frankel relève qu'une étude récente portant sur les tendances en matière de commissions interbancaires menée dans 10 pays (ou sur les commissions interbancaires applicables aux transactions transnationales au sein de l'UE), démontre que dans « huit d'entre eux, les commissions interbancaires sont en baisse ou se stabilisent ». Dans cinq des ces huit pays, soit les commerçants ont été ou sont autorisés à facturer un supplément à leurs clients qui payent par carte soit cette règle donne lieu à un débat. Dans chacun des trois autres pays où les commissions diminuent ou se stabilisent, les autorités de tutelles sont intervenues ou mènent des études sur les commissions interbancaires ou la facturation de suppléments. Les commissions interbancaires n'augmentent qu'aux États-Unis et au Canada où l'application d'un supplément n'est pas autorisée et où les autorités de tutelle n'interviennent pas activement » (Frankel 2005 p. 60).

Simon (2005) explique que « la possibilité de faire payer un supplément n'a pas besoin d'être exercée pour jouer un rôle important lors de la négociation des commissions de service commerçants, puisque ces derniers peuvent menacer d'appliquer un supplément et obtenir ainsi une révision à la baisse des frais qu'ils encourent. En soi, la pratique du supplément, telle qu'elle est observée, ne peut être considérée comme un indicateur précis de l'effet de la réglementation » (p. 377).

4.2 Lorsque les prix de détail n'incorporent pas les coûts induits par les différents mécanismes de paiement :

4.2.1 les systèmes à coûts élevés peuvent dominer des systèmes à bas coûts plus efficaces

Lorsqu'il n'y a pas de différence des prix au détail selon les coûts induits par les différents mécanismes de paiement, les consommateurs peuvent être amenés à choisir celui qui coûtera dans l'ensemble le plus cher au « client dual ». La notion de client dual regroupe à la fois le commerçant et le consommateur. Les coûts (généralement à la charge du commerçant) peuvent être compensés par les avantages (revenant généralement au client) pour évaluer le coût net d'une option de paiement donnée. En gardant à l'esprit cette notion de « client dual », on peut régler le problème soulevé par Rochet et Tirole (2003, RNE) qui craignaient qu'en tenant uniquement compte des coûts assumés par un seul des deux côtés prenant part à la transaction (le commerçant par exemple), on n'en vienne à prendre des mesures inutiles, limitant l'aptitude du système de paiement à être bien utilisé à la fois par les commerçants et par les clients.

Sur un marché dual, les commissions commerçants peuvent être plus élevées pour un produit donné (par exemple une carte de crédit) qui procure certains avantages aux clients utilisant la carte. Nombre de cartes de crédit procurent ainsi des points de fidélité de compagnies aériennes en contrepartie des dépenses réglées par carte et ces points sont positivement appréciés par le consommateur. Les modes de paiement à moindre coût ne procurant aucun avantage financier aux consommateurs, ceux-ci privilégient le mécanisme de paiement qui aura le coût le plus élevé pour le client dual.

Le tableau I. ci-dessous illustre cet aspect au moyen d'un exemple simple⁴¹ : un client achète un article coûtant 100 unités monétaires. S'il paie en argent liquide, aucun frais n'est facturé au commerçant. S'il paie avec une carte de débit, la commission commerçant est de 0.4 mais le consommateur ne bénéficie d'aucun avantage⁴². Enfin, s'il paie au moyen d'une carte de crédit associée à un programme de fidélité

⁴¹ Ces chiffres sont donnés à titre d'exemple et ne proviennent pas d'un pays donné.

⁴² On suppose que le débit en question résulte d'une transaction réglée par carte à débit immédiat. Avec une carte à débit différé, les clients tireraient avantage d'une façon ou d'une autre de la période de prêt en franchise d'intérêt dont ils bénéficient.

d'une compagnie aérienne, il reçoit un avantage d'une valeur monétaire estimée à 0.5 alors que le commerçant, lui, paie une commission de 2.0. Le client préférera donc régler avec sa carte de crédit, bien qu'il ait à sa disposition deux modes de paiement moins onéreux, qui coûteraient à l'arrivée moins cher au client dual.

Tableau 1. Comparaison des systèmes de paiement et des avantages incitant le consommateur à les utiliser

	Valeur de l'avantage pour le client (par exemple crédit de points de fidélité)	Commission commerçant	Coût net pour le client dual	Recette de la société de carte de paiement
Argent liquide	0	0	0	0
Carte de débit	0	0.4	0.4	0.4
Carte de crédit	0.5	2.0	1.5	1.5

M. Macfarlane, gouverneur de la RBA, a fait valoir que des systèmes de tarification comme celui qui est présenté au tableau I. induisent une éviction des solutions de paiement les moins coûteuses par les plus onéreuses, la loi de Gresham s'appliquant ainsi aux paiements⁴³. « Ce n'est plus la mauvaise monnaie qui chasse la bonne, mais les moyens de paiement à coût élevé qui chassent les moyens de paiement à moindre coût. Pour prendre l'exemple le plus évident, une carte de crédit offre le même service au commerçant – l'irrévocabilité du paiement – qu'une carte de débit, mais lui coûte beaucoup plus cher. A l'inverse, pour le titulaire de la carte, la carte de crédit offre plus – une cinquantaine de jours de crédit gratuit – mais lui coûte moins cher, puisqu'il est souvent rétribué pour l'utiliser. De toute évidence, le second critère de la loi de Gresham qui veut que les indicateurs de prix pour le décideur ne reflètent pas les coûts sous-jacents, est rempli, ce qui revient à dire que le principe selon lequel « l'utilisateur paie » ne s'applique pas. Cet effet de la concurrence tendant à favoriser le produit le plus coûteux semble être l'une des caractéristiques des systèmes de paiement dans le monde et explique l'intérêt croissant que leur portent les autorités de la concurrence » (Macfarlane, 2005).

Macfarlane (2005) laisse entendre que la concurrence entre les émetteurs a conduit les dispositifs (quadripartites) de paiement américains à augmenter leurs commissions interbancaires afin de convaincre les banques d'émettre la carte de tel dispositif plutôt que de tel autre. Les taux interbancaires appliqués par l'un des principaux dispositifs ont ainsi été portés de 1.3 % à plus de 1.6 % (et les commissions commerçants ont globalement suivi)⁴⁴. De même, aux États-Unis, les cartes de débit à signature s'accompagnent d'une commission interbancaire bien plus élevée que les cartes de débit à code PIN, soit 1.2 % pour les cartes à signature contre moins de 0.3 % en moyenne tout d'abord pour les cartes à code PIN et plus de 0.4 % par la suite. De 1993 à 2002, la part de marché des cartes de débit régies par un tel dispositif (autrement dit le système le plus coûteux) est passée d'un peu plus de 45 % à plus de 60 %. En Australie, les paiements par carte de crédit par habitant ont spectaculairement augmenté de 1995 à 2006 (passant de moins de 15 % à environ 60 %), la commission interbancaire étant de près de 1 % sur presque

⁴³ Selon la loi de Gresham, « la mauvaise monnaie chasse la bonne ». Ce constat remonte à l'époque où les pièces de monnaie étaient battues en métal précieux que les utilisateurs récupéraient pour payer ensuite avec des pièces moins lourdes que les pièces d'origine. Des pièces de moindre valeur étaient ainsi mises en circulation, chassant peu à peu les bonnes pièces, l'aspect principal étant que le pouvoir d'achat associé aux pièces de moindre valeur était égal à celui conféré par les pièces battues en métal de valeur.

⁴⁴ Lors de son allocution ont été présentés les graphiques illustrant l'évolution des commissions aux États-Unis ainsi que ceux présentant l'évolution des commissions et la part de marché respectives du dispositif en question et des formules de débit immédiat existant aux États-Unis et en Australie.

toute la période, soit un taux nettement supérieur à la commission facturée pour un débit par transfert électronique de fonds au point de vente⁴⁵.

« On observe donc que les banques encouragent l'utilisation de cartes de débit MasterCard/Visa dans les commerces traditionnels (au titre desquelles elles perçoivent des commissions interbancaires relativement élevées) et dissuadent les transactions par cartes de débit à code PIN sur l'Internet (au titre desquelles elles perçoivent des commissions interbancaires relativement faibles), malgré un taux de fraude moins élevé et la plus grande rapidité de traitement des transactions qu'offrent les réseaux de paiement en ligne sécurisés par un code PIN » (Frankel et Shampine, 2006)⁴⁶.

De nombreux observateurs estiment que les commissions appliquées pour certaines transactions par carte sont indûment élevées. La RBA a ainsi conclu qu'avant une réforme récente, les coûts associés aux cartes de crédit en Australie étaient supérieurs d'1.1 point environ aux coûts induits par les règlements en espèces⁴⁷. Les débats portant sur le coût « élevé » des cartes présument souvent que les paiements en espèces ou par chèque ne coûtent rien. Si pour la collectivité, les coûts liés à l'utilisation des cartes sont, par exemple, moins élevés que ceux des règlements en espèces, alors les politiques visant à dissuader les consommateurs d'utiliser les cartes peuvent avoir pour effet d'augmenter les coûts assumés par la collectivité pour des transactions pourtant identiques⁴⁸.

4.2.2 *Pour les achats au détail, des subventions croisées vont se développer entre les modes de paiement à moindre coût et les modes de paiement à coût élevé, ceux qui utilisent les modes de paiement à moindre coût payant alors plus cher parce que d'autres règlent leurs achats avec des moyens de paiement plus coûteux*

La possibilité d'appliquer un supplément au client entraînerait une baisse des prix facturés à ceux qui utilisent des modes de paiement à moindre coût. Dans le cas contraire, en revanche, la situation qui s'instaure est assimilable à un système de subventions croisées (sans coïncider tout à fait avec la définition économique précise de cette notion). « Lorsque les paiements par carte coûtent plus cher aux commerçants que les transactions réglées par d'autres moyens, les clients qui n'utilisent pas la carte sont pénalisés du fait que d'autres y ont recours, les commerçants étant incités à augmenter leurs prix de détail pour répercuter

⁴⁵ De 1995 à 2004, le taux de croissance annuel cumulé des opérations de transfert électronique de fonds au point de vente était de 15.3 %, contre 18.5 % pour les cartes de crédit. Ce système à moindre coût s'est donc développé moins rapidement que le système plus onéreux.

⁴⁶ Evans et Schmalensee font valoir que « les banques sont disposées à proposer des cartes de débit à code PIN 'qui ne sont pas rentables pour elles' car elles tirent des revenus de leur relation globale avec le client – raison pour laquelle elles proposent aussi la gratuité des chèques. Cela étant, sans les bénéfices générés par les cartes de débit à signature auxquelles s'applique une commission interbancaire plus élevée, elles n'auraient très certainement pas promu les cartes de débit autant que ces dernières années. Elles auraient pu augmenter d'autres commissions ou diminuer le taux qu'elles paient sur les dépôts pour compenser les coûts liés à l'offre de cartes de débit à code PIN. » (Evans et Schmalensee, 2005, p. 244). Il faut également rappeler que toutes les cartes de débit peuvent avoir pour effet de réduire le recours à l'argent liquide (tiré au DAB ou remis au guichet de la banque), ce qui réduit d'autant les coûts bancaires de gestion des espèces.

⁴⁷ Au moment où l'étude a été menée, les commissions interbancaires étaient d'environ 0.95 %.

⁴⁸ Ces discussions sont extrêmement complexes et dépassent généralement les limites de cette note. Cela étant, il convient en particulier d'interpréter au sens large la notion de coûts pour la collectivité, lorsque l'on tente de les calculer. En ce qui concerne les espèces, l'un des aspects – rarement évoqué correctement – à prendre en compte est que ce mode de paiement assure une forme de revenu à la banque centrale (ou à l'État) du fait du seigneurage qui peut réduire le poids d'impôts créant des distorsions, la monnaie électronique et les transactions par cartes de débit étant susceptibles d'entraîner une baisse du seigneurage comprise entre 0.29 et 0.66 %, si l'on en croit une étude consacrée à ses conséquences en Europe (Boeschoten et Hebbink, « *Electronic Money, currency demand and seignorage loss in the G10 countries* » DNB-Staff Reports, 1996).

les coûts plus élevés liés au fait que certains clients utilisent des moyens de paiement relativement plus onéreux (Katz, 2001 p. 41).

Quand il y a cohérence des prix, les transactions réglées avec d'autres moyens de paiement coûtent plus cher. L'effet est d'autant plus pervers que les personnes disposant de faibles revenus sont disproportionnellement susceptibles de ne pas avoir de carte quand les personnes disposant d'un revenu élevé sont, elles, disproportionnellement susceptibles d'en avoir une, ce qui implique que les faibles revenus paient, en l'occurrence, plus cher et les hauts revenus moins cher. L'effet final est donc régressif⁴⁹.

4.3 Pour de nombreux types de paiements de détail, les commerçants n'ont, à titre individuel, qu'une possibilité très limitée de refuser les cartes, notamment celles des principaux dispositifs

Un commerçant peut difficilement refuser, à titre individuel, les cartes des principaux dispositifs car s'il le faisait, de nombreux clients iraient chez ses concurrents, et il perdrait de ce fait des transactions par ailleurs rentables. Comme le dit John Vickers, « d'une certaine façon, les commerçants sont dans l'obligation d'accepter » (Vickers 2005, p. 234). En raison de cette concurrence entre les commerçants, l'acceptation générale des cartes ne prouve en rien que les commerçants dans leur ensemble bénéficient du fait qu'ils acceptent la carte de tel système (comme les cartes de crédit) plutôt que de tel autre. Vickers précise que « le fait que les commerçants sont prêts, à titre individuel, à accepter les cartes ne permet pas de mesurer correctement l'avantage que les commerçants dans leur ensemble (ou la collectivité) tirent de l'acceptation de la carte ». (Vickers, 2005 p. 235). Le conseil des commerçants britanniques a déclaré qu'« ...aucun commerçant – c'est-à-dire, pour autant qu'il en soit informé, aucun commerçant important dans aucun secteur – n'a vraiment eu le choix d'accepter les cartes émises par tel grand système de cartes de crédit ou de débit plutôt que par tel autre »⁵⁰. Le conseil « a expliqué à l'OFT que l'on ne peut raisonnablement penser que les commerçants sont en mesure de renoncer aux systèmes de cartes de paiement, les principaux dispositifs étant devenus pour eux à certains égards des « installations essentielles »⁵¹.

Cela revient, de façon générale, au problème des commissions commerçants, problème qui ne concerne pas seulement les dispositifs quadripartites mais vaut aussi pour les systèmes tripartites. Alors que la grande majorité des consommateurs possédant une carte tripartite ont également une carte quadripartite, les avantages pour le consommateur offerts aux utilisateurs de cartes tripartites peuvent amener les porteurs de ces cartes à les utiliser de préférence aux cartes quadripartites potentiellement moins avantageuses. Si de nombreux commerçants refusent les cartes tripartites, un grand nombre les accepte, notamment dans certains secteurs, comme celui des voyages, principalement parce qu'ils savent que dans le cas contraire, ils perdraient une clientèle rentable.

Dans l'hôtellerie, par exemple, lorsqu'il y a des chambres vacantes, la majeure partie des recettes par chambre générées par tout client supplémentaire représente un bénéfice. Examinons quel serait raisonnement de l'hôtelier vis-à-vis des différents modes de paiement. Les chèques ne sont souvent pas

⁴⁹ David Evans a fait valoir que la pratique des subventions croisées de même nature était courante dans de nombreux domaines. Ainsi, « tous les clients finissent pas payer un supplément du fait que les commerçants offrent des services tels que le parking, la retouche des vêtements, les escaliers roulants, l'allongement des horaires d'ouverture, l'emballage des cadeaux et bien d'autres commodités qui ne sont utilisées que par quelques clients ». (David S. Evans, « Bank Interchange Fees Balance Dual Demand », American Banker, 26 janvier 2001). Cependant, ces services ne sont offerts par les commerçants qu'à titre individuel et ne sont en aucun cas une obligation à laquelle tous seraient tenus.

⁵⁰ Décision n° CA98/05/05 de l'Office of Fair Trading « Investigation of the multilateral interchange fees provided for in the UK domestic rules of Mastercard UK Members Forum Limited (formerly known as MasterCard/Europay UK Limited) » 6 septembre 2005, Affaire CP/0090/00/S, p. 78.

⁵¹ Office of Fair Trading (2005) op. cit., p 81.

souhaités comme mécanisme de paiement du fait que le client est par nature en transit et du risque de non-paiement qui en découle. Le paiement en espèces n'est souvent pas possible puisque nombre de clients n'ont généralement pas sur eux les fonds suffisants pour régler leur séjour. Accepter la carte d'une plateforme tripartite, contre paiement d'une commission de 5% sur un bénéfice de, disons, 70 % de la valeur de la transaction est donc sans doute avantageux. Pour qu'il soit rentable de refuser une carte tripartite, l'hôtelier doit tenir pour probable que, dans 9 cas sur 10, les clients possédant une telle carte accepteront de régler avec la carte d'un autre système⁵².

L'exemple qui précède donne à penser que les systèmes de carte détenant une petite part de marché peuvent tout de même détenir un important pouvoir de marché, dans le sens où tel ou tel commerçant peut s'estimer dans l'impossibilité de refuser les cartes en question. Comme le précise Katz (2001), « en soi, démontrer que les cartes de crédit et les cartes accréditives émises par les réseaux American Express ou Diners Club ne représentent qu'une part réduite du marché total des cartes de paiement ou qu'une fraction minime du total des transactions par carte ne prouve nullement, si l'on veut apprécier correctement la règle de non-discrimination, que ces systèmes n'ont pas de pouvoir de marché. Si les voyageurs d'affaires utilisant les cartes de société American Express sont tenus d'utiliser ces cartes lorsqu'ils sont en voyage d'affaires pour pouvoir être remboursés par leur employeur, alors cette obligation peut générer un pouvoir de marché pour American Express vis-à-vis des commerçants et notamment de ceux qui assurent des prestations aux voyageurs d'affaires comme les compagnies aériennes, les hôtels et les restaurants. Visa fait également valoir que les avantages dont bénéficient les titulaires de cartes American Express peuvent également avoir des effets similaires pour d'autres clients » (Katz 2001, p. 51).

4.4 Les bénéfices des banques sont supraconcurrentiels

Vickers explique que « si les rabais consentis aux titulaires de carte deviennent inférieurs au taux de la commission interbancaire, toute augmentation de cette commission tendra à accroître les bénéfices cumulés des banques ». Le cas échéant, les banques seront alors, d'un point de vue commercial, naturellement incitées à obtenir et à maintenir des commissions interbancaires élevées. L'une des raisons pour lesquelles le rabais consenti aux titulaires de carte ne peut être égal à 100 % de la commission interbancaire tient à ce que la concurrence au sein du marché des émetteurs peut être tenue pour imparfaite et au fait que ce marché est moins concurrentiel que celui des acquéreurs, car les services d'émission se caractérisent par une importante différenciation des produits et les acheteurs (les titulaires de carte) sont des individus, assumant pour une grande part des coûts proportionnellement élevés de recherche du produit et de changement de prestataire (par rapport à ceux assumés par de nombreux commerçants). De plus, les banques risquent d'être liées par les rabais qu'elles consentent aux titulaires de carte, rabais qu'il convient de bien dissocier de la baisse de la commission annuelle qu'elles peuvent appliquer » (Vickers 2005, p. 234). Comme le souligne Vickers, Rochet et Tirole (2002) partent de l'hypothèse que les bénéfices des banques affiliées augmentent proportionnellement à la commission interbancaire. Les banques sont donc incitées à fixer « la commission interbancaire la plus élevée possible auprès des commerçants acceptant la carte » (p.588).

L'idée que les bénéfices réalisés par les banques sur les transactions peuvent être supraconcurrentiels revient à affirmer que les prix des services de carte dépassent nettement le taux de rendement corrigé des risques correspondants. Conformément à la théorie économique, dans la mesure où des bénéfices

⁵²

Supposons qu'un hôtel fasse payer une chambre 100, accepte des cartes quadripartites pour lesquelles il paye une commission de 2 % et refuse les chèques. Imaginons que le coût marginal de location de la chambre est de 30. Si le client paye pour cette chambre avec une carte quadripartite, alors le bénéfice pour l'hôtel sera de 68 contre 65 si le client paye avec une carte tripartite. Si l'hôtel pense que, dans au moins 95.5 % des cas, le fait de refuser la carte tripartite n'aura pas d'effet sur les mouvements de sa clientèle, il peut être rentable pour lui de refuser ces cartes. En revanche, s'il estime que ce refus dissuaderait 1 client sur 20, il est rentable pour lui d'accepter les cartes tripartites même si les commissions commerçants qui lui sont facturées sont nettement plus élevées.

supraconcurrentiels sont réalisés, « la concurrence finit par anéantir » une grande partie d'entre eux. Ainsi, l'existence de bénéfices supraconcurrentiels peut expliquer pourquoi les ménages américains se sont vus proposer par courrier 5.23 milliards d'offres de cartes de crédit en 2004, malgré le faible taux de réponses obtenues (0.4 %) la même année⁵³. Le coût élevé d'acquisition de nouveaux titulaires de carte peut réduire l'ampleur des bénéfices supraconcurrentiels, mais cet effort peut également avoir été mené en vain⁵⁴. Selon une étude de l'OFT consacrée aux systèmes de paiement au Royaume-Uni, « les frais moyens facturés aux petites entreprises pour chaque transaction réglée par carte de débit s'élèvent à 0.40 GBP, alors que la commission BACS classique [commission versée pour les transactions par l'établissement acquéreur au réseau de compensation des paiements] est de 0.01 à 0.02 GBP »⁵⁵ (OFT, 2003 p.66). Même s'il y a là assurément une différence importante entre le prix pratiqué d'une part et le coût assumé d'autre part, les banques peuvent être soumises à de nombreux coûts qui viennent s'ajouter à la commission BACS, lorsqu'elles assurent le traitement d'une transaction par carte à débit immédiat.

L'analyse de la rentabilité exige donc les plus grandes précautions. En particulier, même s'il est démontré que les bénéfices sont élevés, ce n'est pas, de façon générale, un critère suffisant pour établir qu'il y a eu violation du droit de la concurrence ou que la concurrence était insuffisante. L'une des analyses de source publique les plus rigoureuses de la rentabilité des systèmes de cartes de paiement est celle présentée dans le récent rapport intermédiaire sur les cartes de paiement de la Commission européenne (*Interim Report I on Payment Cards*)⁵⁶. Ce rapport indique que, dans les pays de l'Union européenne, « le ratio bénéfices/coûts moyen pondéré des émetteurs de cartes de crédit était de 65% en 2004 contre 47 % pour les émetteurs de cartes de débit » (p. 76) ; ce rapport ne propose pas une analyse des taux de rendement sachant qu'il serait difficile de réaliser une telle analyse, exclusivement limitée aux cartes de paiement. Cruickshank (2000) a examiné plus généralement la rentabilité des activités de banque de réseau au Royaume-Uni, en s'intéressant principalement aux taux de rendement des comptes des particuliers et des petites et moyennes entreprises. Il conclut que les activités bancaires s'y rapportant engendrent des bénéfices supérieurs au taux de rendement du marché, corrigé des risques. Il a analysé, dans ce cadre, les bénéfices des banques au Royaume-Uni de 1989 à 1999⁵⁷. Ses conclusions sont présentées plus en détail à l'annexe A.

4.5 L'entrée de nouveaux systèmes ou de nouveaux membres est lente, incertaine et souvent limitée

Les nouveaux dispositifs peuvent représenter une concurrence profitable pour les systèmes déjà en place. Si la concurrence entre les divers dispositifs a pu parfois entraîner une augmentation de la commission nette pour le client dual, l'arrivée de nouveaux concurrents semble avoir produit l'effet

⁵³ Frankel et Shampine (2006)

⁵⁴ Alors que les ménages américains peuvent recevoir un nombre excessif d'offres, ne se différenciant souvent pas les uns des autres, dans d'autres pays, de nombreux ménages, quant à eux, peuvent ne pas en recevoir suffisamment.

⁵⁵ Office of Fair Trading (2003) « UK Payment Systems: An OFT Study of Clearing Systems and Review of Plastic Card Networks », Rapport de mai 2003, p. 66. <http://www.oft.gov.uk/NR/rdonlyres/10DB2458-FBD9-4B5C-9EE7-CEB7ACA472BB/0/oft658.pdf>

⁵⁶ Commission européenne, « *Interim Report I Payment Cards: Sector Inquiry under Article 17 Regulation 1/2003 on retail banking* » du 12 avril 2006. http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/financial_services/public_consultation.html consulté le 21 avril 2006.

⁵⁷ L'analyse des bénéfices globaux des banques de réseau dans les pays où un pourcentage important de titulaires de carte détiennent les cartes d'un nombre limité d'établissements distincts de la banque qui tient leur compte courant ne fournirait que des informations parcellaires sur les bénéfices supraconcurrentiels, dans la mesure où un nombre relativement restreint de banques et d'établissements financiers émettent la majorité des cartes de crédit.

inverse⁵⁸. L'arrivée de nouveaux dispositifs est généralement lente et difficile⁵⁹. Lorsque le jeu de la concurrence ne fait pas baisser les prix en vigueur, l'entrée de nouvelles plateformes peut y contribuer.

De nombreuses plateformes sont formées par des groupements ou associations de sociétés, mais l'adhésion au groupement peut être difficile. Pour les plateformes créées par une association comme Visa, et MasterCard, et pour de nombreux dispositifs nationaux de cartes de débit, l'entrée de nouvelles sociétés est soumise à des restrictions. Les règles d'adhésion peuvent notamment prescrire que les membres d'un groupement (ayant le droit d'utiliser la plateforme du groupement) doivent être un établissement financier réglementé (comme une banque ou une mutuelle de crédit), que tous les acquéreurs doivent assumer une fonction d'émetteur et que les demandes d'adhésion doivent être approuvées par le conseil d'administration de la plateforme⁶⁰. Ce genre de règles semble avoir pour finalité d'assurer que seules les banques soient autorisées à s'affilier. Si les groupements sont légitimement fondés à s'assurer que les nouveaux membres n'occasionnent pas de risques financiers pour les membres existants (que ceux-ci devraient assumer en cas de faillite), de nombreuses grandes entreprises (comme les grandes sociétés de distribution) disposent des ressources suffisantes pour certainement verser un cautionnement ou souscrire une assurance garantissant, comme il se doit, que les membres existants ne se trouvent exposés à aucun risque. Apparemment, rien ne justifie de limiter aux établissements financiers l'adhésion au groupement. Il peut être légitime de s'assurer que les membres sont en mesure d'internaliser les intérêts des émetteurs comme des acquéreurs, surtout si la dualité de ces marchés est un aspect essentiel. Mais on comprend alors difficilement pourquoi les émetteurs ne seraient pas, eux aussi, tenus d'assumer la fonction d'acquéreur quand la réciprocité est vraie.

4.6 *Commissions interbancaires*

Alors que le mécanisme des commissions interbancaires appliquées par les systèmes quadripartites existe dans le monde entier, on observe des différences importantes d'un pays à l'autre. En ce qui concerne les cartes de crédit, les mécanismes sont relativement similaires, du fait, peut être, de la grande influence de Visa et MasterCard. Cependant, les commissions interbancaires applicables aux transactions nationales peuvent varier considérablement d'un pays à l'autre. Dans de nombreux pays et juridictions comme l'Australie, la Colombie, l'Union européenne, le Mexique, la Nouvelle-Zélande, la Pologne, le Portugal, la Norvège, la Suède, le Brésil, la Hongrie, l'Espagne, le Royaume-Uni et les États-Unis, (notamment au niveau de certains États américains, comme ceux du Kentucky et de Washington)⁶¹, les commissions interbancaires sont contestées et font l'objet d'enquêtes. Alors que les partisans de ce système font valoir que ces commissions peuvent être essentielles pour l'existence d'incitations appropriées garantissant l'adoption et l'utilisation du système par les clients et les commerçants, elles sont pourtant inexistantes dans certains pays (les Pays-Bas, la Finlande et le Danemark) où les systèmes de cartes de débit ont

⁵⁸ D'une part, l'entrée du principal groupement sur le marché américain des cartes de débit semble par exemple avoir entraîné une hausse des commissions applicables à ces cartes par rapport aux commissions appliquées par les systèmes qui proposaient jusque là ce type de cartes : il s'agit là d'un exemple de hausse des coûts induite par l'arrivée d'un nouveau concurrent. D'autre part, la carte Discover, lancée en 1985 aux États-Unis, s'accompagne de commissions commerçants moins élevées que celles des principales cartes quadripartites ou cartes accréditives. Elle octroie également d'importants avantages financiers à ses utilisateurs, représentant environ 1 % des achats qu'ils réalisent par ce moyen. On voit ainsi que l'arrivée de nouveaux concurrents peut induire dans certains cas une baisse des coûts et dans d'autres une hausse des coûts.

⁵⁹ Même après 17 ans d'exploitation en 2002, la carte Discover, malgré ses avantages financiers apparemment plus importants pour les commerçants et les consommateurs, n'a conquis qu'une part de marché de 4 % (Evans et Schmalensee, 2005, p. 15).

⁶⁰ « L'adhésion à *MasterCard International* et à ses filiales est généralement réservée aux banques et autres établissements financiers réglementés et soumis au contrôle des autorités de tutelle ». (MasterCard Incorporated, Formulaire 10-K 2006 (16 mars 2006))

⁶¹ MasterCard Incorporated, Formulaire 10-K 2006 (16 mars 2006).

prospéré. De surcroît, au Danemark, les commissions interbancaires applicables aux transactions nationales par carte sont proscrites par la loi⁶².

Dans le passé, les groupements de cartes bancaires ont été mis en cause pour avoir violé la règle intrinsèque qui interdit toute détermination commune des prix pour fixer le taux de la commission interbancaire. Dans l'affaire NaBanco, la *National Bancard Corporation* (NaBanco) a fait valoir que la commission interbancaire constituait un accord de détermination des prix en infraction à l'article 1 de la loi Sherman⁶³. Les allégations de NaBanco donnaient à penser que la commission interbancaire constituait en soi un accord de fixation de prix et que même, dans le cas contraire, elle serait illégale en vertu de la règle de bon sens, puisqu'elle défavorise les banques qui acquièrent les comptes des commerçants par rapport aux établissements intégrés exerçant à la fois des fonctions d'acquéreur et d'émetteur. NaBanco laissait entendre qu'une banque intégrée acquérant les transactions des commerçants peut détenir un avantage puisque, s'agissant des transactions pour lesquelles elle intervient des deux cotés de la transaction, la commission interbancaire est neutre et que, par conséquent, la banque peut appliquer, au titre de sa fonction d'acquisition, des commissions commerçants moins élevées que les banques n'intégrant pas les deux fonctions. Visa a affirmé que la détermination collective des prix devait être évaluée en vertu de la règle de bon sens en se fondant sur les gains d'efficience qui peuvent découler de cette décision collective. Visa « a dépeint l'association comme une coentreprise regroupant des banques dans le but d'optimiser l'utilisation de la carte Visa par les titulaires de carte et les commerçants. Visa a soutenu que la commission interbancaire a pour finalité de procurer un « mécanisme servant à répartir et partager les coûts assumés par la coentreprise en lien avec les bénéfices prospectifs, et d'encourager ainsi ses membres à assurer le service Visa de la manière la plus concurrentielle tant du côté des 'titulaires de carte' que du côté des 'commerçants' ». Elle a ajouté que la commission interbancaire était indispensable pour que la coentreprise puisse proposer des services de cartes de crédit. Sans cette commission (même s'il s'agit d'une commission à taux nul), le système serait chaotique, puisqu'il supposerait que soient conclues littéralement des milliers de négociations bilatérales entre banques émettrices et banques acquéreuses, au risque de mettre en péril sa viabilité même. Au contraire d'un système classique de détermination commune des prix dans le cadre duquel l'élimination de la collusion induit une augmentation de la production et une baisse des prix, une telle mesure pourrait avoir ici pour corollaire une baisse de la production et une augmentation globale des prix » (Evans et Schmalensee, 2005, p. 287). La cour d'appel américaine du 11^e Circuit a soutenu que les commissions interbancaires devaient être examinées selon la règle de bon sens et a conclu que le tribunal de district « était fondé à conclure de façon plausible et logique que, dans la mesure où il était nécessaire de préserver la stabilité du système et par conséquent de garantir l'un des éléments indispensables à la viabilité du système Visa, autrement dit sont acceptation universelle, les [commissions interbancaires] favorisaient, tout compte fait, la concurrence ».

Dans l'affaire tranchée par la Commission européenne concernant la commission multilatérale d'interchange (CMI) appliquée par Visa, l'un des plaignants (EuroCommerce) considérait que cette commission constituait « une entente sur la fixation des prix et donc une infraction caractérisée au droit de la concurrence »⁶⁴. Selon la Commission européenne, la CMI constitue « un accord entre concurrents qui restreint la liberté des banques de déterminer individuellement leur politique de prix et fausse les conditions de concurrence sur les marchés de l'émission et de l'acquisition Visa ».

Les commissions interbancaires appliquées par les systèmes de carte de débit sont bien plus diverses que celles des dispositifs de cartes de crédit, surtout du fait que ces commissions sont le résultat d'accords bancaires nationaux et que les cartes en question sont (fréquemment) à l'origine des cartes de retrait aux

⁶² Voir Commission européenne, « *Interim Report I Payment Cards: Sector Inquiry under Article 17 Regulation 1/2003 on retail banking* » du 12 avril 2006, p. 45.

⁶³ *National Bancard Corp. v. Visa U.S.A., Inc.*, 596 F. Supp 1231 (S.D. Fla 1984), aff'd, 779 F.2d 592 (11th Cir. 1986).

⁶⁴ JO L318, 22.11.2002, p. 28.

DAB/GAB. En Finlande et en Nouvelle-Zélande, aucune commission interbancaire n'est appliquée aux cartes de débit. Au début, aux États-Unis, le taux de la commission interbancaire était nul, même si cela a changé après le rachat par Visa de l'une des plus importantes plateformes de cartes de débit. Certains avancent que la suppression de la commission à taux nul appliquée aux cartes de débit aux États-Unis est liée au comportement de Visa après ce rachat⁶⁵.

La commission interbancaire est presque toujours versée par l'acquéreur à l'émetteur de cartes⁶⁶ en contrepartie de l'accès au réseau des terminaux se trouvant sur les points de vente. Cependant, quand les commerçants disposent d'un important pouvoir de négociation, cette commission peut, dans une certaine mesure, être versée aux commerçants comme cela a été le cas en Australie avec le système en place de transfert électronique de fonds au point de vente.

Cruickshank précise que « s'il peut être raisonnable d'accorder à un nouveau venu – tel Visa dans les années 60 – ou à un prestataire de taille relativement petite la liberté de fixer les prix sur le marché, c'est indéfendable pour un prestataire bien implanté détenant un pouvoir de marché » (Cruickshank 2000 p. 266).

Un certain nombre de décisions se rapportant à la fixation, d'un commun accord, de la commission interbancaire ont été rendues, les plus importantes étant celles :

- concernant le Groupement des cartes bancaires en France,
- rendue par la Commission européenne,
- concernant MasterCard au Royaume-Uni,
- rendue par la RBA en Australie
- rendue par le tribunal de la concurrence d'Espagne.

Groupement des cartes bancaires en France

Au moment de l'enquête menée sur le Groupement des cartes bancaires en 1988 par le Conseil de la concurrence, le système Carte Bancaire appliquait un taux de commission interbancaire de 0.8 % et un taux moins élevé de 0.4 % à certaines catégories de commerçants. Dans sa décision, le Conseil a estimé que la fixation « concertée » de cette commission, dite alors d'« interchange » constituait une restriction à la concurrence, limitait la capacité des banques à négocier avec les commerçants le taux de la commission que ces derniers leur versent à l'occasion de chaque transaction réglée par carte bancaire, en imposant des « seuils de tarification »⁶⁷. Alors que le Conseil estimait que la fixation de la commission d'interchange lui est apparue nécessaire au bon fonctionnement du système de paiement par carte bancaire, il concluait par ailleurs que les modalités de calcul de la commission ne reposaient pas sur des « critères objectifs ». De plus, ce dispositif n'incitait guère les banques ou le système dans son ensemble à limiter la fraude. Le Groupement des cartes bancaires a adopté, pour le calcul de la commission interbancaire de paiement, de nouvelles modalités, applicables à compter du 1^{er} mai 1990. La nouvelle commission interbancaire de paiement comportait trois composantes :

⁶⁵ Voir Constantine (2005) et le règlement du différend dans l'affaire Visa Check.

⁶⁶ En Australie toutefois, la commission interbancaire applicable aux cartes de crédit est versée dans le sens inverse, c'est-à-dire par l'émetteur à l'acquéreur.

⁶⁷ Décision n° 90-D-41 du octobre 1990, le Conseil de la concurrence..

- Un élément fixe destiné à couvrir les charges inhérentes au traitement de toute transaction effectuée, quelle que soit son montant ; il était fixé à 0.70 FRF,
- Un élément proportionnel destiné à couvrir le coût des mesures collectives de sécurité ; son montant est égal à 0.21% de la transaction,
- un élément destiné à couvrir les dépenses que les banques des porteurs de carte sont amenées à engager au titre de la garantie de paiement qu'elles accordent aux commerçants. Son montant est également exprimé en pourcentage de la transaction, mais selon un taux variable, qui est le taux interbancaire de cartes en opposition (TICO).

Cette structure a été approuvée par le Conseil le 30 octobre 1990.

Commission européenne

Le 24 juillet 2002, la Commission européenne a décidé que la commission multilatérale d'interchange (CMI) modifiée de Visa remplit les conditions permettant l'octroi d'une exemption en application de l'article 81, paragraphe 3, du traité de Rome⁶⁸. Cette exemption a été accordée, en ce qui concerne la CIM par défaut applicable aux paiements transnationaux après que Visa a apporté une série de modifications à son système. Dans le cadre du système modifié, Visa réduira le niveau global de la CMI intrarégionale applicable aux paiements par carte dans sa région « Union européenne » en introduisant :

1. un montant fixe par transaction pour les cartes de débit, dont la moyenne pondérée annuelle n'excède pas 0.28 EUR,
2. une réduction progressive du niveau des CMI *ad valorem* par transaction applicable aux cartes de crédit et de débit différé, le taux moyen pondéré de la CMI ne devant pas excéder 0.7 %.

Visa a estimé que ces modifications cumulées auront pour effet de réduire les recettes d'interchange de « plus de 20 % sur la période de cinq ans » prévue.

« Aux fins du système modifié, Visa utilisera trois catégories de coûts supportés par l'émetteur dans le cadre de la prestation de services de paiement Visa comme données de référence pour l'appréciation des CMI intrarégionales de Visa actuellement payées par les acquéreurs aux émetteurs sur les transactions réalisées aux points de vente. Ces trois catégories de coûts sont les suivantes : (1) le coût du traitement des transactions, (2) le coût de la période de financement gratuit dont bénéficient les titulaires de cartes et 3) le coût de l'octroi de la « garantie de paiement ». Certains observateurs généralement favorables à l'approche de la Commission se sont demandés si le coût de la période de financement gratuit dont bénéficient les titulaires de cartes doit être inclus dans l'ensemble des coûts autorisés, puisque d'autres modes de paiement, comme les paiements en espèces, n'offre pas cette possibilité.

Visa a précisé qu'elle réalisera régulièrement des études de coûts qui seront vérifiées par un cabinet comptable pour estimer le niveau de ces coûts et que le niveau effectif de la CMI n'excèdera pas la somme de ces trois catégories de coûts, sauf « circonstances exceptionnelles ».

MasterCard au Royaume-Uni

Le 1^{er} mars 2000 MasterCard a notifié un accord de fixation des commissions interbancaires multilatérales par défaut qui s'appliquerait aux transactions réglées au moyen de cartes émises au

⁶⁸ JO L 318, 22.11.2002, p. 17-36.

Royaume-Uni. Cet accord a conduit l'*Office of Fair Trading* à ouvrir une enquête avant de rendre une décision, le 6 septembre 2005 concluant que « l'accord a limité la concurrence de deux façons. Premièrement, il a donné lieu à une entente collective sur le niveau de la commission interbancaire multilatérale (essentiellement une entente collective de fixation des prix). Deuxièmement, il en est résulté le recouvrement injustifié, par le biais de cette commission, de certains coûts (« coûts extérieurs ») encourus par les membres de *MasterCard UK Members Forum* et d'autres établissements agréés par MasterCard » (OFT 2005 op. cit., p. 6). Les coûts extérieurs identifiés dans la décision incluent « les coûts de l'octroi d'une période de financement gratuit et certains coûts liés à l'octroi d'une garantie de paiement contre le risque de défaillance » (OFT 2005 op. cit., p. 197). *MasterCard UK Members Forum Limited* ainsi que *MasterCard International Incorporated/ MasterCard Europe SPRL* et le *Royal Bank of Scotland Group* ont fait appel de cette décision ; Visa et le *British Retail Consortium* se sont vus accorder le droit d'intervenir en appel. Une audition est prévue pour septembre 2006.

L'OFT a défini comme suit les marchés concernés :

- Le marché des services de paiement par carte entre les émetteurs et les acquéreurs pour les achats réglés au Royaume-Uni au moyen de cartes de crédit consommateur et de cartes à débit différé de marque MasterCard,
- Le marché des services d'acquisition commerçants fournis par les acquéreurs aux commerçants pour les achats réglés au Royaume-Uni au moyen de cartes de crédit consommateur et de cartes de débit différé de marque MasterCard,
- Le marché des services d'émission de cartes de crédit et de cartes de débit différé de marque fournis par les émetteurs aux titulaires de carte au Royaume-Uni.

L'Office a conclu que la plupart des commerçants (98 % d'entre eux au moins) se voyaient appliquer un taux unifié pour les transactions réglées par carte MasterCard et Visa. En réponse aux préoccupations selon lesquelles les marchés cités ci-dessus ne se limitent pas à MasterCard, l'OFT a notamment observé que, face à la réduction des commissions appliquées par Visa, les commerçants qui payaient des commissions distinctes pour Visa et MasterCard n'ont pas renoncé à la carte MasterCard pour ne plus accepter que les cartes Visa. Cela revient à dire que les changements de prix n'ont pas induit un changement de prestataire en faveur de la carte à moindre coût. L'OFT a également conclu que les commissions interbancaires peu élevées applicables aux cartes de débit n'ont nullement eu pour effet d'empêcher la hausse de la commission interbancaire appliquée par MasterCard. L'Office a ajouté que le fait que la CMI appliquée par MasterCard « soit cinq à huit fois supérieure à celle appliquée aux cartes de débit Visa pour des paiements équivalents indique que la CMI appliquée par Visa sur ce type de cartes n'empêche pas la CMI de MasterCard d'augmenter » (OFT 2005 op. cit., p. 81).

RBA en Australie

La loi (de réglementation) sur les systèmes de paiement de 1998 a officiellement conféré à la Banque de réserve d'Australie (*Reserve Bank of Australia* ou RBA) le pouvoir de réglementer les systèmes de paiement en Australie et d'obliger les participants de ces systèmes à lui fournir des renseignements. La RBA et la Commission australienne de la concurrence et pour la protection des consommateurs (*Australian Competition and Consumer Commission* ou ACCC) ont mené une étude conjointe sur les systèmes de paiement, qui a abouti à la publication d'un rapport sur ce sujet en 2000. En 2001, la RBA a classé les systèmes de carte de crédit dans la catégorie des systèmes de paiement. En 2002, elle a déclaré que « tout comportement ayant pour objet la concertation entre des concurrents dans le but de déterminer collectivement les prix est rarement autorisé dans les économies de marché. Ce comportement est, de prime abord, anticoncurrentiel et, lorsqu'il est permis, suppose généralement une forme ou une autre

d'exemption accordée par les autorités de la concurrence à la condition que certains avantages pour le grand public viennent compenser l'exemption accordée ». En 2003, Visa et MasterCard se sont vus imposer de respecter une règle de calcul des commissions interbancaires en fonction des coûts, ce qui les a conduit à ramener le taux applicable de 0.95 % à 0.55 %.⁶⁹ (Lowe, 2005 p.272). Cette baisse a pris effet le 1^{er} novembre 2003. Les commissions de service commerçants ont diminué d'environ 0.45 point depuis cette date.

Certains observateurs du secteur partagent notamment la préoccupation que ces modifications ne s'appliquent pas à American Express, bien qu'American Express soit désormais en relation avec des banques assurant la promotion de ses produits et les rémunère à ce titre. Ils soutiennent que le recul de la rentabilité des produits quadripartites conduira les banques à privilégier de plus en plus les produits d'American Express, auxquels s'appliquent des commissions commerçants nettement plus élevées. Depuis 2003, la part des transactions réglées avec les cartes American Express et Diners Club est passée de 14.5 % environ à près de 16.5 %⁷⁰. Simultanément cependant, la commission commerçant moyenne d'American Express a été ramenée de 2.48 % début 2003 à 2.30 % en décembre 2005⁷¹. S'il est prématuré de parler des effets définitifs des modifications apportées, elles semblent néanmoins avoir notamment entraîné une réduction importante du total des commissions versées par les commerçants, ce qui, dans l'hypothèse économique où une baisse des coûts entraîne une baisse des prix, devrait profiter à l'ensemble des consommateurs. Le prix des cartes pour les consommateurs a sans doute un peu augmenté, mais pas à hauteur de la réduction des commissions. Le produit de la commission interbancaire que tirent les banques des cartes quadripartites a baissé, mais rien n'indique que l'utilisation de ces cartes a reculé et que la progression des cartes de crédit a été moins forte et celle des cartes de débit plus prononcée que ces dernières années⁷². Selon Chang et al (2005), rien n'indique un recul des prix de détail à la suite de la diminution des commissions commerçants, mais il est vraisemblable que les données disponibles soient encore insuffisantes pour pouvoir trancher la question.

La RBA n'a imposé aucune réglementation pour les commissions qu'American Express ou Diners Club peuvent appliquer aux banques émettrices car, bien que ces commissions puissent s'apparenter aux commissions interbancaires, le fait qu'American Express et Diners Club soient respectivement leur propre acquéreur implique qu'on ne peut compter sur la concurrence entre acquéreurs pour réduire les commissions commerçants. Par conséquent, cette réglementation aurait eu un effet limité. De plus, il aurait été difficile de réglementer tous les versements des systèmes tripartites aux banques émettrices, les commissions interbancaires pouvant être dissimulées sous forme de commissions de commercialisation ou autres, ce qui nécessiterait un arsenal réglementaire bien plus complet que pour les systèmes quadripartites. Pour des raisons vraisemblablement liées, au moins en partie, à l'abrogation de l'interdiction faite au commerçant de facturer un supplément et de l'obligation qui lui est imposée de ne pas canaliser le choix du client ainsi qu'à la réduction des commissions commerçants appliquées par les systèmes quadripartites, les commissions appliquées par American Express aux commerçants ont diminué depuis la baisse des commissions de Visa et de MasterCard, dans une moindre mesure toutefois. Il s'agit là des dernières évolutions concernant les cartes de crédit en Australie.

⁶⁹ Les coûts admis étaient les coûts de traitement des paiements par carte, les coûts d'opposition et de prévention des fraudes, les coûts d'autorisation et les coûts du financement de la période de franchise d'intérêts. Ces derniers étant les seuls à n'être pas directement liés au commerçant ni à des gains d'efficience.

⁷⁰ Voir RBA *Bulletin*, tableau C2.

⁷¹ Voir RBA *Bulletin*, tableau C3.

⁷² Voir Lowe, Philip (2006b) « *Opening Statement to House of Representatives Standing Committee on Economics, Finance and Public Administration* », allocution du 15 mai 2006, http://www.rba.gov.au/Speeches/2006/sp_ag_150506.html site consulté le 15 mai 2006.

En ce qui concerne les cartes de débit, un processus de réforme, plus lent toutefois, est également à l'œuvre. A l'issue d'une consultation avec la RBA, les banques ont présenté une proposition à l'autorité de la concurrence visant à supprimer les commissions interbancaires applicables aux cartes de débit à code PIN. Cette proposition a été approuvée par l'ACCC, avant d'être rejetée par le tribunal australien de la concurrence⁷³. A la suite de ce refus, la RBA a déclaré, en septembre 2004, que le système de carte de débit à code PIN relevait de sa compétence. Elle a introduit des propositions qui aboutiront probablement à ramener de 0.20 à 0.05 AUD par transaction la commission interbancaire applicable aux cartes de débit à code PIN⁷⁴. En ce qui concerne les cartes de débit à signature, la RBA a rendu publiques des propositions visant à ramener le taux des commissions calculé en pourcentage, qui s'établit à 0.40 AUD en moyenne, à un taux forfaitaire d'environ 0.15 AUD⁷⁵.

Espagne

« En Espagne, le tribunal de la concurrence a rendu une décision en avril 2005 rejetant la demande d'exemption que lui avaient présentée deux des trois systèmes de traitement nationaux de cartes de crédit et de débit au sujet de leurs commissions interbancaires et a initié une procédure de révocation de l'exemption qu'il avait préalablement accordée au troisième de ces systèmes. Les commissions interbancaires fixées par ces trois sociétés de traitement s'appliquent aux transactions réglées par carte MasterCard en Espagne et MasterCard a donc fait appel de cette décision. De plus, le tribunal a donné son avis quant au mode de calcul qui lui semble approprié pour les commissions interbancaires et qui, s'il était utilisé, entraînerait une forte baisse des commissions interbancaires applicables aux transactions réglées par carte de crédit et de débit en Espagne. En décembre 2005, les sociétés de traitement ont accepté de modifier les modalités de calcul de leurs commissions interbancaires et les nouvelles commissions sont actuellement examinées par les autorités espagnoles de la concurrence afin de déterminer si elles réunissent les conditions d'une exemption (MasterCard Incorporated, Formulaire 10-K 2006 — 16 mars 2006).

5. Les règles non fondées sur les prix s'appliquant aux systèmes de paiement par carte posent-elles des problèmes ?

L'analyse ci-dessus a essentiellement porté sur les caractéristiques des cartes de paiement qui sont liées aux prix et qui ont parfois été considérées comme la marque d'imperfections existant dans le secteur des cartes au regard du droit et de la politique de la concurrence. Cette section s'intéresse plus particulièrement aux caractéristiques des systèmes de paiement par carte qui ont souvent été au centre de la politique de la concurrence. Il s'agit notamment de :

- la règle imposant d'accepter toutes les cartes
- la règle interdisant de canaliser le choix du client
- la structure de gouvernance

⁷³ Tribunal australien de la concurrence, Dossier n° 7 et 9 de 2003 ayant pour objet l'accord du 25 mai 2004 sur les commissions interbancaires applicables au système de transfert électronique de fonds aux points de vente.

⁷⁴ Notons qu'à l'inverse de la plupart des commissions interbancaires appliquées dans le monde, cette commission est versée par les émetteurs aux acquéreurs.

⁷⁵ En outre, il est interdit de lier l'acceptation des cartes de crédit Visa à l'acceptation des cartes de débit Visa.

- les règles d'affiliation
 - l'exclusivité
 - la dualité

5.1 *La règle imposant d'accepter toutes les cartes*

Certaines plateformes de paiement peuvent introduire des technologies et des plateformes de paiement concurrentes tout en les distribuant sous la même marque. Dans ce cas, elles peuvent tenter d'imposer aux commerçants « d'accepter toutes les cartes » émises sous cette marque et, lorsque les cartes bénéficient de l'hébergement multiple (c'est-à-dire lorsqu'elles peuvent être utilisées sur des plateformes multiples), elles peuvent même tenter de présenter leurs produits comme des produits prioritaires par rapport à ceux de la concurrence. La règle imposant d'accepter toutes les cartes établit un ensemble de liens entre des produits jugés distincts, comme :

- l'obligation, pour un commerçant qui choisit d'accepter une carte de crédit ou une carte de débit, d'accepter ces deux types de cartes,
- et l'obligation, pour un commerçant qui choisit d'accepter une carte nationale ou une carte internationale, d'accepter ces deux types de cartes.

Les commerçants ont fait valoir que, dans la pratique, il leur était impossible dans certains pays de refuser les cartes de crédit de groupements ou de fournisseurs importants. De ce fait, la règle imposant d'accepter toutes les cartes a pour effet d'associer une carte de crédit « incontournable » à une carte qui ne l'est pas (comme la carte de débit d'un groupement que les commerçants pourraient tenter de refuser) et peut amener les commerçants à accepter des cartes de crédit à des taux « fixes, supraconcurrentiels et exorbitants »⁷⁶.

Les groupements ont intérêt à s'assurer qu'une personne possédant leur carte peut s'en servir dans tous les magasins qui déclarent accepter cette marque. Ils créent ainsi de la valeur ajoutée pour les consommateurs et s'assurent que ceux-ci souscrivent et utilisent les cartes.

Les règles imposant d'accepter toutes les cartes semblent poser des problèmes de droit de la concurrence dans un grand pays au moins, mais elles ont été maintenues dans d'autres.

Aux États-Unis, dans l'affaire Visa Check/MasterMoney, par exemple, une action collective a été intentée à l'encontre de Visa U.S.A. Inc. et de MasterCard International, Inc. par différents détaillants américains, dont Wal-Mart et plusieurs autres grands distributeurs d'envergure nationale. Selon les plaignants, Visa et MasterCard ont acquis une position dominante sur le marché national des cartes de crédit généralistes, ou des cartes de crédit et des cartes accréditives généralistes et ils ont tenté de contraindre les commerçants à accepter des cartes de débit à un coût exceptionnellement élevé, en liant l'acceptation de ces cartes de débit à celle des cartes de crédit⁷⁷. En d'autres termes, ils ont exigé des commerçants qu'ils « acceptent toutes les cartes », alors même que certains produits différaient sensiblement. En bref, Visa et MasterCard ont mis au point plusieurs modes de paiement se substituant aux cartes de crédit, et notamment des cartes de débit « en ligne » (Interlink et Maestro, respectivement) et

⁷⁶ Différend Visa Check/MasterMoney relevant de la législation antitrust, Deuxième action collective consolidée modifiée et demande de procès devant jury. CV-96-5238, §93.

⁷⁷ Les cartes accréditives appartenaient notamment à des systèmes tripartites comme American Express, Diners Club ou Carte Blanche.

traditionnelles (Visa Check et MasterMoney, respectivement) pouvant être utilisées au point de vente. Les cartes en ligne ont été sécurisées à l'aide d'un code PIN que les consommateurs devaient saisir au point de transaction, tandis que les achats effectués à l'aide de cartes traditionnelles étaient sécurisés par le biais d'une signature, ces moyens de paiement étant qualifiés de cartes « de débit à signature ». Si les risques encourus par les émetteurs de cartes de débit traditionnelles étaient nettement inférieurs à ceux présentés par les cartes de crédit, compte tenu de leur moindre risque de crédit, les commissions commerçants ne rendaient pas compte de cette réduction des risques et pendant de nombreuses années, elles ont été équivalentes pour une carte de crédit Visa et une carte Visa Check, ainsi que pour une carte de crédit MasterCard et une carte MasterMoney⁷⁸. Aux États-Unis, on comptait un grand nombre de réseaux de paiements par carte de débit en ligne, issus pour la plupart de réseaux régionaux. Lorsque les détaillants ont voulu refuser les cartes de débit en ligne des groupements tout en acceptant leurs cartes de crédit, on les a informés qu'ils perdraient toute possibilité d'accepter la carte d'un groupement s'ils refusaient certaines cartes. La différence entre les diverses commissions prélevées pour l'utilisation de différents types de cartes était considérable. Selon les plaignants, pour une transaction de 100 USD réalisée dans un magasin (hors supermarché) doté du matériel de traitement électronique le plus pointu, les commissions interbancaires présentées au tableau 2 étaient appliquées :

Tableau 2. Commissions interbancaires applicables aux commerçants pour une transaction de 100 USD, en 1996

Carte	Type de carte	Frais	Calcul
Carte de crédit Visa	crédit	1.25 USD	1.25 % de la transaction
Visa Check	débit traditionnel	1.10 USD	1.04 % de la transaction + 0.06 USD
Carte de crédit MasterCard	crédit	1.31 USD	1.31 % du montant de la transaction
MasterMoney	débit traditionnel	1.31 USD	1.31 % du montant de la transaction
NYCE	débit en ligne	0.075 USD	0.075 USD par transaction
MAC	débit en ligne	0.065 USD	0.065 USD par transaction
MOST	débit en ligne	0.05 USD	0.05 USD par transaction
Pulse	débit en ligne	0.05 USD	0.05 USD par transaction
Shazam	débit en ligne	0.05 USD	0.05 USD par transaction
Honor	débit en ligne	0.05 USD	0.05 USD par transaction
BankMate	débit en ligne	0.05 USD	0.05 USD par transaction
Explore	débit en ligne	0.075 USD	0.075 USD par transaction
Maestro	débit en ligne	0.095 USD	0.095 USD par transaction

Source : Différend Visa Check/MasterMoney relevant de la législation antitrust, Deuxième action collective consolidée modifiée et demande de procès devant jury. CV-96-5238, §69.

En se fondant sur la règle de non-discrimination, les détaillants ont fait valoir qu'ils n'étaient pas autorisés à orienter leurs clients vers les modes de paiement qui avaient leur préférence. De plus, certaines banques ont pris des mesures pour retirer les caractéristiques de « l'hébergement multiple » aux cartes de débit traditionnelles, qui les auraient associées aux réseaux en ligne moins onéreux.

En définitive, le différend a donné lieu à un accord par lequel Visa et MasterCard ont renoncé à appliquer, aux États-Unis, l'obligation d'accepter toutes les cartes. Cette règle reste néanmoins en vigueur dans d'autres pays.

À l'inverse, la Commission européenne a décidé que la règle imposant d'accepter toutes les cartes n'était pas restrictive de la concurrence. « Le fait qu'en application de la règle imposant l'obligation d'accepter toutes les cartes le commerçant est tenu d'accepter toutes les cartes valables portant une marque donnée, quel que soit le type de carte et quels que soient les frais qui lui sont facturés, ne peut être considéré comme restrictif de la concurrence. Le fait que les frais facturés au commerçant peuvent varier d'une banque « acquéreur » à l'autre ne prouve pas que les différents types de cartes Visa ne sont pas des

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En 1995, les commissions correspondant à une carte Visa Check ont été revues en baisse par rapport à celles de la carte de crédit Visa, mais restaient nettement supérieures à celles prélevées pour les cartes de débit en ligne.

produits apparentés. En outre, ce sont les acquéreurs, et non Visa International, qui fixent le montant des frais à payer par le commerçant, et dans de nombreux cas, ces frais sont négociés cas par cas. Si chaque commerçant était libre d'accepter ou non une carte Visa donnée, uniquement sur la base des frais qui lui sont facturés par sa banque, l'acceptation universelle des cartes de paiement de Visa International serait sérieusement compromise. Les titulaires ne sauraient pas à l'avance si leur carte Visa sera ou non acceptée. Il convient également de tenir compte du fait que le type de carte Visa émise peut varier d'un émetteur à l'autre et, plus encore, d'un pays à l'autre. De toute évidence, si les commerçants étaient libres d'accepter ou non une carte Visa donnée, uniquement sur la base des frais qu'ils peuvent avoir à payer, cela compromettrait la fonction internationale de la carte. En outre, la règle prévoyant l'obligation d'accepter toutes les cartes imposée par Visa International n'oblige pas les commerçants à accepter les futurs types de cartes Visa, puisqu'ils sont libres à tout moment de cesser d'accepter les cartes Visa⁷⁹. »

La règle imposant d'accepter toutes les cartes, même lorsqu'elle est appliquée à des produits apparemment comparables (cartes Visa émises dans le pays et à l'étranger) peut créer des distorsions. Les détaillants pourraient raisonnablement souhaiter réserver un traitement différent aux cartes de crédit nationales et aux cartes de crédit étrangères pour deux raisons au moins. Premièrement, les règles applicables aux droits de remboursement dépendent des règles en vigueur dans le pays émetteur et non dans le pays acquéreur. Les régimes de paiement de certains pays émetteurs prévoient des mesures de protection relativement généreuses pour les utilisateurs de cartes pouvant être exposés à des abus. Prenons l'exemple d'un utilisateur de carte qui séjourne dans un hôtel (à l'étranger) dont les responsables n'ont pas connaissance de ces dispositions généreuses, puis qui rentre chez lui, conteste la facture (pour en obtenir le remboursement) et finit par ne payer pratiquement rien pour son séjour. Cela pourrait inciter les commerçants à tenter de refuser les cartes étrangères relevant d'un dispositif international.

Deuxièmement, les commerçants peuvent tenter de refuser les cartes de crédit émises dans le pays. Étant donné que la plupart des titulaires de cartes de crédit nationales détiennent aussi des cartes de débit nationales, le commerçant peut vouloir exiger des clients nationaux qu'ils utilisent leur carte de débit nationale, qui induisent des commissions commerçants plus faibles, tout en cherchant à accepter les cartes de crédit émises à l'étranger, puisque les titulaires de ces cartes ne possèdent probablement pas de carte de débit susceptible d'être traitée via le dispositif de paiement par carte de débit nationale.

Si la règle imposant d'accepter toutes les cartes devait subir des modifications, il conviendrait de peser les intérêts des détaillants à l'aune des avantages que procure aux consommateurs le fait de posséder des cartes universellement acceptées.

5.1 Règle interdisant de canaliser le choix des clients

De nombreux systèmes de paiement par carte prévoient, dans leurs conditions de vente applicables aux commerçants, des règles interdisant de canaliser le choix des clients, en d'autres termes d'informer les clients qu'ils préfèrent un type de carte à un autre. Ces règles sont d'une importance capitale puisqu'un grand nombre de clients possèdent plusieurs cartes. On considère souvent que ces clients pratiquent « l'hébergement multiple », car ils disposent de plusieurs possibilités de paiement. Si les commerçants pouvaient choisir, parmi les cartes des consommateurs, celles pour laquelle ils ont une préférence, ils opteraient souvent pour celle qui s'accompagne de la commission commerçant la plus faible⁸⁰. Nombre de commerçants peuvent ne pas être tentés d'orienter leurs clients lorsqu'il ne s'agit pas d'une pratique courante et les clients peuvent s'irriter qu'on leur demande d'utiliser une carte de préférence à une autre. À

⁷⁹ JO L 293, 10.11.2001, p. 37.

⁸⁰ C'est particulièrement vrai lorsque les consommateurs ne bénéficient pas de toute la valeur ajoutée offerte par la différence de commissions commerçants entre une carte présentant une commission plus faible et une carte présentant une commission plus élevée.

l'inverse, si un consommateur détenait une « supercarte » unique, assortie de multiples identifiants pour tous les systèmes auxquels il aurait souscrit, la préférence d'un commerçant à l'égard d'un système de paiement lui paraîtrait moins choquante.

5.2 *La structure de gouvernance*

Dans le domaine des cartes, la structure de gouvernance des principaux systèmes quadripartites a été à l'origine de nombreuses actions en justice relevant du droit de la concurrence. Ce risque juridique est dû à la structure de gouvernance en vertu de laquelle les groupements de cartes de paiement sont détenus par leurs banques membres et les décisions relatives aux prix sont prises par des conseils d'administration où siègent des représentants de ces mêmes banques, les représentants des émetteurs de cartes étant souvent plus nombreux que ceux des acquéreurs. Ce risque juridique explique pour une part que MasterCard Incorporated modifie actuellement sa structure de gouvernance. Selon un document déposé par MasterCard auprès des autorités de tutelle américaines,

« Un grand nombre des difficultés juridiques et réglementaires auxquelles [MasterCard] ... est confronté concernent pour une part notre actionnariat et notre structure de gouvernance, en vertu de laquelle... les clients [de MasterCard] — les institutions financières affiliées ... [à MasterCard] — détiennent la totalité des actions ordinaires [de MasterCard] et participent à ... la bonne gouvernance [de MasterCard] ..., étant donné que leurs représentants siègent ... aux conseils d'administration mondiaux et régionaux [de MasterCard]. Bien que [MasterCard] ... s'attelle fermement à ces difficultés, [MasterCard] ... estime qu'en raison de la mise en place d'un actionnariat et d'une structure de gouvernance plus ouverts à la suite des opérations décrites ci-dessous dans la rubrique « Proposition de modification de l'actionnariat et de la structure de gouvernance », [MasterCard] ... devrait connaître moins de difficultés et ... être mieux armé pour lutter contre les difficultés que [MasterCard] ... pourrait rencontrer, en s'assurant que les ... membres [de MasterCard] détiennent une minorité du capital de [MasterCard] ... et n'ont pas le droit de vote, sauf en ce qui concerne un nombre limité de questions qui ne sont pas sensibles du point de vue de la concurrence ; en assurant la transition vers un conseil d'administration comptant une majorité significative d'administrateurs indépendants de [MasterCard] ... et des membres [de MasterCard] et en limitant, au niveau régional, la participation régulière ... des membres [de MasterCard] à la gouvernance aux seuls organes consultatifs ou, dans le cas de l'Europe, à un conseil régional supervisé par ... le conseil d'administration indépendant [de MasterCard]. » (MasterCard Incorporated, Formulaire 10-K relatif à 2006 (16 mars 2006))⁸¹

5.2.1 *Règles d'affiliation*

Les règles d'affiliation aux groupements peuvent avoir pour effet de limiter l'entrée dans ces groupements. À titre d'exemple, il se peut que des groupements prélèvent des frais excessivement élevés pour les nouveaux membres et discriminatoires envers les institutions non financières, limitant de fait

⁸¹ Selon MasterCard International, « à la suite des opérations relatives à l'actionnariat et à la gouvernance, les investisseurs participant à l'introduction en bourse devraient détenir 61 535 098 actions ordinaires de catégorie A représentant 46 % du capital de notre société et 82 % des droits de vote généraux (ou 66 150 230 actions représentant 49 % du capital et 83 % des droits de vote généraux si les souscripteurs exercent leur option pour acquérir de plein droit des actions supplémentaires), la Fondation MasterCard devrait détenir 13 500 047 actions ordinaires de catégorie A représentant 10 % du capital et 18 % des droits de vote généraux (ou 17 % des droits de vote généraux si les souscripteurs exercent leur option pour acquérir de plein droit des actions supplémentaires) et nos actionnaires actuels devraient détenir 59 965 325 actions ordinaires de catégorie B représentant 44 % du capital (ou 55 350 193 actions représentant 41 % du capital si les souscripteurs exercent leur option pour acquérir de plein droit des actions supplémentaires), ainsi que des actions de catégorie M leur permettant d'élire jusqu'à trois de nos administrateurs et d'approuver certaines mesures significatives prises par la société, sans leur conférer de droit de vote dans tous les autres cas. » MasterCard Incorporated, Formulaire 10-K relatif à 2006 (16 mars 2006)

l'affiliation aux institutions proposant de comptes de dépôt à vue (comptes chèque). Dans la demande d'ordonnance concernant Interac déposée par le Bureau de la concurrence canadien, par exemple, ce dernier a indiqué que les membres principaux d'Interac « ont mis en place une structure et des critères d'affiliation qui sont discriminatoires envers les institutions non financières, dont des tiers exploitants et des détaillants, et envers des membres non principaux⁸² ». Dans certains pays, les règles peuvent être relativement souples et permettre à certaines institutions de dépôt non bancaires d'émettre des cartes, même si ces dernières doivent passer par l'intermédiaire d'une banque. Un courtier en valeurs mobilières (Merill Lynch), par exemple, a émis des cartes de débit permettant d'accéder aux dépôts détenus auprès de la firme de courtage, par l'intermédiaire d'une banque (Maryland Bank) et compte, de fait, parmi les 10 plus grands émetteurs de cartes de débit.⁸³

5.2.2 *Exclusivité*

Parfois, les institutions financières se sont associées en instaurant des plateformes uniques afin d'atteindre des objectifs définis au sein d'une juridiction (comme c'est le cas pour les cartes de débit dans de nombreux pays), de telle sorte qu'une seule plateforme soit exploitée pour proposer un type de paiement donné. Ce cas de figure n'est pas forcément inefficace et dans de nombreux pays disposant d'une plateforme unique pour un type de paiement donné (par carte de débit, par exemple), les commissions commerçants et le coût total des transactions sont inférieurs à ceux des pays comptant de multiples plateformes concurrentes. Dans de telles circonstances, il n'y a généralement pas d'obligation d'exclusivité pour un même mode de paiement, sauf peut-être lorsqu'un nouveau système tente de s'imposer.

Les cartes de crédit et les cartes accréditives constituent un type de plateforme de paiement ; cependant, dans la majorité des pays de l'OCDE, il existe une multitude de plateformes. Dans de nombreux pays, les dispositions relatives à l'exclusivité se sont multipliées, limitant la capacité des émetteurs à mettre sur le marché des cartes portant au moins une marque, voire plusieurs. En ce qui concerne les cartes de crédit et les cartes accréditives, notamment, certaines plateformes ont déployé des efforts significatifs pour continuer de réserver l'affiliation à des émetteurs entièrement dévoués à une seule marque. Des groupements de MasterCard et de Visa, par exemple, ont parfois interdit à certains de leurs membres d'émettre les cartes d'autres membres, ainsi que les cartes American Express et Discover. Dans certains pays, toutefois, la « dualité de l'émission » a été autorisée, sinon imposée et elle a permis aux banques d'émettre simultanément des cartes portant plusieurs marques. De plus, les émetteurs de cartes relevant de systèmes quadripartites sont de plus en plus autorisés à inclure American Express dans leur portefeuille d'émission. Aux États-Unis, le ministère de la Justice a engagé des poursuites⁸⁴ en alléguant que :

« Visa et MasterCard ont nui à la compétitivité d'American Express et de Discover en édictant des règles d'exclusivité interdisant aux membres de leur groupement d'émettre des cartes de crédit sur les réseaux concurrents. Comme la sanction infligée en cas d'émission de cartes American Express ou Discover consiste à priver le membre du groupement de son droit d'émettre des cartes Visa ou MasterCard, les pouvoirs publics estiment que ces 'règles portent le coût d'émission de cartes American Express ou Discover supporté par une banque affiliée à un niveau prohibitif et empêchent

⁸² Voir le Bureau de la concurrence (1995) « Le Directeur dépose une demande d'ordonnance par consentement auprès du Tribunal de la concurrence concernant Interac » communiqué de presse, <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=736&lg=f>, consultée pour la dernière fois le 20 avril 2006.

⁸³ Evans et Schmalensee (2005) p. 241.

⁸⁴ États-Unis d'Amérique c/ Visa U.S.A., Inc., Visa International Corp. et MasterCard International, Incorporated.

quasiment American Express et Discover de convaincre les banques... d'émettre les cartes appartenant à leur réseau⁸⁵. »

Les défenseurs ont fait valoir que « les règles d'exclusion renforcent en fait la concurrence entre les quatre systèmes, car elles empêchent toute fusion de ces systèmes ». Selon eux, si en raison de la « dualité », quelle que soit sa définition, les intervenants sont moins enclins à rivaliser au niveau des réseaux, la « trialité » ou la « quadralité » ne fera qu'aggraver la situation.

La dualité n'est pas présente partout. Au Canada, par exemple, les émetteurs de cartes se caractérisent par « l'unicité », c'est-à-dire qu'ils peuvent émettre des cartes de paiement MasterCard ou Visa, mais pas les deux. Aux États-Unis, les systèmes de paiement par carte de débit Visa ou MasterCard n'étaient pas non plus marqués par la dualité, du fait de la règle d'exclusivité traditionnellement applicable à ce type de paiement. À la suite du procès intenté par le ministère américain de la Justice, la règle d'exclusivité des cartes de débit Visa n'était plus applicable. « Toutefois, Visa a adopté une mesure imposant une commission à ses 100 principaux émetteurs américains de cartes de débit, en cas de réduction de leur volume de paiement par carte de débit Visa supérieure à 10 % ; si elle était mise en œuvre, cette mesure pourrait empêcher ...[MasterCard] de s'approprier les transactions effectuées par d'actuels clients de Visa⁸⁶. »

5.2.3 *Dualité*

La dualité est une forme particulière d'exclusivité, selon laquelle les membres d'une marque peuvent être membres d'une autre marque, mais pas d'une marque tierce. Le ministère américain de la Justice a proposé d'établir une distinction entre la dualité d'émission et la dualité de gouvernance⁸⁷. En vertu de la dualité d'émission, une institution financière émettant une marque de carte (Visa, par exemple) peut également émettre une autre marque de carte (MasterCard, par exemple). Selon la dualité de gouvernance, un régime de gouvernance permet à des institutions de se doter d'une « instance de décision officielle dans un système tout en émettant un pourcentage significatif de ses cartes de crédit et cartes accréditives dans un système concurrent ». Dans l'affaire États-Unis d'Amérique c/ Visa U.S.A., Visa International et MasterCard International, le ministère américain de la Justice et son expert ont exprimé leur inquiétude quant à l'éventuelle communauté d'intérêts des dirigeants de MasterCard et de Visa, car pour bon nombre de dirigeants de l'un de ces systèmes de paiement, le portefeuille des cartes émises incluait souvent de fortes proportions de cartes appartenant à l'autre système. De plus, les membres du conseil d'administration étaient désignés par les banques affiliées et les dirigeants de certaines institutions faisaient partie des deux groupements. Qui plus est, dans tous les cas, l'actionnariat se recoupait pour une bonne part, un grand nombre d'émetteurs affiliés détenant des portefeuilles de cartes qui se distribuaient de manière relativement homogène entre les deux marques. Ainsi, tout en soulignant que le fait d'autoriser les émetteurs à proposer de multiples marques de cartes serait utile et aurait tendance à accroître la production et la concurrence afin d'offrir de nouvelles caractéristiques, le ministère américain de la Justice a également indiqué que seuls les émetteurs engagés de manière prépondérante auprès d'une marque donnée seraient autorisés à siéger au conseil d'administration des sociétés représentant cette marque.

Traditionnellement, les conseils d'administration de deux grandes plateformes de paiement (Visa et MasterCard) comptaient parmi leurs membres des représentants des banques émettrices de cartes⁸⁸. Compte tenu de la dualité de certaines banques émettrices (émettant à la fois des produits Visa et

⁸⁵ Décision 98 Civ. 7076 (BSJ), Tribunal de district des États-Unis, Southern District of New York.

⁸⁶ MasterCard Incorporated, Formulaire 10-K relatif à 2006 (16 mars 2006).

⁸⁷ États-Unis d'Amérique c/ Visa U.S.A., Inc., Visa International Corp. et MasterCard International, Incorporated.

⁸⁸ Lors du procès NaBanco, les dirigeants étaient souvent issus des acquéreurs.

MasterCard), bon nombre de banques affiliées à l'un des deux groupements étaient également membres de l'autre. Sur le plan de la gouvernance, il y avait une forte convergence des intérêts. Le ministère américain de la Justice a déclaré que cela freinait dans une certaine mesure l'innovation et la concurrence entre les marques et que, si la dualité de l'émission était bénéfique, la dualité de la gouvernance serait préjudiciable. En fait, avant l'apparition de la dualité de l'émission, les groupements de cartes de paiement avaient eux-mêmes fait remarquer qu'elle nuirait à la concurrence. Cependant, le tribunal a jugé que les preuves soumises pour attester de la nocivité de la dualité de la gouvernance étaient insuffisantes pour fonder la plainte.

6. Faut-il modifier les dispositifs?

Les pouvoirs publics ont institué une panoplie de règles, règlements et conventions afin de limiter certains des problèmes apparents de concurrence et d'efficacité des cartes de crédit et de débit. En principe, il convient de mettre en évidence une grave défaillance du marché ou une problématique de distribution nécessitant une intervention, puis mettre en œuvre une démarche permettant d'améliorer la situation. Comme il est sans doute impossible de trouver la démarche idéale pour diverses raisons juridiques, réglementaires ou politiques, il sera sans doute judicieux de partir du principe que la démarche choisie améliorera sensiblement la situation, sans nécessairement se traduire par les plus grandes améliorations possibles.

Les choix juridiques et réglementaires se présentant aux pouvoirs publics diffèrent, de même que les problèmes de concurrence et d'efficacité évalués pour les systèmes de paiement par carte. Les pouvoirs publics hésitent souvent à réglementer ou à promouvoir le changement dans un secteur qui, dans certains pays, s'est développé dans un contexte de faible intervention de l'État. Par conséquent, les démarches adoptées au regard de ce secteur varient considérablement d'un pays de l'OCDE à l'autre. Les grands choix qui se présentent sont les suivants :

- Non-intervention ;
- Réglementation ou décisions destinées, entre autres, à restreindre la tendance de systèmes concurrents plus onéreux et inefficients à dominer les systèmes moins coûteux et plus efficaces ou à éviter les transferts entre titulaires de cartes et non-titulaires ;
 - Modification des commissions ;
 - Modification, dans les contrats des cartes de paiement, des conditions indépendantes des commissions ;
- Autorisation des activités conjointes exercées par les commerçants ;
- Promotion de nouvelles technologies susceptibles d'amener les systèmes existants à modifier leur grille tarifaire selon des modalités favorables aux systèmes de paiement plus efficaces.

6.1 *Non-intervention*

De l'avis de plusieurs commentateurs, la non-intervention pourrait être l'attitude la plus judicieuse à l'heure actuelle. Tirole et Rochet indiquent qu'avant de prendre des mesures, il conviendrait de procéder à (i) une mise en évidence théorique d'une défaillance significative du marché qui soit validée empiriquement et à (ii) une identification précise du moyen permettant de remédier à cette défaillance en provoquant le moins de distorsions possibles et en étant sûr que le résultat obtenu ne sera pas pire que la

situation actuelle⁸⁹. Ils estiment qu'aucune de ces conditions n'est satisfaite, puisque le débat reste houleux et que de fortes incertitudes demeurent quant aux effets des éventuelles démarches que peuvent adopter les pouvoirs publics. La non-intervention est donc selon eux l'attitude la plus judicieuse.

6.2 Mesures destinées, entre autres, à restreindre la tendance des systèmes plus onéreux et inefficients à dominer les systèmes concurrents moins coûteux et plus efficaces ou à éviter les transferts entre titulaires de cartes et non-titulaires

6.2.1 Modification des commissions

Après avoir conclu que certaines conventions relatives aux cartes de paiement sont extrêmement préjudiciables, les pouvoirs publics de certains pays ont cherché à favoriser l'introduction de commissions et de frais davantage conditionnés par les coûts. Si de nombreux observateurs ont laissé entendre que la réglementation des commissions pourrait limiter de manière excessive le comportement des intervenants en cas de dualité du marché, des éléments attestent que la disparition des groupements annoncée par certains des opposants à la réglementation ne s'est pas produite et que le total des coûts de transaction est peut-être légèrement inférieur à ce qu'il serait sans cela.

Pourtant, plusieurs critiques pourraient s'appliquer de manière générale à la réglementation des prix dans le domaine des paiements par carte. Selon Guerrin-Calvert et Ordovery (2005), « la réglementation des prix – en particulier celle qui détermine ou plafonne les commissions en fonction d'une partie, mais pas de la totalité des indicateurs de coûts du service – n'est pas garantie, difficile par nature à mettre en œuvre sans fausser les décisions et propre à créer des inefficiences significatives et à nuire à un marché qui sans cela, serait effectivement concurrentiel ».

6.2.2 Réglementation des commissions

En Australie, par exemple, MasterCard, Visa et Bankcard ont été priés en 2003, par la Banque de réserve d'Australie, de ramener leurs commissions interbancaires de quelque 0.95 % à 0.55 % environ. Il leur a également été demandé de renoncer à leurs règles interdisant de facturer un supplément⁹⁰. De ce fait, la moyenne des commissions de service commerçants est revenue, pour ces cartes, de quelque 1.40 % aux alentours de 0.95 %⁹¹. Les commissions d'American Express et de Diners Club ont échappé à ces mesures d'encadrement. Néanmoins, après la réduction des commissions interbancaires sur les plateformes quadriparties, American Express a ramené ses commissions commerçants moyennes de 2.48 % environ à quelque 2.30 %. La Banque de réserve d'Australie a récemment annoncé de nouvelles évolutions du contrôle des commissions prélevées pour les cartes de débit, qui auront probablement pour effet de ramener les frais inhérents au système de transfert électronique de fonds au point de vente (généralement versés par les émetteurs aux acquéreurs) de 20 cents environ aux alentours de 4 ou 5 cents et les commissions correspondant aux cartes de débit Visa de quelque 40 cents par transaction à 15 cents environ.

Selon Rochet et Tirole (2003b), la réglementation pure des commissions interbancaires en fonction des coûts n'est pas adaptée en raison de la dualité du marché. À leur avis, même s'il n'y a peut-être aucune raison de croire que les dispositifs de paiement fixeront des commissions interbancaires socialement optimales (elles pourraient être supérieures ou inférieures à ces commissions socialement optimales), cela

⁸⁹ « An Economic Analysis of the Determination of Interchange Fees in Payment Card Systems », Review of Network Economics, Juin 2003 (*en anglais uniquement*).

⁹⁰ American Express et Diners Club n'ont pas été soumis à la règle relative aux commissions interbancaires et se sont engagés à supprimer leurs règles interdisant de facturer un supplément.

⁹¹ *Bulletin* de la Banque de réserve d'Australie, Tableau C3.

ne justifie pas en soi une telle réglementation. En particulier, cela ne justifie pas la réglementation des coûts. Rochet et Tirole estiment que les dispositifs de paiement ont la lourde tâche de s'assurer que les titulaires et les commerçants adhèrent au réseau et que les marchés peuvent fonctionner à la seule condition que les deux volets du réseau soient convenablement équilibrés, en particulier en prenant en compte les élasticités de la demande sur les deux volets du marché.

L'autre possibilité, qui est peut-être davantage cohérente avec la dualité présumée du marché, serait d'introduire une réglementation fondée à la fois sur les coûts et sur la demande, donc comparable à la tarification de Ramsey, les paiements étant alors fonction de la sensibilité aux prix des payeurs, définie de manière appropriée⁹². Une telle réglementation nécessiterait néanmoins une connaissance approfondie, qui fait généralement défaut aux pouvoirs publics, des diverses options disponibles en matière de cartes de paiement et de modes de paiement concurrents, comme les chèques et les espèces. Même s'il est possible d'acquérir une telle connaissance des élasticités de la demande, il serait cependant difficile de mettre en œuvre une réglementation de ce type.

Chang et al. (2005) ont indiqué que l'action des pouvoirs publics australiens a été suivie d'une augmentation de la valeur des transactions effectuées à l'aide des cartes de crédit les plus onéreuses (American Express et Diners Club). Selon d'autres observateurs, American Express aurait probablement émis des cartes par l'intermédiaire de banques australiennes indépendamment de toute diminution des commissions interbancaires ; la progression de la part d'American Express se serait donc probablement produite dans tous les cas, American Express ayant commencé à émettre des cartes par l'intermédiaire d'établissements bancaires et signé des conventions avec quelque 100 banques à l'échelle mondiale.

Chang et al. (2005) précisent également qu'aucun élément n'atteste que l'abaissement des commissions interbancaires a entraîné une diminution des prix au détail. Eu égard à la hausse du coût des cartes de crédit pour le consommateur (via les commissions annuelles et autres), certains estiment que l'action des pouvoirs publics australiens n'a pas conféré d'avantages aux consommateurs (Avocat de Visa, Réunion de printemps de l'Association du Barreau américain sur la loi antitrust, 2006).

Ces critiques à l'encontre de l'action des autorités australiennes sont probablement prématurées, voire inexacts. Des calculs approximatifs indiquent que la réduction des commissions commerçants agrégées concernant une large proportion des transactions réalisées à l'aide de cartes de crédit est nettement supérieure à la variation agrégée des commissions applicables aux titulaires de cartes accréditives et au faible pourcentage des transactions (2 % environ) s'effectuant désormais par carte accréditive et non plus à l'aide d'une carte appartenant à un groupement. Même si la diminution des commissions commerçants était intégralement contrebalancée par une hausse des prix pour les titulaires de carte, les réformes pourraient réussir à condition de modifier de manière adéquate les incitations offertes aux utilisateurs d'instruments de paiement et de les aligner davantage sur les coûts de ces instruments. De plus, dans la mesure où la croissance des paiements par carte de crédit et carte accréditive est plus modérée qu'elle ne l'était, cela serait cohérent avec les déclarations selon lesquelles ces modes de paiement étaient surutilisés avant l'introduction de réglementations ayant eu pour effet d'aligner davantage les incitations sur les coûts.

Katz (2001) affirme que l'intérêt que l'on manifeste communément pour les commissions interbancaire est sans doute trop limité. Cela s'explique notamment par le fait que l'autorité centrale du réseau peut prélever des commissions auprès des acquéreurs et des émetteurs. Ces commissions « compensatoires » viennent s'ajouter aux commissions interbancaires classiques. Puisque certains paiements s'effectuent par le biais de l'autorité centrale du réseau, si les commissions interbancaires sont

⁹²

Rochet et Tirole (2003) en ont tiré un certain nombre de conditions caractérisant la concurrence entre différentes plateformes de paiement et qui, pour la demande linéaire du moins, peuvent coïncider de façon surprenante avec la tarification de Ramsey.

réglementées ou supprimées alors que les autres paiements demeurent, un réseau pourrait dupliquer l'impact des commissions interbancaires par le biais de paiements compensatoires judicieusement adaptés. (Katz 2005 p. 123) Ainsi, dans la pratique, les réglementations qui se concentrent exclusivement sur les commissions interbancaires pourraient *in fine* être contournées.

Selon certaines critiques, enfin, la réglementation des commissions interbancaires se traduit par une réglementation asymétrique des systèmes tripartites et des systèmes quadripartites, conférant de fait un avantage aux systèmes pour lesquels le coût des ressources est le plus élevé. De plus, selon d'autres observateurs, comme American Express effectue des paiements assimilables à des commissions interbancaires au profit de ses banques partenaires, s'il y a des motifs de réglementer, il faut aussi réglementer ce type de paiements. La Banque de réserve d'Australie s'est déclarée, du moins pour l'instant, opposée à une réglementation des sommes versées par American Express aux banques émettrices qui sont ses partenaires.

Comme l'a déclaré récemment le gouverneur adjoint M. Lowe⁹³ :

« Premièrement, nous avons estimé que le fait de réglementer les paiements au profit des banques partenaires n'aurait qu'une faible incidence sur les commissions de service commerçants d'American Express. Si ces conventions semblent s'apparenter aux dispositifs quadripartites traditionnels, une importance de taille demeure – à savoir qu'American Express reste le seul acquéreur de ses transactions. Eu égard à cette absence de concurrence concernant l'acquisition des transactions d'American Express, si la réglementation imposait à American Express d'effectuer des paiements moins importants à ses banques partenaires, les pressions directes qu'il subirait pour abaisser ses commissions commerçants seraient très faibles. Cette opinion contraste fortement avec ce qui s'est produit lorsque les commissions interbancaires ont été diminuées dans les autres systèmes, où compte tenu de la forte concurrence existant sur le côté acquisition du marché, la baisse des commissions interbancaires s'est très vite traduite par une diminution des commissions commerçants. Ce phénomène ne se serait certainement pas produit dans le dispositif d'American Express.

Deuxièmement, il est peu probable que les incitations des banques à émettre des cartes American Express aient été affectées par la demande de la Banque de réserve enjoignant American Express de revoir à la baisse les paiements destinés à ses banques partenaires. Compte tenu de la nature des contrats liant American Express et les banques émettrices, une réduction des paiements interbancaires aurait pu être compensée par d'autres formes de paiements correspondant à la commercialisation et à l'assistance concernant le produit. En principe, cette question aurait pu être traitée en réglementant la totalité des paiements en faveur des banques émettrices, y compris les paiements au titre de la commercialisation. Nul doute que certains auraient alors demandé une réglementation similaire de MasterCard et de Visa. Notre opinion, et je pense qu'elle est largement partagée, est qu'une réglementation aussi étendue ne sert pas l'intérêt général. » (Lowe, 2006)

6.2.3 Commission interbancaire à taux nul

La fixation d'une commission interbancaire à taux nul pourrait être considérée comme une réglementation des prix identique, sur le plan fonctionnel, à un système dépourvu de commission interbancaire. De l'avis de certains observateurs, l'existence d'une commission interbancaire à taux nul n'est pas nécessaire à la préservation d'un système de paiement. Balto (2000) s'est déclaré en faveur de la

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Nota : Le gouverneur adjoint Philip Lowe fait partie de la Banque de réserve d'Australie; il ne s'agit pas de Philip Lowe, qui est Directeur général de DG Compétition. Toutes les citations de la présente note attribuées à M. Lowe concernent le gouverneur adjoint de la Banque de réserve d'Australie.

commission interbancaire à taux nul. Il estime que les coûts pourraient être couverts directement par les consommateurs.

Selon Visa, en l'absence de commission interbancaire, « l'ampleur des activités de Visa, et partant, leur impact concurrentiel, seraient fortement réduits. Le « produit » offert aux deux catégories d'utilisateurs pourrait être différent et d'un niveau inférieur ; les titulaires de cartes auraient accès à un réseau de commerçants plus restreint et à une communauté réduite de titulaires de cartes »⁹⁴.

Au Canada, le mode de paiement le plus couramment utilisé (Interac) s'est imposé sans commission interbancaire. Au Danemark, plus de 80 % des transactions concernent les cartes de débit faisant l'objet d'un règlement au pair. « Aux États-Unis, le réseau Interlink était le plus vaste réseau de paiement par carte de débit à code PIN, bien que fonctionnant selon le principe de la parité. Visa a racheté Interlink, puis fixé une commission interbancaire pour ses transactions. Ces dernières années, Visa a relevé ses commissions à plusieurs reprises » (Frankel et Shampine, 2006). Selon EuroCommerce, le dispositif allemand ec-Karte, qui passe pour un système quadripartite, fonctionne sans commission interbancaire commerçant. Sur la foi d'analyses menées par Visa et révélées lors du procès Visa Check, Lloyd Constantine a déclaré que Visa prévoyait « non seulement qu'à moins d'une intervention de Visa, les réseaux de paiement par carte de débit au pair à code PIN, arrivés à maturité remplaceraient les paiements par carte de débit à signature par des commissions interbancaires applicables aux cartes de crédit, mais également que la concurrence des réseaux de paiement par carte de débit au pair arrivés à maturité réduirait le produit que Visa et MasterCard tirent des cartes de crédit à concurrence d'une somme estimée par Visa, en dollars de 1991, entre 701 millions et 3,5 milliards USD par an. » (Constantine, 2005)

Constantine note qu'en réponse au danger que représentent les paiements par carte de débit à code PIN, « l'offensive déloyale de Visa et MasterCard prévoyait notamment la suppression du clavier de saisie du code PIN, le rachat du plus grand réseau de paiement par carte de débit à code PIN, Interlink, et sa transformation de réseau florissant à règlement au pair en levier destiné à contraindre d'autres réseaux de paiement par carte de débit à code PIN à abandonner leur règlement au pair, ainsi que la désintermédiation, par MasterCard, d'un réseau national naissant formé des réseaux régionaux, via Maestro, pratiquement abandonnés par MasterCard aux États-Unis (en dépit de sa réussite dans d'autres régions du monde). Les banques ont été payées pour renoncer aux réseaux régionaux de paiement par carte de débit et les six principales banques émettrices de cartes de débit ont été ciblées les premières pour que leur sortie des réseaux régionaux de paiements par carte de débit produise un effet de « domino » ou de « boule de neige », entraînant la sortie de 100 autres grandes banques émettrices de cartes de débit » (Constantine, 2005, p. 160-161)⁹⁵.

6.2.4 Satisfaire à la norme de Farrell : l'indifférence du commerçant

Farrell (2006) a proposé dernièrement d'établir une norme concernant l'action à mener, qui permettrait de s'assurer que le choix du système de paiement est judicieux⁹⁶. Il note que la « concurrence peut s'épanouir à la seule condition que le client ait tendance à choisir la meilleure des offres qui lui est faite ; ... D'ordinaire (sur des marchés dotés d'une clientèle classique), cela va sans dire, ou presque, mais

⁹⁴ Extrait de la Décision de la Commission relative à l'affaire COMP/29.373 – Visa International – Commission multilatérale d'interchange. JO L 318, 22.11.2002, p. 27.

⁹⁵ Diverses allégations sont présentées dans la requête de jugement sommaire déposée par des commerçants auprès du tribunal de district chargé de l'affaire Visa Check (voir <http://www.inrevisacheckmastermoneyantitrustlitigation.com>). Avant le procès, le tribunal a rendu un jugement sommaire concernant plusieurs plaintes déposées par des commerçants.

⁹⁶ Farrell, Joseph, Efficiency and Competition between Payment Instruments, Review of Network Economics, mars 2006. http://www.rnejournal.com/articles/farrell_march06.pdf (en anglais uniquement)

du fait d'une asymétrie d'esprit d'équipe existant par nature entre le commerçant et le titulaire de la carte, la grille tarifaire des instruments de paiement fausse souvent le choix de l'instrument de paiement effectué par cette équipe imparfaite que constitue le client dual. » Au lieu de se focaliser sur les tests de bien-être, Farrell s'attache essentiellement au principe qui consiste à s'assurer que les clients sont convenablement incités à effectuer le bon choix entre les options qui leur sont offertes. Il fait remarquer que, dans le cas des cartes de paiement, les incitations des titulaires de cartes pèsent surtout dans le choix du mode de paiement, de sorte que pour que le consommateur effectue le bon choix, il doit se voir proposer une grille tarifaire qui favorise un choix judicieux. « Aligner les incitations du titulaire de carte quant au choix de l'instrument de paiement sur les intérêts (conjoint) du client dual a pour effet de rendre le commerçant indifférent à l'instrument de paiement utilisé. En d'autres termes, il faut que le total des coûts d'acceptation à la charge du commerçant, y compris les frais de traitement qu'il supporte et la déduction sur les fonds qu'il perçoit, ainsi que les avantages moins tangibles en termes de commodité et de sécurité, soient équivalents pour l'ensemble des instruments de paiement⁹⁷ » (Farrell, 2006, p. 32).

Farrell estime que si le critère de l'indifférence du commerçant ne s'applique pas en même temps à tous les instruments de paiement, « il importe surtout qu'il s'applique aux couples d'instruments qui sont pratiquement interchangeables aux yeux des titulaires de cartes ». Il considère également que « ce critère est destiné à aider le client dual à effectuer (en son for intérieur), parmi les offres qui lui sont présentées, un choix optimal en matière d'instrument de paiement. À moins que les bénéfices marginaux ne soient égaux, il ne coïncide pas avec un choix efficient au sens de Pareto entre ces offres, thème de prédilection des publications les plus récentes. Il n'implique pas non plus une réglementation du niveau global des commissions, comme le ferait une intervention générale des autorités de tutelle. En ce sens, même si on pourrait le décrire comme une norme de bien-être du client (dual) compte tenu des offres (niveau des commissions compris) faites pour des instruments de paiement concurrents, il ne s'agit pas d'une véritable norme de bien-être du client, car celle-ci prévoirait sans doute un contrôle du niveau des commissions » (Farrell, 2006, p. 33).

Ce critère se rapporte principalement aux commissions commerçants, et non aux commissions interbancaires. Néanmoins, on peut établir un lien avec les commissions interbancaires lorsqu'un commerçant bénéficie avec un système de paiement X et un système de paiement Y des mêmes avantages en termes de traitement, de commodité et de sécurité : si le système de paiement X est assorti d'une commission interbancaire qui est répercutée « de façon à 'faire évoluer' les commissions commerçants applicables à l'instrument de paiement », alors le critère serait rempli dès lors les commissions interbancaires du système de paiement X atteindraient un niveau tel que la commission commerçant pour X rendrait le commerçant indifférent à Y et à X. À titre d'exemple, si un système de paiement X, présentant une commission interbancaire de 1.6 %, était assorti d'une commission commerçant de 2 % (et si les acquéreurs recevaient 0.4 %), et si un système de paiement Y, présentant une commission interbancaire de 0.2 %, était assorti d'une commission commerçant de 0.5 % (et si les acquéreurs recevaient 0.3 %), le critère d'indifférence serait rempli si la commission interbancaire de X pouvait être ajustée à 0.1 %, d'où une commission commerçant de 0.5 %. Autre possibilité : ce critère serait rempli si la

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Le critère de l'indifférence du commerçant peut être rebaptisé du point de vue du client (de l'utilisateur de la carte) en « critère du client éclairé ». Si le commerçant est indifférent, cela signifie que les coûts différentiels à sa charge sont pris en compte dans le calcul, par le client, de l'impact des autres modes de paiement possibles, associé à la propre valeur différentielle du client (pour certaines transactions, par exemple, un client peut apprécier de pouvoir reporter le paiement à plusieurs mois et donc accorder une plus grande valeur à une carte de crédit qu'à une carte de débit.) Pour que le client fasse le bon choix en ce qui concerne le système de paiement à utiliser, du point de vue des deux parties à la transaction, il doit ainsi faire l'expérience de tous les coûts du client dual, c'est-à-dire prendre en compte, lorsqu'il décide du système de paiement à utiliser, l'intégralité des coûts du client dual (commerçant + client).

commission interbancaire de Y pouvait être ajustée à 1.7 %, ce qui donnerait une commission commerçant de 2 %⁹⁸.

Cette norme n'impose pas que les commissions interbancaires soient fondées sur les coûts mais, dans certaines circonstances, elle pourrait donner des indications quant à l'approche à adopter en la matière. Supposons, par exemple, que des commerçants considèrent que les instruments de type « carte » sont « équivalents, sauf en matière de prix ». Supposons donc qu'un commerçant considère qu'une carte de débit est équivalente, de son point de vue, à une carte de crédit. Ou encore qu'un commerçant estime qu'une carte de débit à signature est équivalente à une carte de débit à code PIN. Le critère de l'indifférence du commerçant impliquerait alors que les commissions commerçants sont égales. En résumé, la commission interbancaire, plus le coût marginal d'acquisition des ressources, plus le bénéfice marginal des acquéreurs seraient identiques pour les deux modes de paiement. Si on suppose que l'acquisition est extrêmement concurrentielle (et qu'elle présente des bénéfices identiques en termes absolus), alors les deux modes de paiement seraient assortis d'une commission interbancaire égale à une constante minorée du coût d'acquisition. Si l'on fixait la constante de sorte qu'elle soit égale aux coûts marginaux du système, le critère de l'indifférence du commerçant serait rempli. « En principe, toutefois, le critère de l'indifférence du commerçant ne joue généralement pas en faveur d'une commission interbancaire fondée sur les coûts ; il constitue plutôt un critère de référence en fonction duquel on évalue si, d'un point de vue pragmatique, elle serait préférable à un *statu quo*. »

Appliquer le critère de l'indifférence du commerçant à tous les systèmes de paiement pourrait être un idéal vers lequel il faut tendre mais, dans la pratique, il est très difficile à mettre en œuvre dans la plupart des pays, pour un ensemble de raisons liées aux systèmes judiciaires, à la dispersion des compétences en matière de réglementation et à l'absence d'autorité judiciaire chargée de superviser un ou plusieurs des *n* systèmes de paiement en activité⁹⁹.

Pour se rapprocher du critère de l'indifférence du commerçant, on peut par exemple procéder à un ajustement des commissions interbancaires pour les systèmes qui en sont pourvus. Dans certaines structures réglementaires et juridiques, c'est peut-être la méthode la plus judicieuse et la plus facile à mettre en œuvre pour rapprocher les systèmes de paiement de l'idéal préconisé par le critère de l'indifférence du commerçant. On pourrait également s'intéresser directement aux commissions commerçants. Si les commerçants, par exemple, étaient contraints de fixer des prix différents pour les divers modes de paiement en fonction d'estimations raisonnables des coûts qu'ils supportent pour chacun d'eux, ce qui est possible dans un monde où les transactions électroniques se multiplient et où les factures sont établies électroniquement, alors les utilisateurs de cartes de crédit paieraient effectivement davantage que les utilisateurs de cartes de débit, en supposant que les commissions commerçants prélevées pour les cartes de crédit soient supérieures à celles qui s'appliquent aux cartes de débit. Que ce soit par le biais d'une remise, dans le cadre du système le plus onéreux, ou d'un supplément dans celui qui coûte le moins cher, l'écart de prix entre différents systèmes de paiement réduirait, voire éliminerait, les distorsions du régime de tarification actuel qui peuvent inciter de nombreux consommateurs à préférer les méthodes de paiement plus onéreuses aux méthodes moins coûteuses.

⁹⁸ Farrell note qu'un tel raisonnement « doit être interprété dans un sens large ou comme une moyenne lorsque les comparaisons avec les commissions commerçants de l'instrument j et de l'instrument k donnent des résultats différents ou lorsque les commerçants n'attachent pas la même valeur, d'un point de vue non marchand, à l'utilisation de divers instruments de paiement. » (p. 33)

⁹⁹ Le critère de l'indifférence du commerçant se fonde sur des commissions *relatives*. Avec *n* systèmes, l'une des commissions ne nécessiterait donc aucun contrôle, pour autant que les autres commissions soient fixées en fonction d'elle. Cela concerne tout particulièrement les espèces, pour lesquelles les commerçants ne doivent peut-être pas verser de commission particulièrement élevée, qu'elle soit positive ou négative, et pour lesquelles il ne serait pas facile de réglementer de telles commissions. Compte tenu de ces éléments, les espèces devraient naturellement faire office de système de paiement « de référence » pour établir des comparaisons relatives.

L'approche consistant à déterminer les prix en fonction des coûts est exposée dans le tableau 3, en prenant l'exemple du supplément. Supposons, pour l'instant, que les coûts supportés par les commerçants pour différents mécanismes de paiement sont composés exclusivement de la commission commerçant¹⁰⁰. Dans ce contexte, le consommateur acquitte, pour l'utilisation d'une carte de crédit, un prix légèrement supérieur à celui qu'il paierait pour l'utilisation d'une carte de débit, elle-même facturée plus cher que l'utilisation des espèces. La majoration des commissions commerçants applicables à certains systèmes de paiement est donc contrebalancée par celle du revenu qu'en tirent ces systèmes, de sorte que le commerçant est indifférent aux diverses options disponibles. Le commerçant perçoit un revenu net de 100 quel que soit le système de paiement utilisé¹⁰¹.

Tableau 3. Comparaison des systèmes de paiement et des éléments incitant les consommateurs à les utiliser

	Prix à la consommation avec supplément	Valeur de l'avantage offert au consommateur (ex : programme de fidélité des compagnies aériennes)	Commission commerçant	Revenu net du commerçant	Coût net pour le client dual	Revenu de la société de cartes de paiement
Espèces	100	0	0	100	0	0
Carte de débit	100.4	0	0.4	100	0.4	0.4
Carte de crédit	102	0.5	2.0	100	1.5	1.5*
Carte à débit différé	103	0.7	3.0	100	2.3	2.3*

* Ces chiffres du revenu perçu par la société de cartes de paiement correspondent à des chiffres bruts et non à des marges. Pour obtenir des marges, il faudrait intégrer le coût des avantages offerts au client.

Pour être efficace, la détermination des prix en fonction des coûts devrait être obligatoire. En effet, en l'absence d'obligation d'établir une tarification différenciée, les commerçants sont confrontés au dilemme du prisonnier : il se peut qu'ils aient une préférence pour la tarification différenciée, mais il est peu probable qu'ils la pratiquent à titre individuel, car cela irriterait certains de leurs clients et leur ferait perdre une partie d'entre eux¹⁰². L'obligation de fixer les prix en fonction des coûts résoudrait la question du dilemme du prisonnier de telle façon que les variations des commissions commerçants se répercuteraient sur les prix à la consommation, créant ainsi, entre les systèmes de paiement pouvant être utilisés par les consommateurs, une forme de concurrence qui tendrait à promouvoir le développement des systèmes peu coûteux et à réduire la taille des systèmes onéreux¹⁰³. Cela étant, la tarification fondée sur les coûts

¹⁰⁰ En fait, les commerçants peuvent supporter des coûts différents pour des systèmes de paiement différents. Les espèces, par exemple, peuvent induire des coûts supérieurs à 0 compte tenu de leur coût de traitement, de la nécessité de se déplacer plus souvent à la banque en cas d'utilisation accrue, de l'obligation d'approvisionner plus fréquemment les caisses en pièces et en billets, etc. (Notons toutefois que les coûts pertinents pour l'utilisation des espèces sont davantage liés à des hausses marginales de l'utilisation des espèces qu'aux espèces proprement dites.)

¹⁰¹ Dans un souci de simplification, cet exemple ne tient pas compte des différences concernant les avantages offerts aux commerçants en termes de traitement, de commodité et de sécurité. Il serait néanmoins aisé de les prendre en considération. Il est peu probable qu'ils réduisent la différence de prix à la consommation existant entre les paiements par carte de crédit et les paiements par carte de débit (1.6%), car les commerçants doivent supporter pour ces deux types de paiement des coûts très similaires en termes de traitement, de commodité et de sécurité. Ils pourraient néanmoins limiter la différence existant entre les paiements par carte de crédit et les paiements au comptant, par exemple.

¹⁰² Certains secteurs pourraient être exclus de ce régime de tarification si l'introduction d'un tel mécanisme s'y avérait trop coûteuse ; ce pourrait être le cas, notamment, des activités où un pourcentage élevé des factures sont établies à la main (taxis, restaurants).

¹⁰³ Les différences de coûts relatives prendraient en compte une estimation des différents avantages conférés au commerçant en termes de traitement, de commodité et de sécurité.

induirait des coûts de mise en œuvre, qu'il conviendrait de rapporter aux gains de ressources pouvant en être retirés.

La fixation des prix en fonction des coûts pourrait être mise en œuvre soit en appliquant un supplément, soit en accordant une remise. Dans la pratique, les effets de la première solution sur les consommateurs pourraient être sensiblement différents de ceux de la seconde, en dépit de l'équivalence des prix qui leur sont proposés, car les consommateurs n'en ont pas la même perception. Un supplément pourrait être perçu comme un élément qu'il convient davantage d'éviter que l'absence de remise^{104 105}.

La tarification fondée sur les coûts éliminerait ou réduirait sensiblement le phénomène des « subventions croisées » qui apparaît lorsque, dans un contexte de fixation de prix uniforme pour différentes méthodes de paiement, les utilisateurs de cartes autres que les cartes de crédit acquittent un prix plus élevé que celui qu'ils paieraient autrement et que les utilisateurs de cartes de crédit paient un prix moins élevé. Les détracteurs de la tarification fondée sur les coûts font valoir que c'est justement parce qu'elle éliminerait les subventions croisées qu'elle induirait une réduction des outils que peuvent utiliser les dispositifs de paiement pour s'assurer que les deux côtés du marché (consommateurs et commerçants) participent à la plateforme.

6.2.5 *Obligation de séparation obligatoire*

Dans un grand nombre de pays de l'OCDE, beaucoup de commerçants se voient imputer des frais qui sont « unifiés », c'est-à-dire que les frais sont identiques pour MasterCard et Visa, même si les commissions interbancaires sont différentes pour les deux sociétés. Cette unification réduit la sensibilité potentielle des commerçants aux variations des prix relatives aux commissions interbancaires d'une plateforme donnée, et peut entraîner de graves distorsions des éléments incitant les plateformes à abaisser leurs commissions commerçants. Pour éviter toute unification, il est notamment possible d'exiger, pour les paiements par carte, une facturation et des relevés séparés pour chaque marque de carte. Cette séparation permettrait aux commerçants de mieux connaître les différences de prix existant entre les plateformes de cartes concurrentes et, de ce fait, les prix applicables aux commerçants reflèteraient davantage les coûts.

6.3 *Modification des conditions indépendantes des commissions*

Les conditions indépendantes des commissions des systèmes de paiement portent essentiellement sur le comportement à l'interface d'acquisition du commerçant, l'interface de la carte et l'interface des réseaux avec les acquéreurs et les émetteurs.

6.3.1 *Interface du commerçant*

A l'interface du détaillant, les principaux aspects indépendants des commissions comprennent des règles comme :

- L'obligation d'accepter toutes les cartes

¹⁰⁴ En d'autres termes, la façon dont est « structuré » un régime de prix applicable aux paiements pourrait avoir des conséquences importantes sur l'usage du consommateur, en dépit de l'équivalence existant entre des prix différents. (Voir Kahnemann et Tversky (1979) "Prospect theory: an analysis of decision under risk". *Econometrica* 47: 263-291 (*en anglais uniquement*.)

¹⁰⁵ Certains observateurs feront probablement remarquer que les espèces coûtent globalement plus cher à la société que ces coûts ne l'indiquent. Même si tel est le cas, les consommateurs se voient de plus en plus appliquer une commission pour obtenir des espèces, comme c'est le cas dans de nombreux pays lorsqu'ils recourent à un distributeur automatique. Une analyse complète des coûts susceptibles d'être comparés pour différents mécanismes de paiement n'entre pas dans le cadre de ce document.

- L'interdiction de canaliser les choix
- La transparence de la commission interbancaire

6.3.2 *Obligation d'accepter toutes les cartes*

La règle imposant d'accepter toutes les cartes requiert que les commerçants indiquant qu'ils acceptent les cartes d'une marque donnée seront tenus d'accepter toutes les cartes de cette marque. Cela étant, quelque groupements quadripartites ont étendu la règle de sorte qu'en acceptant leurs cartes de crédit, non seulement il faut accepter toutes les présentations de cette carte de crédit, mais il faut aussi accepter leurs autres produits (comme les cartes de débit). Dans la mesure où cette règle s'applique à des cartes dotées de « caractéristiques différentes », elle pourrait être jugée inappropriée. Après le litige Check Visa et MasterCard, Visa et MasterCard aux États-Unis ont dû autoriser les commerçants à accepter des cartes Visa ou MasterCard d'un certain type (par exemple, de crédit) tout en rejetant l'autre (par exemple, de débit). Le Payment Systems Board de la Banque de réserve d'Australie a récemment requis que Visa et MasterCard désolidarisent de la même manière l'acceptation par les commerçants des produits de crédit et de débit, demandant l'inclusion de marqueurs visuels et électroniques clairs pour distinguer ces deux types de produits.

6.3.3 *Interdiction de canaliser les choix*

Habituellement, les commerçants ne sont pas autorisés à canaliser le choix des clients ou à les orienter vers certains instruments de paiement ou à les en détourner. Ces limites sont imposées par la convention que doivent signer les commerçants pour avoir le droit d'accepter les cartes. Même si de nombreux commerçants aimeraient pouvoir orienter les clients vers des modes de paiement moins coûteux (par exemple, des cartes de crédit vers les cartes de débit), ils n'ont pas le droit de se livrer à de telles manœuvres. Selon Rochet et Tirole, la canalisation des choix exercerait une pression qui ferait baisser les commissions commerçants. (Rochet et Tirole, 2003, p. 1008) Les groupements de cartes pourraient insinuer que les tentatives répétées de détourner les clients d'une marque de carte pourraient finir par stigmatiser cette marque pour un client et entraîner le rejet de ce mode de paiement par les clients. De leur point de vue, la canalisation des choix pourrait donc réduire la valeur de la marque qu'elles créent et, par conséquent, réduire leurs incitations à investir dans cette marque. Les actions entreprises pour éliminer les règles d'interdiction de canaliser le choix des clients doivent soigneusement peser les avantages et les inconvénients d'une telle suppression.

Dans le système actuellement prédominant où les commerçants n'appliquent pas différents prix pour différents mécanismes de paiement, ils sont confrontés à différentes commissions commerçants. Étant donné que les commissions commerçants sont relativement élevées pour les factures réglées par carte de crédit et par carte accréditive, alors qu'elles sont bien plus faibles pour les cartes de débit, de nombreux commerçants préféreraient recevoir des paiements au moyen de cartes de débit si on leur donne le choix entre des cartes de crédit/cartes accréditives ou les cartes de débit. Cependant, s'ils devaient refuser des cartes de crédit, beaucoup de clients potentiels seraient, dans la pratique, exclus du paiement. Notamment, les clients étrangers auraient souvent des difficultés à effectuer des paiements, car ils n'auraient pas la carte de débit qui est compatible avec les programmes nationaux correspondants. De nombreux commerçants auraient donc tout intérêt à accepter des paiements par cartes de débit sur les systèmes nationaux correspondant à ce type de règlement (donc quitte à refuser les cartes de crédit/cartes accréditives émises nationalement) tout en recevant les paiements par carte de crédit/cartes accréditives des étrangers qui n'ont pas de cartes de débit compatible avec les systèmes nationaux. Les règles actuelles concernant les commerçants les empêchent d'effectuer ou d'encourager de tels choix.

6.3.4 *Informations sur les coûts*

Non seulement les émetteurs restreignent les incitations des commerçants aux consommateurs pour qu'ils recourent à des modes de paiement moins coûteux, mais ils peuvent aussi limiter la diffusion d'informations sur les coûts des transactions à l'aide de cartes (en dehors de la commission commerçants). En particulier, les commissions interbancaires sont souvent classées comme confidentielles par les groupements de cartes.

La Commission européenne, lors de sa décision d'exonération pour les commissions interbancaires multilatérales de Visa, a demandé une amélioration de la transparence, déclarant que « Visa modifiera son règlement intérieur régional pour l'Union européenne de manière à permettre aux banques membres de révéler aux commerçants aussi bien le niveau des CMI [commissions multilatérales d'interchange] intrarégionales de Visa en vigueur dans l'Union européenne que les pourcentages relatifs des trois catégories de coûts. Les commerçants doivent être informés de la possibilité qu'ils ont d'obtenir ces informations auprès de leur banque¹⁰⁶. »

6.3.5 *Caractéristiques physiques des cartes*

Les caractéristiques physiques d'une carte, tant visuelles que non visuelles, peuvent avoir une influence décisive sur la capacité d'un commerçant à canaliser le choix des clients et sur les différents systèmes de paiement à assurer réellement un hébergement multiple. Parmi les règles qui ont été remises en cause figure le mode de présentation visuelle des cartes et l'incorporation d'informations électroniquement encodées sur les réseaux de paiement multiples que le détenteur de la carte peut utiliser avec cette carte. A la suite de l'affaire Check Visa et MasterCard, MasterCard et Visa ont été tenus, aux États-Unis, d'avoir des marques clairement distinctes pour leurs produits de débit et autres. Les groupements de cartes sont accusés d'avoir découragé la greffe de marques de réseaux de paiement alternatives sur leurs cartes de débit, pour favoriser l'utilisation de la carte de débit de leur marque. En encourageant des systèmes de paiement alternatifs à se greffer sur une seule carte physique, on peut promouvoir la concurrence entre des systèmes de paiement et donner aux commerçants plus de capacité à canaliser le choix des clients. La canalisation du choix des clients, quant à elle, peut permettre aux commerçants de mieux réagir aux disparités de commissions commerçants entre les différentes cartes.

6.3.6 *Interface entre l'institution financière et le réseau*

Les réseaux de paiement ont souvent des règles d'adhésion qui imposent des restrictions à ceux qui peuvent émettre des cartes ou acquérir des transactions. Ces restrictions ont souvent limité le cercle des membres à des institutions financières ou à des banques agréées. De telles règles ont notamment pour conséquence de garantir que les membres ne seront pas confrontés à des incitations introduisant un mélange des genres (par exemple, des gros commerçants pourraient chercher à devenir membres et à acquérir leurs propres transactions). Leurs règles de vote accordent souvent un grand poids aux émetteurs. L'impact de ces règles peut être intéressant. En particulier si, comme on le verra plus loin, les commerçants sont davantage incités à mettre en place un système de transaction à bas prix que les banques, l'adhésion et la représentation des commerçants pourraient avoir des effets salutaires.

6.4 *Action conjointe des commerçants*

Un des principaux obstacles au développement de nouveaux instruments de paiement réside dans la difficulté d'obtenir une large acceptation d'un nouveau système de paiement, y compris des terminaux correspondants, par les commerçants. Une méthode qui peut contribuer à susciter une large participation

¹⁰⁶

JO L 318, 22.11.2002, p. 21.

des commerçants pourrait consister à les autoriser à créer une coentreprise en vue du développement d'un nouvel instrument de paiement pour le commerce de détail ou à d'autres fins de coordination commune. Une entreprise formée de commerçants aurait des motivations économiques fondamentalement différentes de celles des systèmes quadripartites existants (dans le cadre desquels la motivation est de maximiser les résultats bancaires) et tripartites (dans le cadre desquels la motivation est avant tout de maximiser les bénéfices des systèmes de paiement). Les systèmes de carte existants génèrent de gros bénéfices par le biais de commissions élevées sur l'utilisation de la carte. Les commerçants ont, en revanche, généralement intérêt à introduire des systèmes qui appliquent de faibles commissions et qui ne maximisent pas les bénéfices des banques ou des systèmes. En fait, dans un pays où les commerçants contrôlaient le système d'acquisition (Australie), les commissions interbancaires étaient versées de l'émetteur à l'acquéreur pour des transferts électroniques de fonds au point de vente¹⁰⁷.

L'action des commerçants consistant à former un réseau d'acquisition, par exemple, modifierait totalement les conditions de négociation entre les commerçants et les réseaux de cartes de paiement. En outre, si un réseau d'acquisition était associé à la création d'un nouveau système de cartes de paiement, les commerçants seraient en mesure de créer un réseau de grande portée avec des incitations fondamentalement différentes de celles des réseaux existants.

Les commerçants se sont préoccupés des questions de droit de la concurrence qui pourrait être invoquées à leur encontre au cas où ils formeraient une coentreprise. Par exemple, s'ils établissaient une coentreprise qui crée une carte assortie d'une commission interbancaire nulle, puis refusaient d'accepter une quelconque autre carte assortie d'une commission interbancaire nulle, les commerçants craignent que le droit de la concurrence ne soit utilisé contre eux. En outre, pendant la période de constitution d'une telle coentreprise, les sociétés de cartes existantes pourraient essayer d'« acheter » des gros commerçants, qui formeraient certainement le socle d'une telle coentreprise, en leur faisant plusieurs propositions, consistant notamment à abaisser les commissions interbancaires¹⁰⁸. Le cas échéant, les autorités de la concurrence pourraient envisager de déclarer publiquement et explicitement que ces coentreprises, si elles sont correctement structurées, n'enfreindraient pas le droit de la concurrence.

Au moins une représentante d'une autorité de la concurrence a précisé qu'elle était personnellement convaincue que les commerçants pouvaient sans doute former une coentreprise pour créer un réseau de paiement « organisé de façon à ne pas enfreindre le droit de la concurrence¹⁰⁹. » Les autorités de la concurrence préoccupées par les pratiques existantes de paiement par cartes pourraient prendre des mesures en faveur de la création de réseaux concurrents aux motivations fondamentalement différentes de celles des réseaux de paiement existants. Cela exigerait des autorités de la concurrence et, plus généralement, des systèmes juridiques qu'ils cherchent à savoir si une action commune des commerçants (source alternative la plus probable de coalescence pour un système de paiement) dans le domaine des paiements serait légale et, en particulier, si les commerçants pouvaient :

- constituer une coentreprise qui serait leur l'unique prestataire de services d'acquisition ou de terminaux ;
- convenir de développer, de commercialiser et de promouvoir un nouvel instrument de paiement ;
- convenir d'une commission interbancaire pour un nouvel instrument de paiement ;

¹⁰⁷ La notion de « transfert électronique de fonds au point de vente » correspond à l'acronyme anglais EFTPOS ou « electronic funds transfer at the point of sale ».

¹⁰⁸ Il arrive déjà que les commissions d'utilisation pour les commerçants soient nettement inférieures pour les gros commerçants qui se servent de terminaux extrêmement perfectionnés que pour les petits commerçants.

¹⁰⁹ http://www.kansascityfed.org/PUBLICAT/PSR/Proceedings/2005/Regulatory_Gen_Discuss.pdf

- convenir de commissions maximums pour des instruments de paiement alternatifs ;
- convenir de boycotter les autres instruments de paiement ; et
- convenir d'une ristourne sous forme de paiement ou d'un supplément sous forme de paiement qui serait fonction des coûts moyens que représenterait pour les commerçants chaque type de paiement.

6.5 *Nouvelles technologies*

Des technologies naissantes existent sur l'Internet et les téléphones portables qui pourraient permettre aux consommateurs d'effectuer des paiements sans passer par une plateforme pour les cartes. Il pourrait être judicieux de faire en sorte que les nouveaux prestataires de ces technologies aient accès à des informations de compte correctes concernant le consommateur, et éventuellement aux comptes des consommateurs, pour que les nouvelles technologies puissent faire une entrée réussie sur le marché avec une offre de services étendue. Autrement dit, il pourrait être utile, par exemple, que les éventuelles technologies nouvelles permettent d'effectuer des vérifications des soldes et de débiter directement le compte bancaire d'un client, si le client a donné une autorisation en ce sens. Il pourrait être également utile que les prestataires de cette nouvelle technologie n'aient pas les mêmes motivations de contrôle que les banques. Par exemple, si les nouvelles technologies coopéraient avec les détaillants pour obtenir qu'ils adhèrent largement au système, la concurrence entre des systèmes inspirés par différentes motivations s'en trouverait favorisée.

La Finlande propose des services bancaires par téléphone portable depuis 1996. A l'origine, les services bancaires par téléphone portable (comme les virements bancaires) étaient actionnés par SMS. Désormais, on a mis au point des systèmes de téléphone par l'Internet (Wireless Application Protocol ou WAP). Les utilisateurs de téléphone peuvent effectuer des virements de fonds vers un système de paiement, puis utiliser leur téléphone portable pour demander le paiement depuis leur système de paiement vers les détaillants choisis. Des paiements peuvent aussi être effectués en contactant un numéro de téléphone ou en envoyant un SMS pour signaler une demande de produit. La facturation de ces services est ensuite intégrée à la facture téléphonique de l'utilisateur. Cette méthode a été utilisée pour les distributeurs automatiques, les parcs de stationnement et les transports publics.

7. **Si une intervention des pouvoirs publics a lieu, quel organe de l'administration publique doit intervenir?**

Les pouvoirs publics sont intervenus de différentes façons pour influencer les aspects des systèmes de paiement par carte qui sont préoccupants pour la politique de la concurrence¹¹⁰. La plupart du temps, il peut s'agir d'interventions des autorités de la concurrence ou de mesures de réglementation éventuellement plus générales. La démarche la plus judicieuse dépend sans doute d'une combinaison de facteurs qui varient d'une juridiction à l'autre :

- Nature et gravité du problème potentiel
- Origine du problème
- Normes juridiques

¹¹⁰

Les mesures des pouvoirs publics se sont également concentrées sur plusieurs autres initiatives des sociétés de cartes, en particulier des sociétés de cartes de crédit, comme le plafonnement des taux d'intérêt, la diffusion de notices d'informations claires, le recouvrement de créances, etc.

- Pouvoirs réglementaires
- Possibilité d'amélioration à partir de solutions envisageables émanant des pouvoirs publics
- Impacts relatifs sur les futurs investissements et l'innovation

Selon John Vickers, « en partie en raison de cet important recoupement éventuel, on ne peut affirmer que la démarche de la politique de concurrence est généralement meilleure ou pire que la démarche réglementaire. Mais elle a ses avantages, sous réserve qu'elle soit efficace, par exemple en évitant la nécessité de dispositions ou de structures législatives ou réglementaires particulières. »

Dans bien des juridictions, il n'existe pas d'autorité de tutelle clairement définie qui soit habilitée à surveiller les paiements par carte et la création d'une telle autorité pourrait exiger une nouvelle législation, comme cela a été le cas en Australie. Dans de nombreuses juridictions, on a le sentiment que le droit de la concurrence peut traiter des mesures mises en œuvre par des coentreprises (systèmes quadripartites) plutôt que par des systèmes tripartites, même si ces derniers ont des commissions commerçants qui témoignent d'une plus grande exploitation d'un pouvoir de marché que les systèmes quadripartites. En outre, le droit de la concurrence peut être plus soumis à plus de restrictions quant au traitement des problèmes et davantage sujet à des remises en cause. Mais quand il n'y a pas d'autorités de tutelle ou qu'elles sont, pour diverses raisons, incapables de prendre des mesures ou n'en ont pas envie, l'intervention des autorités de la concurrence peut être la solution la plus réalisable pour améliorer les imperfections apparentes du marché.

En Australie, la banque centrale possède de larges pouvoirs de réglementation concernant les paiements qui viennent de la création d'un Payment Systems Board [Conseil des systèmes de paiement], au sein de la banque centrale, cette instance étant habilitée à agréer un système de paiement et à le réglementer. Le Payment Systems Board s'est intéressé aux commissions interbancaires des cartes de crédit, dans leur état de 2003, et aura réglé la question du plafonnement des commissions interbancaires des cartes de débit et des conditions ne portant pas sur les commissions au moyen de règles qui entreront en vigueur à la fin de 2006. La banque centrale et l'autorité de la concurrence ont travaillé conjointement, tout d'abord pour préparer une étude sur les cartes de paiement et élaborer ensuite des solutions. L'autorité australienne de la concurrence a dans un premier temps enquêté sur le secteur des cartes de débit et s'est penchée sur les propositions de réforme du système de transfert électronique de fonds au point de vente, mais lorsque le Payment Systems Board a décidé que ce système relevait de sa compétence, l'autorité de la concurrence a renoncé à intervenir de façon indépendante dans ce domaine. Le Payment Systems Board est bien plus en mesure d'adopter une démarche intégrée quels que soient les systèmes de paiement qu'une autorité de la concurrence et elle a pour principe qu'il faut évaluer la conduite au regard de « la concurrence, l'efficacité et la stabilité financière ». (Simon, 2005)

Un avantage des approches réglementaires est que les autorités de tutelle sont plus à même d'avoir « une démarche prospective »¹¹¹. Autrement dit, pour qu'une action en justice soit engagée aux termes du droit de la concurrence, il faut qu'il y ait une violation de la loi. De nombreuses activités dans le domaine des systèmes de paiement peuvent ne pas constituer une violation de la loi, malgré les défaillances du marché. Les autorités de la concurrence peuvent donc ne pas être en mesure d'agir. Contrairement aux autorités de la concurrence, les autorités de tutelle peuvent agir en l'absence de violation. Une telle souplesse pourrait, de manière générale, donner lieu à des débordements si l'on utilisait l'autorité à mauvais escient, mais elle pourrait être le seul moyen de traiter une conduite préjudiciable sans pour autant être illégale.

¹¹¹ Simon, 2005.

Dans de nombreuses juridictions, c'est dans ce domaine que les autorités de la concurrence ont pris les mesures les plus énergiques, souvent faute d'autorité de tutelle dûment habilitée. Une solution couramment proposée a été l'adoption d'une norme fondée sur les coûts pour le règlement différé. Certains ont affirmé qu'une telle « réglementation » n'avait aucun sens dans un marché dual. Fondamentalement, assurent-ils, ces règles reviennent à diviser les coûts entre le client et le commerçant (le client dual), limitant ainsi artificiellement la capacité des systèmes de paiement à fournir les incitations qui peuvent être nécessaires pour promouvoir l'acceptation d'un système par les commerçants ou son utilisation par les consommateurs. Aux États-Unis, des recours privés ont permis d'obtenir à la fois un important règlement financier (en faveur des commerçants) et des modifications considérables de la règle obligeant à accepter toutes les cartes¹¹².

8. Conclusion

Le présent rapport a cherché à traiter de nombreux problèmes importants actuellement concernant les cartes de paiement. Son but n'était pas de donner une vue d'ensemble exhaustive¹¹³, mais plutôt de présenter un ensemble d'informations qui seront utiles pour les pouvoirs publics.

Les aspects qui ressortent de ce rapport donnent à penser que, dans le domaine des cartes de paiement pour les détaillants de façon générale :

- Le marché présente une grosse défaillance car les coûts relatifs des différents mécanismes de paiement sont rarement reflétés dans les prix payés par les consommateurs ;
- Cette défaillance du marché fait notamment que la libre concurrence aboutit sans doute à une utilisation d'une ampleur disproportionnée des systèmes de paiement à coût élevé ;
- Le pouvoir du marché est exercé par les émetteurs de cartes contre les commerçants ;
- Il est probable que les clients qui achètent sans carte (souvent à faible revenu) « subventionnent » implicitement les utilisateurs de cartes.

Un grand débat a lieu pour savoir si le préjudice causé par ces caractéristiques des cartes de paiement suffit à justifier une action de la part des autorités de la concurrence, des autorités de tutelle du secteur financier ou de parties privées. Les gouvernements s'orientent cependant de plus en plus vers une certaine forme d'intervention, qu'elle soit limitée ou étendue. Ces mesures pourraient notamment consister à accorder la priorité aux aspects suivants :

Réglementation des commissions

- Suppléments/ristournes : garantir que les prix pour les consommateurs puissent ou doivent refléter les différences de coûts
- Réglementation fondée sur les coûts : limiter les commissions à une certaine forme de recouvrement des coûts

¹¹² Voir l'affaire Visa Check /MasterMoney.

¹¹³ Compte tenu des contraintes de longueur, bien des problèmes importants n'ont pas été traités dans ce rapport, tels que l'impact du refus des réseaux d'autoriser un contournement et du refus des réseaux, dans certaines circonstances, d'être disponibles pour des cartes à hébergement multiple.

- Réglementation relative fondée sur les coûts : s’assurer que les consommateurs bénéficient d’incitations qui les amèneront à utiliser des modes de paiement à faible coût le cas échéant
- Tarification de Ramsey : s’assurer que les prix reflètent les niveaux relatifs de la demande entre les différentes catégories de clients
- Conditions indépendantes des commissions
 - En ce qui concerne l’obligation d’accepter toutes les cartes : empêcher l’offre groupée de cartes permettant un certain type de paiement avec des cartes permettant un autre type de paiement
 - En ce qui concerne l’interdiction de canaliser les choix : permettre aux détaillants d’orienter leurs clients vers leurs modes favoris de paiement
 - En ce qui concerne l’élimination de l’unification des commissions : faire en sorte que les détaillants sont confrontés à des commissions distinctes pour différents systèmes de cartes de paiement
- Gouvernance
 - Accroissement de la capacité des établissements non bancaires à jouer un rôle dans l’émission ou l’acquisition

Des approches moins réglementaires face aux problèmes apparents sur le marché des cartes de paiement consisteraient notamment à autoriser et à habilitier prioritairement de nouvelles formes de concurrence et des concurrents ayant des motivations fondamentalement différentes de celles des principaux mécanismes de paiement actuels. Il faut en effet dans l’ensemble garder à l’esprit que les mécanismes de paiement chez les détaillants ont une finalité élémentaire simple qui consiste à transférer la valeur d’une entité (le client) à une autre (le commerçant). Fondamentalement, rien ne justifie que les banques se chargent d’organiser ce transfert, sauf que les banques tendent à servir de centre de stockage de la valeur pour les clients, de combinaison de préférences et de réglementations concernant les clients. À long terme, cependant, d’autres intermédiaires pourraient se développer. L’utilisation des cartes n’est pas inévitable, par exemple, par rapport à d’autres modes d’identification sûre du consommateur.

- Il faudrait envisager d’autoriser les commerçants à constituer des entités de paiement, des coentreprises d’acquisition ou d’autres entités de négociation, car cela favoriserait la concurrence ou les négociations entre parties ayant des motivations fondamentalement différentes ;
- Il faudrait envisager des méthodes destinées à promouvoir l’entrée par de nouvelles technologies potentielles.

Si les systèmes de cartes existants cherchent à désarmer de nouvelles formes potentielles de paiement qui représentent une menace pour leurs flux de bénéfices, les autorités de la concurrence devront se montrer particulièrement vigilantes pour s’assurer que des nouveaux systèmes de paiement peuvent se développer sans être rachetés ou cooptés, car il se peut que ce soit à travers de nouveaux systèmes qu’une innovation spectaculaire se produise ; à long terme, une telle innovation pourrait offrir les meilleures perspectives pour résoudre des problèmes qui ne semblent pas devoir se résorber dans l’immédiat.

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ANNEXE A. ÉTUDE PAR CRUICKSHANK DE LA RENTABILITÉ BANCAIRE

« Des taux de rentabilité qui restent constamment élevés à travers un marché économique indiquent que ce marché n'est pas pleinement concurrentiel. Pour établir si les taux sont 'trop élevés', il faut d'abord trouver un élément de comparaison : le niveau de rentabilité attendu si la concurrence sur le marché fonctionnait efficacement. Ce n'est vraiment pas simple et toutes les méthodologies présentent leurs problèmes. »

« En conséquence, l'Étude a utilisé diverses méthodologies pour essayer d'établir si les marchés économiques concernés ont affiché (ou afficheront) des niveaux de rentabilité nettement supérieurs aux attentes dans le cas où la concurrence fonctionnait correctement. Plus particulièrement, l'Étude a analysé les données comptables et comparé les taux comptables de rentabilité au regard d'une norme comptable ; et elle a analysé les informations sur les marchés et les a comparées à une norme fondée sur les marchés. »

« La rentabilité de nombreux marchés bancaires est très sensible au cycle de l'activité. Quand les prestataires tirent une part importante de leurs revenus en accordant des crédits à leurs clients (à travers des prêts personnels, des crédits aux entreprises, des hypothèques, des cartes de crédit ou des découverts en comptes courants, par exemple), la rentabilité du marché dépend inévitablement dans une large mesure de l'existence de créances irrécouvrables, quand les clients ne peuvent rembourser leur prêt ou les intérêts. Les taux de créances irrécouvrables dépendent quant à eux de la santé économique plus générale du Royaume-Uni. En outre, compte tenu des conventions comptables, le moment où une défaillance sur prêt se produit ne coïncide pas tout à fait avec son impact sur les bénéfices comptables. »

« Cela signifie que la rentabilité doit être mesurée tout au long du cycle d'activité pour se faire une certaine idée de la rentabilité relative de ces activités par rapport au reste de l'économie. »

Cruickshank a utilisé deux principaux indicateurs de rentabilité : les rendements sur le marché (rentabilité des capitaux propres ou taux internes de rendement) et les rendements comptables.

Rendements sur le marché

« Un moyen de mesurer les rendements effectifs pour les actionnaires est de suivre pendant une période donnée la performance d'un investissement nominal dans les entreprises du sous-secteur concerné entrant dans la composition de l'indice FT All Share. Un investisseur achetant des actions (pondérées de la capitalisation boursière) dans des banques britanniques au cours de l'action cotée à la fin de décembre 1988, réinvestissant les dividendes dans le même portefeuille et vendant les actions à la fin de décembre 1998, aurait vu chaque 1.00 GBP investie devenir 11.07 GBP. La conservation des actions de décembre 1988 à décembre 1999 aurait généré un rendement de 12.96 GBP. »

« Il est impossible de mesurer le rendement attendu pour les actionnaires sur un marché bancaire efficacement concurrentiel. Des comparaisons ont été effectuées avec les rendements sur d'autres marchés et des corrections ont été apportées pour tenir compte de différences fondamentales entre les deux secteurs. Deux ajustements importants sont nécessaires pour prendre en compte la différence de

risques non diversifiables (ajustement du bêta) et l'efficacité de la concurrence sur le marché servant à la comparaison. »

« Le rendement pour les actionnaires du marché correspondant à l'indice FT All Share exprime le caractère risqué du marché d'actions dans son ensemble (autrement dit, avec un bêta de 1), soumis aux pressions concurrentielles moyennes à travers l'économie britannique. Le rendement pour les actionnaires de ce marché (y compris le sous-secteur bancaire), pendant la même période (décembre 1988 à décembre 1998) a été de 4.43 GBP pour un investissement de 1.00 GBP. De décembre 1988 à décembre 1999, il a été 5.50 GBP. »

« Au moins une partie de la différence entre les rendements pour les actionnaires du secteur bancaire (11.07 GBP) et du marché boursier (4.43 GBP) viendra de la différence de risque indiversifiable entre les valeurs bancaires et le marché boursier dans son ensemble. En 1989, le bêta du secteur bancaire était de 0.95. Il était monté à 1.58 en 1998. En utilisant la méthodologie du Modèle d'évaluation des actifs financiers (MEDAF), il est possible de calculer le rendement supplémentaire permettant de dédommager les investisseurs de la divergence du bêta bancaire par rapport au marché boursier dans son ensemble. Cette correction produit un rendement attendu en 1998 de 5.13 GBP pour une valeur suivant la performance du marché boursier dans son ensemble (y compris le sous-secteur bancaire), mais avec le bêta du secteur bancaire. Pour la période allant de décembre 1988 à décembre 1999, il s'est établi à 6.80 GBP. »

« Cela étant, si les marchés bancaires sont moins efficacement concurrentiels que le reste de l'économie, la comparaison de leurs résultats avec ceux du marché boursier dans son ensemble, hors secteur bancaire, a un sens. Avec cette correction (et si l'on inclus un important ajustement par rapport aux bêtas relatifs), le rendement attendu pour un investissement avec le même bêta que le secteur bancaire et la même efficacité moyenne en termes de concurrence pour l'ensemble de l'économie sans la banque, est de 4.44 GBP pour la période de décembre 1998 à décembre 1998, et de 5.95 GBP pour la période de décembre 1998 à décembre 1999. »

Taux interne de rendement

« Une autre méthode pour examiner le rendement pour les actionnaires consiste à calculer le taux de rendement interne (TRI) des revenus dont ont bénéficié les actionnaires sous forme de dividendes et d'éventuelles plus-values réalisées lors de la vente d'actions, pour un investissement effectué à un moment donné. Ce flux de revenus est évalué en calculant le taux d'actualisation qui serait nécessaire pour réduire sa valeur immédiate nette à zéro. Ce taux d'actualisation correspond au taux de rendement interne (TRI) de cet investissement. »

« Cette analyse a été effectuée sur les quatre grandes banques. Elle a abouti à un TRI moyen de 24 % par an sur la période 1987-99. Le résultat équivalent pour le marché boursier dans son ensemble, corrigé de la différence de risque (bêta) était de 20 %. Si l'on retire les banques de l'échantillon du marché, on obtient un TRI de 19 %. Sur cette base, les investisseurs dans un portefeuille contenant ces quatre grandes banques ont enregistré en moyenne 5 points de plus par an que dans le cadre d'un investissement de risque équivalent sur le marché boursier dans son ensemble. Sur une période de 12 ans, cela représente une prime de rendement d'environ 65 %. Si l'on avance la date de départ à 1989, on obtient une augmentation aussi bien du rendement excédentaire annuel que de la prime de rendement totale pour la période de 10 ans. »

Rendements comptables

« La méthode comptable indique que les rendements totaux à ce jour pour les entreprises de l'échantillon (de 1989 à fin 1999) ont été neutres à excessifs durant la période. Dans l'échantillon, on constate des écarts considérables. Mais surtout, du point de vue prospectif, toutes les entreprises de l'échantillon ont enregistré – à quelques exceptions près – et c'est le cas depuis plusieurs années, des rendements considérablement plus élevés que le coût de leurs fonds propres. Le résultat sur 11 ans soulève cependant quelques incertitudes, dues à la divergence entre les indicateurs économiques et les indicateurs comptables. Il est clair cependant qu'en tant que groupe, si le niveau actuel de rentabilité de ces entreprises se poursuit pendant un certain temps, les rendements durant le cycle deviendront manifestement excessifs. Les mesures de rendements sur le marché donnent une indication bien plus claire du caractère excessif des rendements pour les actionnaires durant la période de 1988 à 1999. »

« Les indicateurs comptables pour les bénéfices et la rentabilité... se fondent sur les conventions comptables. Sans affecter les performances effectives de l'entreprise, ces chiffres peuvent changer considérablement en utilisant simplement différentes conventions et modes d'évaluation. L'élément de comparaison dérivé du MEDAF ne changerait pas. Par conséquent, avant de tirer une quelconque conclusion finale sur la signification des résultats comptables, il est nécessaire de s'assurer que ces conclusions se fondent sur des mesures réelles plutôt que sur de simples conventions comptables. »

« Une des faiblesses les plus graves des indicateurs comptables de rentabilité est qu'à tout moment, la mesure réelle des charges d'exploitation et des valeurs des actifs peut être erronée dans les comptes, si les dépenses et les investissements opérationnels ne sont pas évalués sur une base économique. Autrement dit, l'évaluation des fonds propres ne reflètera pas la valeur économique nette de la société. En conséquence, l'indicateur des bénéfices (recettes moins charges d'exploitation) et de la rentabilité (bénéfices divisés par les fonds propres) peut ne pas refléter une réalité économique. »

« Par exemple, les dépenses sous forme d'investissement économique peuvent être comptabilisées comme des charges d'exploitation. Cela tend à faire baisser l'évaluation des bénéfices durant l'année où elles se produisent et entraîne une sous-estimation des actifs utilisés. Durant l'année en question, les bénéfices de même que la rentabilité seront sous-estimés. Les années suivantes, les bénéfices seront surestimés, les fonds propres sous-estimés et la rentabilité surestimée. Cela continue ainsi jusqu'à ce que la valeur économique de l'actif créé arrive à zéro. Le même type d'erreur survient si l'amortissement d'un actif dans les comptes ne correspond pas à la perte de valeur économique de cet actif. Si l'amortissement se fait trop vite, cela signifie que les bénéfices et la rentabilité sont tout d'abord sous-estimés, puis surestimés ; quand il se fait trop lentement, c'est le contraire qui se produit. »

« À terme, le montant total des bénéfices comptables ne change pas, contrairement à l'année durant laquelle il apparaît. Ainsi, les erreurs concernant le montant des bénéfices s'estompent au fil du temps. Ce n'est cependant pas le cas des évaluations de la rentabilité. Plus les investissements sont traités comme des dépenses courantes, ou plus vite les actifs sont amortis, plus le taux comptable des bénéfices est élevé par rapport à la rentabilité dont ont effectivement bénéficié les actionnaires. Ce phénomène est dû à un décalage dans le temps des données comptables par rapport aux bénéfices effectifs (dont peuvent bénéficier les actionnaires ou qui sont investis dans le développement de l'entreprise) et à la sous-estimation du capital effectivement lié à la production des biens ou des services. Cet aspect est plus ou moins important selon que le bilan reflète ou non l'évaluation économique des actifs et des passifs à tout moment et selon l'ampleur du décalage dans le temps entre le moment où surviennent les bénéfices réels et le moment où ils apparaissent dans les comptes. »

Aucune de ces estimations ne ventile les bénéfices selon le domaine d'activité, ce qui serait le plus souhaitable pour rassembler des informations sur la rentabilité des cartes pour juger si la rentabilité était superconcurrentielle. Cependant, Cruickshank estime avec prudence, sur la base d'une répartition des fonds propres selon les proportions prévues par la réglementation, que les taux de rendement des fonds propres avant impôt s'établissaient à 30 % pour les services bancaires aux particuliers au Royaume-Uni, au sein desquels peuvent être incluse la prestation de services de cartes¹¹⁴. (Cruickshank, p. 24)

¹¹⁴

Les taux de rendement pour l'activité des entreprises sont considérablement plus bas, car ce marché a une portée plus nationale ou internationale.

AUSTRALIA

This note provides background on the Australian card payments system and regulatory arrangements. It sets out the main policy initiatives and explains the reasoning underlying regulation of interchange fees. The final section sets out the main effects of the reforms implemented to date. Further details of developments in Australia can be found in the references.

1. Background

Payment cards have become increasingly important in Australia over the past 15 years, as use of cheques has fallen rapidly. Around 85 per cent of adult Australians have a debit card and 55 per cent a credit card. Australians now make around 60 credit and 60 debit card payments per head each year, and the value of credit card payments is equivalent to 30 per cent of household consumption.

Before 2003, the international credit card schemes operated much as they do in many parts of the world, with no surcharge rules, honour all cards rules, membership restricted to supervised deposit-taking institutions and jointly-determined interchange fees (which were the same for MasterCard and Visa and averaged 0.95 per cent) paid by acquirers to issuers. Most banks issued both MasterCard and Visa cards. American Express¹ and Diners Club operated three-party schemes.

Around 15 per cent of debit card transactions are signature-authorised scheme debit. They have the same interchange fees and merchant service fees as credit cards and are processed in exactly the same way as credit cards. The remaining 85 per cent of debit card transactions take place in the domestic PIN-based system, known as EFTPOS. Interchange fees in the EFTPOS system are bilaterally negotiated and, in contrast to virtually all other mature systems, are paid in the opposite direction to the credit card system, that is, paid by card issuing banks to acquiring banks. These flat rate fees have been virtually unchanged since the system was established in the 1980s and average around A\$0.20 (€0.12).

These features of the credit card and EFTPOS systems had important effects on pricing to users on both sides of these two-sided markets, and on the behaviour of users of the systems.

In 1999, four-party credit card merchant service fees averaged 1.8 per cent of the transaction value and for the three-party schemes around 2.9 per cent. Merchant fees for EFTPOS were more complex. Some large merchants had been able to negotiate arrangements with their acquirers under which they were *paid* a rebate of A\$0.10-0.15 per EFTPOS transaction by acquirers. Most small merchants paid flat fees of around A\$0.50 to \$1.00 to their banks.

Cardholders paid an annual fee of around A\$20-25 (€12-15) on most credit cards. Most credit cards had an interest-free period ranging from 44 to 55 days. Especially from the mid 1990s, many provided a loyalty scheme, sometimes for an additional annual charge. While around 75 per cent of credit card balances incurred interest, the evidence suggests that a reasonable approximation was the rule of thumb that one third of cardholders always revolved their balances, one third sometimes did and one third were always transactors and paid off their balances in full each month. The result was that credit cardholders

¹ American Express had one relationship under which a small local bank issued its cards.

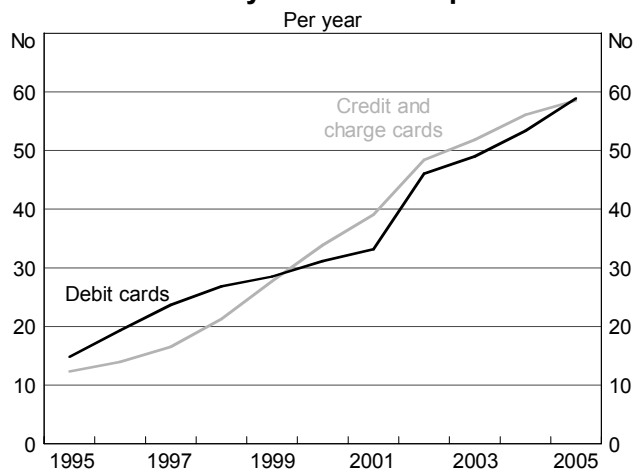
faced prices at the margin that meant their transaction cost was either zero or negative (if they benefited from the interest-free period and loyalty points).

In contrast, in an environment where card issuers had to pay A\$0.20 whenever their customers made an EFTPOS transaction, issuers developed pricing strategies that allowed a small number of fee-free EFTPOS transactions each month and then levied a charge, usually in excess of A\$0.20. The result was that debit cardholders faced a transaction price that was either zero or positive. That remains the case, although more recently most banks have simplified their pricing, offering accounts with higher monthly charges of around A\$5 (€3) and unlimited electronic transactions.

Scheme debit cards are generally offered with EFTPOS functionality on the same card. Whether the transaction is routed through the scheme or the domestic EFTPOS system depends on which button the cardholder pushes at the terminal. Not surprisingly, given the different interchange flows in the two systems, issuers of scheme debit cards encourage their cardholders to push the button that routes the transaction through the scheme. When the transaction is processed through the scheme, the issuer receives an interchange fee (at today's average transaction value, of around A\$0.40) and if it is processed through the EFTPOS system, issuers pay an average of A\$0.20.

The result of these incentives to cardholders was that by the mid 1990s, credit card growth was strongly outstripping debit card growth. Interestingly, at that time only relatively small financial institutions issued scheme debit cards and MasterCard did not offer this product in Australia.

Graph 1
Card Payments Per Capita*



* Break in series in January 2002 due to change in statistical collection and coverage.

2. The Statutory Framework

It is well known that the Reserve Bank of Australia has intervened to address several of the institutional arrangements described above.

The genesis of that intervention was an inquiry into the financial system commissioned by the Government in the second half of the 1990s. The Inquiry concluded that the Australian payments system was not as efficient as it could be, and was concerned particularly about questions of access, technology and interchange fees. It also concluded that the then current self-regulatory arrangements were unlikely to bring about the necessary changes, and recommended that the Reserve Bank be given responsibility and powers to increase competition and efficiency in Australia's payments system.

The Government accepted the Inquiry's recommendation and gave the Bank responsibility and powers to promote competition, efficiency and stability in the payments system, principally by setting standards and access regimes. The Bank's policy on these matters is determined by a separate Board of the Reserve Bank, the Payments System Board.

3. The Joint Study

The Bank's first step in undertaking these responsibilities with respect to card payments was to gather information. It did so by conducting a year-long study, together with the Australian Competition and Consumer Commission, into interchange fees and access in credit card networks, debit card networks and ATM networks.

The study described the rules, operations, costs and revenues of acquirers and issuers in each of the card systems. It described the two-sided nature of the card markets and the explanations then available for interchange fees, and some of the rules of the systems.

The data published in the Joint Study indicated that the resource costs of providing credit card transactions incurred by financial institutions were considerably higher than those associated with PIN-authorized debit card transactions in Australia. There are four main reasons for this. First, on average, PIN-based transactions incur much lower levels of fraud. Second, Australia's EFTPOS system does not provide guarantees to cardholders that goods or services will be delivered, so there are no chargebacks. Third, PIN authorisation means fewer disputed transactions and the overheads and labour costs they involve. Finally, because EFTPOS can only be used domestically, it does not have the higher overheads of the international credit card schemes.

4. The main policy initiatives

The Reserve Bank's work in this area has involved many of the issues mentioned in the Secretariat's note. These include:

- Requiring **interchange fees** in the credit card schemes to be reduced from an average of 0.95 per cent to a maximum of around 0.55 per cent from November 2003. From November 2006, interchange fees for scheme debit cards will be required to fall from around 0.55 per cent of the transaction value (\$0.40 at the average transaction size) to A\$0.15 and for the EFTPOS system from an average of around A\$0.20 to around A\$0.05 paid to the issuer.
- Requiring MasterCard and Visa to remove their no surcharge rules from January 2003. American Express and Diners Club agreed to remove their no surcharge rules at that time.
- Requiring MasterCard and Visa to amend their access rules to consider applications for membership from specialist credit card institutions supervised by the Australian Prudential Regulation Authority on the same basis as applications from other authorised deposit-taking institutions. Net issuer penalties and any absolute prohibitions on self acquiring were also required to be removed.
- Obtaining agreement of American Express to remove no steering rules from its agreements with merchants.
- Requiring the abolition of the honour all cards rule (as it applies to accepting both debit and credit cards) from January 2007.

- Improving access to the EFTPOS system by working with participants in the system to establish transparent entry procedures and setting a cap on the amount that an existing participant can charge to establish a new bilateral direct connection.
- Improving the availability of information to the market. This includes data on interchange fees, merchant service fees and market shares.

5. The Reserve Bank's reasoning

This section briefly summarises the reasoning behind the most controversial of the Reserve Bank's decisions, those related to interchange fees. The other decisions, which remove restrictions on merchants or improve access to the card schemes, are discussed in detail in the Bank's publications listed in the references. An attachment to this note provides a recent summary.

As noted above, when a payment was made by credit card, the cardholder faced a price that was either zero or negative. When the payment was made by EFTPOS, the cardholder faced a price that was either zero or positive. Interchange fees paid to credit card issuers by acquirers and those paid in the opposite direction by issuers to acquirers in the EFTPOS system were an important influence on this pricing.

A key question for the Bank was whether it was in the public interest for many cardholders to face negative per-transaction prices when they used their credit cards but positive prices for EFTPOS transactions, particularly when transactions processed through the EFTPOS system involve lower resource costs.

The Bank has always recognised the two-sided nature of these markets, and the potential role that interchange fees can play in promoting the efficiency of the system. The issue here though, is how interchange fees should be configured when there are competing payment methods, each with their own interchange fees. While it could be argued that the network effects were such that larger welfare gains could be achieved by having interchange fees that were much more favourable to issuers in the credit card system than in the EFTPOS system, the Bank was not aware of any evidence to this effect. In its judgement, the configuration of interchange fees was distorting payment patterns within Australia.

A second and related consideration was that these fees are not subject to the normal forces of competition. This was so both in the credit card schemes where they were multilaterally determined by the same banks in each system, and in the EFTPOS system, where they were determined bilaterally but, once negotiated, almost never changed thereafter.

These considerations led the Bank to the view that the card payment system in Australia could be made more efficient by seeking to reduce the differences in interchange fees between the credit (and scheme debit) card and EFTPOS systems.

The Bank considered two ways to improve these price signals to cardholders. The first was to leave interchange fees as they were and simply remove the no surcharge rule. This was suggested by some economists who argued that allowing surcharging would neutralise the effect of interchange fees. They argued that surcharging would undo the effects of any subsidies paid to cardholders.

This outcome, however, would rely on surcharging becoming widespread, a result that 30 years of conditioning suggested was unlikely. Given this, the Bank's view was that setting of interchange fees needed to be addressed directly.

6. Implementing the reforms

While the Bank had a strong preference for voluntary reform, voluntary changes to interchange fees in the MasterCard and Visa schemes proved impossible. As a result, the Reserve Bank mandated a reduction in the average credit card interchange fee from 0.95 per cent to 0.55 per cent with effect from November 2003.

In contrast, it initially appeared that there could be a voluntary reduction in EFTPOS interchange fees (paid by acquirers to issuers) from around an average of A\$0.20 to zero. However, legal action by a group of merchants made this impossible and the Reserve Bank has recently mandated a fall from A\$0.20 to A\$0.05 (not to zero for legal reasons).

The Reserve Bank has also concluded that interchange fees in the scheme debit system operated by Visa were producing an incentive for cardholders to use that system over the EFTPOS system. This conclusion has led the Bank to require a reduction in scheme debit interchange fees from 0.55 per cent of the transaction value (A\$0.40 for an average transaction) to A\$0.15, to take effect from 1 November 2006.

It is important to note that, although the Bank has used cost-based standards as the *means* to achieve the compression of relative interchange fees, this is not because it sees particular merit in a system that treats interchange fees as a means to recompense a participant on one side of the two-sided payment system for all, or a subset of, its costs. As the Bank said in a recent publication:

“The Bank’s view is that interchange fees are appropriately viewed as a device to balance the costs and revenues of issuers and acquirers to promote efficiency, rather than a means for one side of the transaction to compensate the other for specific costs...The Bank’s decision to use cost-based standards – with eligible costs defined with respect to just one side of the market – reflects the fact that such an approach is transparent and meets the legal test of a ‘standard’. The use of this approach should not be interpreted as the Bank endorsing the idea that interchange fees should be used to compensate one side of the market for either all, or a particular subset, of its costs.”²

7. Effects of the Reforms

Changes to the credit card schemes came into effect over 2003 and 2004. The no surcharge rule was removed in January 2003 and interchange fees fell from November 2003. Access to the card systems was liberalised in mid 2004. Changes to interchange fees in the EFTPOS and scheme debit systems are scheduled to come into effect in November 2006 and the honour all cards rule (as it applies to acceptance of a scheme's debit cards as a condition of accepting the scheme's credit cards) is to be removed at the end of 2006.

When the standard determining credit card interchange fees came into effect in late 2003, average interchange fees fell from 0.95 per cent to 0.55 per cent. This has been fully passed through into merchant service fees, which now average 0.9 per cent, compared to 1.4 per cent immediately prior to the reforms and 1.8 per cent in 1999. Moreover, greater transparency and focus on interchange fees has promoted an increase in competition that has seen merchant service fees fall by more than the fall in interchange fees. Based on the current levels of credit card spending, the fall in merchant service fees since the reforms represents a saving to merchants of around A\$700 million per year.

² Reserve Bank of Australia, (2006) *Reform of the EFTPOS and Visa Debit Systems in Australia: Final Reforms and Regulation Impact Statement*, p28.

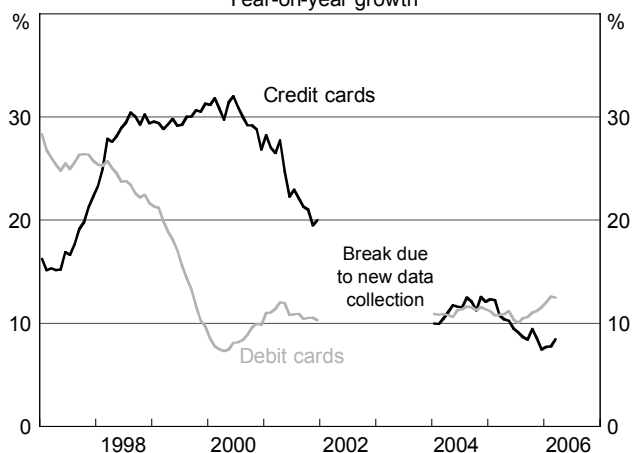
The Reserve Bank of Australia is confident that this cost saving is being passed on to consumers in the form of prices that are lower than they would otherwise be. Although it is not possible to measure these price changes and their timing, particularly given other more significant changes in firms' costs and prices that are going on all the time, lower costs ultimately mean lower prices.

Price signals to holders of credit cards have also changed. Annual fees have increased. On average, the value of reward points on those cards that offer points has fallen from around 0.8 per cent of the amount spent to around 0.65 per cent, and entry to reward programs often requires payment of an additional fee. These effects have meant that issuers have probably recovered more than A\$400 million of the reduction in interchange revenue.³

In addition, survey evidence suggests that around 4 per cent of merchants now levy a surcharge on payment by credit card. Surcharging is still relatively uncommon in most retail stores, but it is being increasingly seen in a range of industries, including some in which competition is strong.

Changes in prices faced by cardholders may be beginning to affect payment patterns, although it is difficult to disentangle this from other influences. Spending on credit cards over the year to March 2006 was around 8½ per cent higher than in the previous year, around the slowest growth since the Bank began collecting data in the early 1990s. In contrast, spending on debit cards was 12½ per cent higher, around its fastest rate since 1999.

Graph 2
Value of Transactions
Year-on-year growth



Another response to the fall in interchange revenue is that some issuers are now attempting to attract cardholders by offering lower interest rates, rather than generous reward points. A range of low-rate credit cards is now available with ongoing interest rates as low as 8.99 per cent, well down on the rates of 16 -18 per cent applying on almost all cards a few years ago.

A controversial issue has been how these reforms have affected American Express and Diners Club. When the reforms to credit cards were being developed in 2002, these schemes both operated as three-party schemes, which had no interchange fees. They did, however, have no surcharge rules but agreed to remove them voluntarily.

³ 'Banking fees in Australia', Reserve Bank of Australia *Bulletin*, May 2006.

Increased competition and greater transparency has seen a decline in merchant service fees for American Express and Diners Club, although the declines are smaller than those for MasterCard and Visa. American Express's and Diners Club's higher merchant service fees have allowed them and the banks that issue American Express cards to offer more generous rewards. This has led to calls for regulation of the fees paid by American Express to its partners, or of American Express and Diners Club directly.

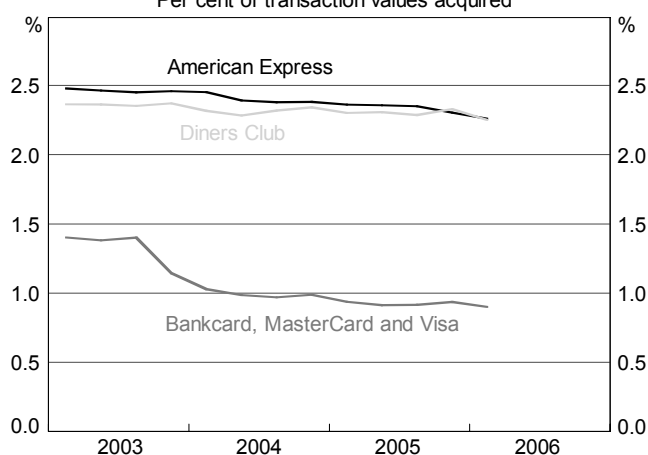
In assessing the case for such regulation, the Bank concluded that one reason that American Express (and Diners Club) can charge relatively high merchant fees is because it is the sole supplier of American Express acquiring services to merchants. As a result of this lack of competition in acquiring, a reduction in payments to its partner banks through regulation would, in the Bank's view, have little impact on American Express's merchant service fees. In contrast, a cut in interchange fees led to a fall in merchant fees in the MasterCard and Visa schemes.

Rather than regulate the payments American Express makes to its partner banks, the Reserve Bank has focussed on ensuring that bargaining between merchants and American Express (and Diners Club) takes place in an environment which is as open and competitive as possible. Important considerations were no surcharge rules and the clauses in American Express's contracts with merchants which prevented merchants from steering customers to use other, less costly, cards. Accordingly, as well as having no surcharge rules removed, the Reserve Bank has obtained American Express's agreement to the removal of its no-steering rules. The Bank has also published a broad range of data useful to merchants when negotiating with both card schemes and acquiring banks.

Graph 3

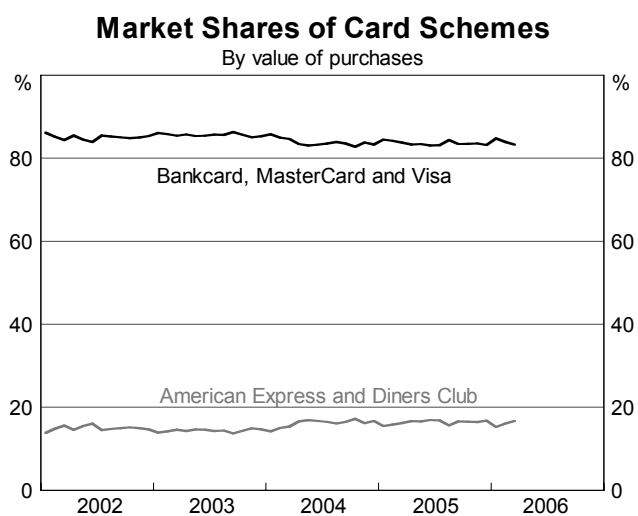
Merchant Service Fees

Per cent of transaction values acquired



The combined market share of American Express and Diners Club has increased from around 14 per cent of the value of all credit and charge card transactions prior to the reforms, to around 16 per cent (Graph 4), with most of the change occurring when American Express's partner banks began issuing its cards in 2004. The Reserve Bank expects that competition will lead to a further decline in American Express's average merchant service fee, and in time, this will be reflected in the structure of the products that are offered by American Express and its issuing partners.

Graph 4



8. Conclusion

These reforms are increasing competition in the Australian payment system by removing restrictions and facilitating access. They are also encouraging price signals to card users designed to promote the development of a more efficient payments system.

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Attachment

**OPENING STATEMENT TO HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON
ECONOMICS, FINANCE & PUBLIC ADMINISTRATION**

Philip Lowe
Assistant Governor (Financial System)
Sydney – 15 May 2006

It is a pleasure to be here today in front of the Committee to discuss the Australian payments system. I would like to say at the outset that the Reserve Bank very much welcomes the Committee's interest in payments system issues, and appreciates the time that the Committee has given to reviewing the Bank's reforms.

In my opening remarks I thought I could usefully do two things. The first is to provide an overview of the main reforms and their rationale, and the second is to provide a summary of their main effects to date.

As you are no doubt aware, the Reserve Bank's current role in the payments system was established by the Government following the Wallis Inquiry into the financial system. The Inquiry concluded that there was considerable room for both competition and efficiency in the Australian payments system to be improved. It also concluded that a separate Board should be established within the Reserve Bank to address the three issues of efficiency, competition and stability in the payments system.

Since its establishment, the Payments System Board has addressed each of these issues, although the work improving competition and efficiency has attracted the most attention (a summary of the Bank's various decisions is provided in an Attachment). This work has examined five aspects of the payments system. These are:

- interchange fees;
- the restrictions imposed by card schemes on merchants;
- access arrangements;
- the availability of information; and
- the governance and architecture of the system.

Before I touch briefly on each of these, I would like to make three general points about the reform process.

The first is that the Payments System Board has a strong preference for industry-based solutions, and has explored these wherever possible. In some cases, changes that promote the efficiency of the system have been achieved without regulation, while in others they have not. The use of regulation is perhaps not surprising given the significant, and often opposing, commercial interests that are sometimes at stake, and the legal hurdles that can arise in voluntary reform.

The second point is that the Bank has consulted widely before using its powers. This consultation has been very useful and has led to a number of significant changes in proposed regulations. While we may not always agree with views put to us, we very much value the ongoing dialogue with the industry and users of the payments system.

The third is that in considering reforms, the Bank has always had a whole-of-system focus. We have been particularly concerned not just with how an individual system operates, but with the potential for substitution between the various individual systems.

I would now like to turn to the five specific aspects of the reform process that I mentioned a moment ago.

1. Interchange Fees

The first, and most controversial, of these is interchange fees. These fees are payable between financial institutions and are not transparent to either cardholders or merchants, but they have a pervasive influence on the prices that financial institutions charge for payment services. These fees are not subject to normal competitive pressures and, in the Bank's view, had been set in a way that was distorting payment patterns in Australia.

Prior to the reforms, the structure of these fees meant that cardholders were often charged by their financial institution to make an EFTPOS transaction, but often received quite large per-transaction subsidies, through reward points and interest-free credit, when making a credit card transaction. As a result, we had the rather anomalous situation in which cardholders were being charged significantly more to use the relatively low-cost payment system. We could see no convincing reason why this was the case.

Given this assessment, the Bank has reduced interchange fees in the credit card system and the two debit card systems. The reforms to the credit card system in 2003 saw interchange fees fall from around 0.95 per cent of the transaction value to around 0.55 per cent. More recently, three weeks ago, the Bank announced reforms that will see interchange fees in the EFTPOS system – which flow in the opposite direction to the credit card system – fall from around 20 cents a transaction to around 5 cents. Interchange fees in the Visa Debit system – which flow in the same direction as the credit card system – will also fall significantly.

The lowering of credit card interchange fees has, as expected, prompted a change in price signals. The prospective changes to the debit card systems will have a similar effect. The fall in debit card interchange fees will also substantially reduce the risk that the Visa Debit system (and its MasterCard equivalent) might eventually drive out the EFTPOS system, simply because the structure of interchange fees made it much more attractive for financial institutions to offer and promote the Visa Debit system. I would like to make it clear though that the Bank's regulation of various interchange fees is not motivated by a desire to protect the EFTPOS system, or by a desire to reduce credit card debt, or by a desire to see greater use of the lowest-cost method of payment. Rather, it reflects the view that the efficiency of the overall system is promoted by the various payment methods competing on their merits, rather than through interchange fees, which themselves are not subject to competition.

I might also note that this interest in interchange fees is not confined to Australia. Over the past few years, these fees have been subject to regulatory investigation in a wide range of countries, including the United Kingdom, Spain, Switzerland, Israel, Mexico, Germany and the Netherlands. And in the United States, these fees have been, and continue to be, subject to numerous court cases. In each of these countries, the concerns are essentially the same as those expressed in Australia. Namely, that interchange fees are not determined in normal competitive markets, and that the levels at which they have been set are not typically in the best interests of the community at large.

2. Restrictions on Merchants

The second issue is the restrictions on merchants. Quite early on in the Bank's work, we became concerned that various restrictions imposed by the card schemes on merchants were effectively eliminating or dulling price signals to cardholders. These included:

- the restriction that prevented merchants from passing onto cardholders the additional costs associated with a credit card payment (the no surcharge rule);
- the restriction that required a merchant to accept Visa Debit cards if it accepted Visa credit cards (the honour all cards rule); and
- the restriction that prohibited a merchant who accepted American Express cards from steering customers to less expensive forms of payment (the no-steering rule).

All three of these restrictions either have been, or will shortly be, removed. Again, as with regulation of interchange fees, these reforms provide the basis for more soundly based competition in the payments system.

3. Access

The third issue is access. Over the years, the Reserve Bank has heard many complaints about how hard it has been for potential entrants to join parts of the Australian payments system. Given this, the Payments System Board has been keen to ensure that inappropriate barriers to entry are removed. In general, the Board's work in this area has proceeded more smoothly than reform of interchange fees, with the Bank and industry working co-operatively on a number of issues.

The first step in improving access was the introduction of an access regime for the credit card schemes. This was done with considerable input from industry. Prior to this regime being put in place, membership of the schemes was restricted to banks, building societies and credit unions, with penalties applying if a scheme member specialised in providing credit card services to merchants.

More recently, the Bank announced an access regime for the EFTPOS system, with this regime co-existing with the EFTPOS Access Code developed by APCA and its members. This outcome represents a successful example of the Bank and the industry working together, and it is a model that we hope will be used again. The Bank has also been working with APCA to improve access arrangements, including their transparency, to a number of the payments clearing streams.

4. Transparency of Information

The fourth issue is the transparency of information. When the Bank started its work, data on interchange fees, merchant service fees and market shares were often treated in the same way as state secrets. Amongst other things, members of the credit card schemes were not permitted to disclose interchange fees to merchants. This general lack of transparency worked to the advantage of the card schemes and their members, but to the disadvantage of cardholders and merchants.

Today, things are much more transparent. All interchange fees are now publicly disclosed, and the Bank collects and publishes data on average merchant service fees and on the market shares of the various types of credit card schemes. This improved flow of information is providing the basis for better and more informed decisions by cardholders and, particularly, merchants.

5. Governance and Technology

The final issue is the governance and architecture of a number of Australia's individual payment systems. While Australia was once recognised for having leading edge payments system technology, I think it is fair to say that this is no longer the case. In a number of countries, there have been greater efforts to update the underlying architecture of the payments system and more options are being offered to consumers and businesses.

We have spent some time trying to understand why this is so and whether it is a problem. While we have further work to do, Australia's payments system is notable for its heavy reliance on bilateral, rather than multilateral, contracts, and, with the exception of the credit card schemes and BPay, the lack of strong central entities that develop and promote particular payment methods. Whether alternative arrangements would promote more innovation is an open, but an important question.

The Bank's general approach in this area has been to raise the questions of whether current architecture and governance arrangements are conducive to the ongoing development of the system. Our hope is that in doing so, there will be greater industry focus on these issues, since these issues are ultimately best dealt with by industry rather than by regulation. Recently, we have seen some steps in this direction, and we hope that this will continue.

6. Effects of Reforms

I would now like to turn to the effects of the various reforms.

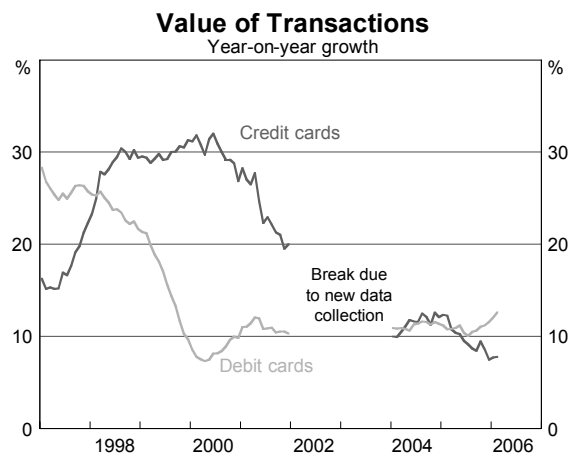
Perhaps the most notable impact has been a marked reduction in merchants' costs of accepting credit cards. The average merchant service fee for the MasterCard and Visa schemes is now around 0.9 per cent of the transaction value, down from 1.4 per cent immediately prior to the reforms. Based on the current levels of credit card spending this represents a saving to merchants of around \$700 million per year.

I know a lot of people believe that this cost saving has not been passed onto consumers but instead has flowed through to merchants' profits. This is not a view that we share, and it is one that sits uncomfortably with the normal dynamics of a competitive marketplace. If firms have lower costs, eventually prices too will be lower. Unfortunately, it is not possible to measure these price changes and their timing, particularly given other more significant changes in firms' costs and prices that are going on all the time. But an inability to measure the change does not mean it is not occurring.

A second significant effect of the reforms has been a change in price signals to holders of credit cards. The value of reward programs has been cut, some merchants have introduced surcharges, and annual fees have been increased. From our perspective, these are welcome developments.

On average, the value of reward points on those cards that offer points has fallen from around 0.8 per cent of the amount spent to around 0.65 per cent. In terms of surcharging, survey evidence suggests that less than 5 per cent of merchants levy an explicit charge on credit cards. Surcharging is still relatively uncommon in most retail stores, but it is being increasingly seen in a range of industries, including some in which competition is very strong.

These various changes in prices appear to be having an effect on payment patterns, although it is difficult to disentangle the various effects. Spending on credit cards over the year to February was around 8 per cent higher than in the previous year, around the slowest growth since we began collecting data in the early 1990s. In contrast, spending on debit cards was 13 per cent higher, around its fastest rate since 1999 (see Graph 1).

Graph 1

Another change is the growth of low-rate credit cards, with the cut in interchange fees prompting many issuers to re-examine their credit card products. With less interchange revenue available, some issuers are now attempting to attract cardholders by offering lower interest rates, rather than generous reward points. As a result, a range of credit cards is now available with ongoing interest rates as low as 8.99 per cent, well down on the rates of 16–18 per cent applying on almost all cards a few years ago. For many people, this represents a saving of hundreds of dollars a year.

In discussing the effects of the reforms, I would also like to address two issues that you are likely to hear about today or tomorrow.

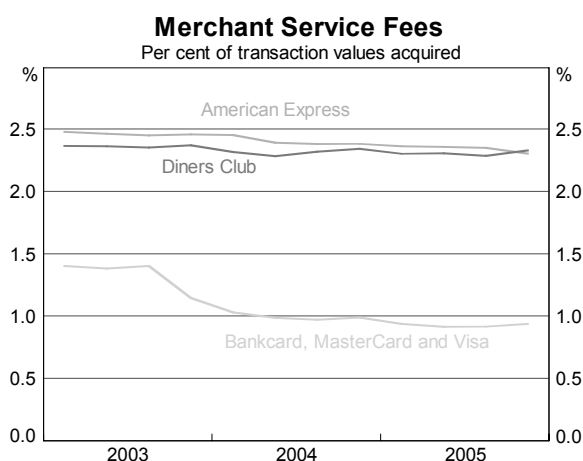
The first of these is that the Bank should have just required the removal of the no surcharge rule and not regulated interchange fees. Those that have put this view have argued that such an approach would have been sufficient to establish appropriate price signals to cardholders, by merchants charging for credit card transactions. The Bank did consider this argument long and hard, but decided in the end that simply removing the no surcharge rule was unlikely to be enough. The main reason was that the long history during which merchants had been prevented from surcharging had contributed to a culture in which there was considerable customer resistance to doing so. Given this culture, we judged that it was unlikely that surcharging would become commonplace within any reasonable time, and thus just removing the no surcharge rule was unlikely to establish more appropriate price signals. I think the evidence on surcharging so far is consistent with this judgment.

The second issue is the claim that the Bank has given American Express a considerable advantage by regulating interchange fees in the MasterCard and Visa systems, but not regulating American Express. This has led to calls for the same regulatory treatment to be applied to all schemes. In practice, the only way in which this could have been done would have been to require just the removal of the no surcharge rule, and not regulate interchange fees at all. For reasons I discussed a moment ago, the Board did not think that would be an effective option.

It is important to recognize that the main reason that American Express can offer relatively high reward points has nothing to do with interchange fees, but rather stems from the relatively high price that American Express has been able to charge merchants for accepting its cards. With more merchant revenue per transaction, American Express, and its partner banks, have offered more generous rewards to cardholders, particularly those prepared to pay the high annual fee associated with premium cards. Given this assessment, the Bank has been keen to see that the bargaining between American Express and

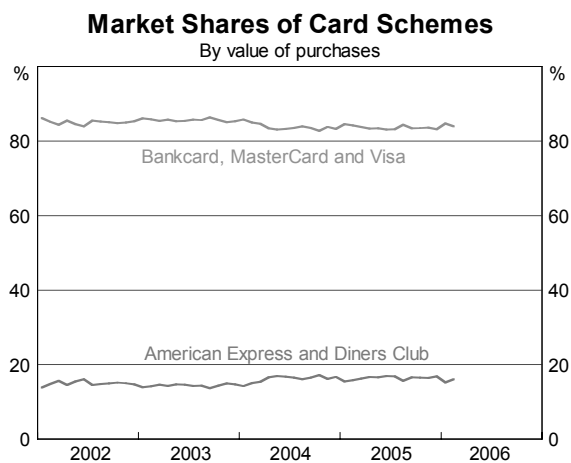
merchants is conducted in as competitive and open environment as possible. In particular, the Bank has sought, and obtained, American Express's agreement to the removal of its no surcharge and no-steering rules and the publication of a broader range of data useful to merchants. This approach is having some effect, with the average merchant service fee charged by American Express having fallen by around 20 basis points since the reforms were introduced (see Graph 2). There has also been an increase in marketing payments to some merchants, so that the decline in effective fees is somewhat larger than this.

Graph 2



In the MasterCard and Visa schemes, the competition between acquirers meant that when interchange fees fell, so too did the fees charged to merchants. In contrast, in the American Express system there is no competition on the acquiring side; American Express is the sole acquirer. This means that the causation runs from merchant service fees to the fees to the partner banks, not the other way around as it does in the MasterCard and Visa schemes. To repeat the key point, it is the high merchant service fees in the American Express scheme that allow the generous rewards, not interchange fees as in the MasterCard and Visa schemes. The different regulatory responses reflect this point.

None of this means that we are not monitoring the competitive landscape very closely. To date, the change in market shares has been small; the combined market share of American Express and Diners Club has increased from around 14 per cent of the value of all credit card transactions prior to the reforms, to around 16 per cent (Graph 3). Looking forward, we expect that competition will lead to a further decline in American Express's average merchant service fee, and in time, this will be reflected in the structure of the products that are offered.

Graph 3

In summary, the changes that we have seen to date are in the direction we expected. However, like other economic reforms that involve the unwinding of subsidies, not everybody is happy with the changes. Also, while the movement to less distorted price signals creates benefits for the community at large, these benefits tend to be less obvious than the higher prices paid by those previously receiving the subsidy.

In the payments system, the importance of getting relative prices right is perhaps best illustrated with the example of cheques. When people were not charged for writing cheques, they wrote lots of them and a tremendous amount of resources were used in their processing. Then, when banks did introduce a charge, people found other, more efficient, ways of making their payments. The result was that as a society we freed up considerable resources to use for things other than processing payments. While nobody who writes a cheque likes paying the charge, collectively we are better off facing lower prices for electronic payments than for cheque payments.

In this example, it was ultimately the normal forces of competition that were important in getting the price more in line with the costs of processing. And this is how things normally work. However, as I have said a number of times already, these normal forces of competition do not work on interchange fees. The fees that previously existed themselves generated strong incentives that encouraged the use of credit cards at the expense of the lower-cost EFTPOS system, and there was no market mechanism to correct the distortion. The same is true when comparing interchange fees in the EFTPOS and Visa Debit systems. In the absence of these normal competitive pressures, the Bank's reforms have promoted more appropriate price signals, and, as a result, are freeing up resources to be used where they are more highly valued. The reforms are also promoting competition, enhancing transparency and removing long-standing barriers to entry. While it will take a number of years for their full effects to be felt, they represent a significant step towards a more efficient payments system.

DENMARK

1. Background on market structure

The Danish market for payment cards is dominated by the national debit card Dankort.

There are issued more than 3.5 million Dankort – which should be compared with an adult Danish population of approximately 4 million – and each card was in 2005 on average used for 168 transactions. Dankort can only be used in Denmark, but approximately 67 % of all Dankort are co-branded with Visa, so these cards may be used outside Denmark as well.

Compare hereto, MasterCard is the largest international credit card issued in Denmark with about 700,000 cards. Furthermore, Maestro and Visa Electron have issued debit cards since 2003. These 350,000 debit cards are mainly used by young people between 15 and 18. To a less extent, Eurocard, Diners and Amex are also present in Denmark with around 300,000 credit cards in total.

The only acquirer of Dankort is Payment Business Service Ltd. (PBS), which also own the Dankort brand. PBS is furthermore the main acquirer of international cards such as Eurocard, MasterCard, Visa and JCB. PBS is owned by Danish banks with Danske Bank, Nordea Bank, and the National Central Bank as the largest shareholders.

Besides being the main acquirer PBS owns the Danish payment card infrastructure and offers processing etc. to card companies. Diners and Amex do their own acquiring, but use PBS as service provider. Many retail card companies buy payments services from PBS.

It is necessary for issuers, acquirers and others who want to use payment card to have access to PBS. PBS's offered prices for access to the infrastructure are currently being investigated by the Danish Competition Authority (DCA).

In Denmark customers can use international payment cards in 20,000 merchants. This number is relatively small compared with the fact that 80,000 merchants accept Dankort. The reason for this is probably that merchants - also in Denmark - pay a higher merchant fee on average to accept cards issued in the international networks (e.g. Visa and MasterCard) than cards issued in domestic networks.

2. Questions by Topic Area

In the following the DCA focus on answering questions with specific interest for the Danish market. Accordingly, a number of questions are not answered here.

2.1 Exit/entry

American Express (Amex) stopped issuing card in Denmark as the first Danish Act on Certain Payments Instrument (the Act) was adopted in 1984. The Act forbids Danish acquires to charge any fees from merchants (MSC) to cover the costs of operating a payments system.

All the international card companies objected to the rule and got after negotiations with the minister of Economic and Business Affairs an exception. Hereafter acquirers were allowed to charge fees from the merchant at a maximum size of 0.75 % of the transaction value, when a Danish issued international card was used in Danish stores. Payment cards issued outside Denmark did not fall within the Act, so for those cards there were no limits on fees charged from the merchants.

Although acquirers of international cards were allowed to charge a fee, Amex did not return to the Danish market until 2000, when the Act had been changed and it became possible to charge a merchant fee based on costs for transactions on the Internet.

2.2 *Merchant charges*

The Danish merchants pay a yearly subscription fee to PBS for accepting Dankort. The Act sets a ceiling for the total amount PBS can charge from merchants per year. In 2006 this ceiling is EUR 17m, but it can rise every year depending on the rise in the total numbers of transaction in the previous year. From 2010 the amount of the subscription fee will be based on the costs of running a payment scheme.

The total yearly fee is divided between the merchants depending on the number of transactions during the year for each merchant. The merchants are divided into three groups, cf. table 1.

Table 1. Dankort Merchant Fees to be paid to PBS

	Dankort transactions/year	Subscription fee for 2006
Group 1	1 – 4,999	79 EUR
Group 2	5,000- 19,999	427 EUR
Group 3	20,000 or more	1,580 EUR

According to the Act, the merchants can only charge the consumers for the use of some cards, cf. table 2.

Table 2. Consumer and merchant fees in physical transactions

	Consumer fee	Merchant fee
A. Danish issued cards		
<i>Debit card</i>		
Dankort with chip	Surcharge forbidden	A yearly amount
Maestro and Visa electron	Surcharge forbidden	0.4 %, max. 0.53 EUR
<i>Credit cards</i>		
Other Danish cards with no chip	0	0
Mastercard, Eurocard, Amex, Diners	Surcharge forbidden	0.75 %
B. Foreign issued international cards	3.5 % – 5.75 %	3.5 % – 5.75 %

Table 3 shows the corresponding fees in the non-physical trade. According to the Act, these fees have to be cost-based.

Table 3. Consumer and merchant fees in non-physical transactions

	Consumer fee	Merchant fee (MSC)
A. Danish issued cards		
Dankort	Max. 0.19 EUR + 0.1 %	0.19 EUR + 0.1 %
Other Danish issued with out chip	Max. 0.19 EUR + 0.1 %	0.19 EUR + 0.1 %
Maestro and Visa electron	Max. 1.25 % min 0.26 EUR	Max 1.25 % min 0.26 EUR
Mastercard, Eurocard, Amex, Diners	Max. 1.25 % min 0.26 EUR	Max 1.25 % min 0.26 EUR
B. Foreign issued international card	3.5 % – 5.75 %	3.5 % – 5.75 %

In January 2006 the DCA investigated whether the merchant fee for non-physical Dankort transactions was cost-based. The investigation showed that PBS still has a significant accumulated deficit on these merchant fees. PBS, however, chose to reduce the fees by approximately 25 % in order to improve consumers' incentive to use Dankort on the Internet when trading with small amounts.

2.3 Interchange fees

In general, the DCA finds that interchange fees could be reasoned by an attempt to maximize social welfare through usage of the payment card.

In a two-sided market both users' decisions affect the other party (through network and usage externalities). One important conclusion is that such markets will only maximise social welfare, if the payment structure internalizes the externalities. This means, that the payment should be divided between card holder and merchant.

In Denmark all interchange fees is a payment from acquirer to issuer, cf. table 4.

Table 4. Interchange fees

Card	Issuer	Acquirer	Interchange fee
Dankort (physical transactions)	Banks in Denmark	PBS	0 EUR
Dankort (non-physical transactions)	Banks in Denmark	PBS	[0.10 – 0.19] EUR
eDankort	Banks in Denmark	PBS	[0.10 – 0.19] EUR
MasterCard (physical transactions)	Banks in Denmark	PBS	< 0.75 %
MasterCard (non-physical transactions)	Banks in Denmark	PBS	< 1.25 %
Eurocard (physical transactions)	SEB	PBS	< 0.75 %
Eurocard (non-physical transactions)	SEB	PBS	< 1.25 %
Amex	Danske Bank	Danske Bank	0 EUR
Diners Club	SEB	Diners Club	0 EUR

Table 4 indicates at least four interesting elements:

- *First*, the Danish market for acquiring is highly concentrated with PBS as the dominant player. (The DCA estimates that PBS represents more than 90 % of all card payments in Denmark)

- *Second*, the Danish market for issuing looks apparently rather competitive, since almost all banks in Denmark are issuing Dankort. But one should keep in mind that the market for retail banking services is concentrated (CR5 > 80 in 2004).
- *Third*, there is no interchange fee when Dankort is used in physical transactions. In addition, almost all issuing banks have chosen not to bill the card holder direct for the use of Dankort. This means that in physical Dankort transactions, the acquirer does not get any direct compensation for his transaction costs.

PBS is currently charging the merchants a yearly subscription fee fixed by the Act (depending on the number of Dankort transactions). The merchants are not allowed to directly pass this fee to the card holders.

- Fourth, an interchange fee of [0.10-0.19] EUR is charged when Dankort is used in non-physical transactions. PBS pays this fee to the issuing banks.

PBS is charging the merchants a MSC of 0.19 EUR per non-physical transaction. This fee includes the interchange fee. Accordingly to the Act the MSC may be passed on directly to the card holders, and so far most of the merchants have chosen to do so.

As mentioned in question 4, the DCA has in 2006 investigated the MSC for non-physical Dankort transactions. The DCA chose to initiate a separate investigation of the interchange fee, since this fee constituted a large part of PBS's costs. This investigation is still ongoing.

If the interchange fee on non-physical Dankort transactions were regulated to be zero, the MSC would decrease correspondingly. The issuing banks would then have to bill the card holder directly to recover the lost interchange fee. Since all the issuing banks have different issuing costs, the banks would be able to compete for card holders by offering the lowest payment per transaction. This may increase competition among banks and benefit the consumers.

2.4 Regulation of fees

The Act is adopted by the Danish Parliament (Folketinget). As mentioned above there has been such a regulation since 1984 when the first act on payment cards was adopted. The Act regulates acquirers' possibility to charge fees from merchants accepting payment instruments for the covering of the costs of operating a payment system.

In 1999 the Act was changed and acquirers were allowed to charge fees from merchant in non-physical trade to cover operation costs. It was still forbidden to charge fees from merchants in physical trade.

The distinction between physical and non-physical trade are defined in the Act - in physical trade both payer and payee have to be physical present when a payment transaction is settled by physical use of a payments instruments confirmed with the use of signature, PIN-code or a similar type of safe identification. Non-physical trade is typical trade on the Internet, distant trade or trade where only card holders are physical present.

The Act from 1999 provides that where fees etc. are fixed for completion of payments transactions prices and profits may not be unreasonable. Unreasonable prices and profits shall mean prices and profits which are higher than those which would have been charged in circumstances of effective competition.

The changes in the Act from 1999 also forbid the use of a no-discrimination-rule. So from 1999 merchants were allowed to surcharge card holders on non-physical transactions, but the size of the surcharge must not exceed the size of the fee payable by card holder to acquirer for payment transactions.

In 2005 the Act were changed again, allowing acquirers to charge a fee of 0.07 EUR on physical transactions with Danish issued payment cards with a chip. The merchants were allowed to surcharge the consumers the same fee as they paid to the acquirer. For Danish issued payment cards with no chip no fees could be charged. During 2004 all Dankort were changed to chip cards.

This law only lasted for two months. Both merchants and cardholders opposed to the law, and the Danish Bankers Association and the politicians decided in common to stop charging the 0.07 EUR per transaction and agreed on a yearly subscription fee for merchants accepting Dankort with chip in physical trade, cf. table 1 above.

As it is difficult to surcharge a yearly fee, the Folketinget decided to ban surcharging for Dankort. For foreign payment cards and for card used in non-physical trade the regulation was unchanged.

2.5 *No-surcharge and no-discount rule*

In Denmark it is not common practice to charge any fee for customers using cash. And the Legal Advice to the Danish Government has indicated that a right to charge fee for paying in cash have to be authorized by law.

On the other hand, the Act demands that merchants that accept payments instruments shall be liable to accept cash payments unless the transaction is in non-physical trade or in unmanned self-service environments.

2.6 *Exclusivity*

To the knowledge of the DCA, no card platform has signed exclusively contracts with card-issuing banks.

2.7 *Competition law application*

The DCA has made several decisions concerning payment cards, see below.

2.7.1 *Decision concerning PBS A/S*

On 22 June 2005 the Danish Competition Council (DCC) adopted a decision concerning PBS. The decision was based on an investigation made by the DCA in January and February 2005 concerning fees on the Danish payment card named Dankort.

During this investigation the DCA discovered that PBS had introduced an IT-system to the financial institutions for the purpose of administration of agreements with merchants concerning acquiring. This IT-system was named "BasisPakken". "BasisPakken" contained among other things five standard settings. In one of these settings the Dankort fee was beforehand set to the maximum value of 0.07 EUR.

The DCC concluded that the relevant product market was the market of Dankort. Further, the DCC concluded that "BasisPakken" constituted an agreement in the sense of competition law. However, the DCC did not find that the agreement had as effect the prevention, restriction or distortion of competition between the financial institutions. Among other things the DCC argued (i) that the financial institutions easily could change the beforehand set Dankort fee of 0.07 EUR, (ii) that 98 % of the financial institutions in

some way de facto adjusted “BasisPakken”, and (iii) that the setting of the Dankort fee assumable depended on other things than an IT-system (e.g. the financial institution’s general fee policy). Accordingly, the DCC concluded that PBS did not infringe § 6 (similar to article 81) of the Danish Competition Act.

2.7.2 Decision concerning “De Samvirkende Købmænd”

On 25 May 2005 the DCC adopted a decision concerning ‘De Samvirkende Købmænd’ - an association of grocers. The decision was based on an investigation made by the DCA in January and February 2005 concerning fees on Dankort.

During this investigation the DCA discovered that ‘De Samvirkende Købmænd’ - in member-magazines etc. - encouraged its members to collect the maximum legal fee (EUR 0.07) on the Dankort.

On this basis the DCA submitted the case to the DCC.

The DCC concluded that the relevant product markets were the market of Dankort and the retail market of commodity and convenience goods. These markets were national. Further, the DCC - in summary - concluded that ‘De Samvirkende Købmænd’s declarations to members of the association in member-magazines etc. constituted a decision by association of undertakings, which had as object the prevention of competition on the relevant markets. Accordingly, ‘De Samvirkende Købmænd’ infringed § 6 (similar to article 81) of the Danish Competition Act.

2.7.3 Investigation of the multilateral interchange fees provided for in Denmark

For the time being the DCA investigates the fallback multilateral interchange fee. The fee applies to all transactions made by the Danish domestic debit card Dankort in the non-physical trade, e.g. Dankort-transactions over the Internet.

The DCA expects to finish the case in 2006.

2.7.4 Other cases

From 1999 - 2005 the DCA has received varying notification of agreements related to the card market. The DCA has typically granted an exemption according to the Danish Competition Act (cf. article 81(3) of the Treaty).

2.8 Joint activity by merchants

The domestic Danish rules regarding mergers (including joint ventures) are very similar to the EC regulation regarding mergers. According to the Danish Competition Act, a merger is under Danish jurisdiction if:

- the combined aggregate annual turnover in Denmark of all the undertakings concerned is more than EUR 0.5bn and the aggregate turnover in Denmark of each of at least two of the undertakings concerned is more than EUR 40m; or
- the aggregate annual turnover in Denmark of at least one of the undertakings concerned is more than EUR 0.5bn and the aggregate annual world-wide turnover of at least one of the other undertakings concerned is more than EUR 0.5bn.

If any activity by a joint venture under Danish jurisdiction raises competition law concerns according to the EC regulation, it can - in general - be assumed that the activity raises similar concerns according to the domestic Danish rules.

FINLAND

For several years, the banking sector has been one of the sectors the Finnish Competition Authority (FCA) has monitored particularly intensively due to its important role in the economy as a whole. This contribution concentrates on cases and enforcement experiences relating to the card business (paperless payments). The main focus in the contribution is on the non-discrimination rule (NDR).

1. Non-Discrimination Rule

In 1997, the FCA proposed that the Competition Council prohibit the so-called no-discrimination rule which was applied by several credit card companies in Finland. The FCA's investigations commenced after a complaint by the Finnish Travel Agents' Association (FTAA).

The FCA considered the NDR anti-competitive for the following reasons:

The NDR hinders the retailers' free and independent price setting. Without the NDR, the retailers' free price setting could allow for a better reflection of the cost differences that individual retailers face when accepting different payment methods. According to the FCA, it would be clear that the retailers have – through their price setting - interest to promote those payment methods that would be most cost-effective for them.

- Through the retailers' independent price setting, it would also be more transparent from the customers' point of view what the cost-effect of different payment methods would be for them. Evidently, customers for their part would favour cost-effective payment methods (less costly payment methods) as well.
- As a whole, the process described above would promote the kind of market mechanism in which the cost of different payment methods is seen more transparently in the markets, and also where the cost-effects of payment methods would be a more important reason for using them. This situation would naturally enhance the success of the most effective payment methods in the markets and furthermore promote the entry of new cost-effective payment methods.
- The FCA concluded that the so-called "renounce model" would not be a workable model for promoting efficiency in the markets.

The credit card companies backed the renounce model as an alternative "competition model" rather than prohibiting the NDR. The companies argued that any retailer is completely free to stop accepting credit cards as a payment method if the merchant fee for this individual retailer is too high. According to the credit card companies, competition and markets would function through this mechanism where retailers "vote with their feet" in case the merchant fees are too high.

The FCA argued that the retailers' free and independent price-setting is the best way to promote healthy competition. According to the FCA, the NDR decreases economic efficiency and therefore

infringes the Competition Act. The FCA stated that the NDR prevented retailers from making independent decisions on the basis of their own cost structure and hindered a price-related market mechanism. Furthermore, the prohibition of the NDR would allow retailers to introduce a fee for credit card payments, which would in turn allow credit cards customers a more transparent view of the costs of various credit cards for themselves. These choices made by the retailer (in price setting) and by the customer (reacting to the retailers' fees) would enhance competition among the credit cards firms: if the merchant fee for an individual credit card would not be competitive, the retailers would set a fee for the purchases paid by this card. This would force the credit cards companies to operate efficiently and therefore also to set the merchant fee competitively.

The FCA also noted that accepting the NDR with credit cards could mean that the NDR was introduced in debit cards as well. The FCA concluded that retailers have almost an obligation to accept at least debit cards in order to maintain their business, which demonstrates that the "renounce model" is not a realistic competition "model", as the credit card companies argued. The FCA pointed out that accepting the NDR in credit cards would make it very difficult to subsequently prohibit the NDR in debit cards. On the other hand, applying the "renounce model" in the debit card markets would mean that the retailers should basically accept only cash, which is perhaps the least cost-effective payment method in Finland. These cumulative effects (the NDR in debit cards) were another reason why the FCA proposed that the NDR be banned.

Furthermore, the FCA strongly pointed out in its proposal to ban the NDR that each and every retailer should independently assess the need for the fee, and that the FCA would not accept any collusive behaviour from the retailers in this area.

The FCA's proposal to ban the NDR was supported by the Bank of Finland and the Financial Supervision Authority. Furthermore, the Consumer Ombudsman did not oppose FCA's proposal.

The FCA's proposal was rejected by the Competition Council in 2001. This decision was appealed by the FCA before the Supreme Administrative Court, but the Supreme Administrative Court upheld Competition Council's decision in 2003. The Competition Council (and the Supreme Administrative Court) largely argued that the NDR is an integral part of the credit card mechanism and that it is basically in the interest of the credit card customers. The EC Commission's study on the effects of the NDR strongly affected the decision to accept the NDR.¹ After the decisions by the Competition Council and the Supreme Administrative Court, the NDR has been accepted in Finland.

The FCA's investigations revealed that at least one credit card company applied a so-called "no-rebate" rule as well. This rule prohibited retailers from giving any discount on purchases paid by other methods than credit cards, for instance by cash, unless the same rebate was given to credit card customers as well. The Supreme Administrative Court or the Competition Council did not address this issue separately in their respective decisions.

2. Other cases

In 1996, the three largest banks in Finland establish a cash card joint venture. The joint venture launched a new cash card for small sum payments, largely for payment transactions of less than 5 euros (payments in payphones, parking, public transport, kiosks etc). While the cooperation between competing banks also contained price cooperation, the banks notified the joint venture to the FCA to obtain an exemption from the Competition Act. The FCA exempted the cooperation on certain terms. The FCA

¹ See background paper for the roundtable (DAF/COMP/WP2(2006)3), para 54.

demanding that each bank in the cash card joint venture have an independent pricing scheme for its customers, which allowed competition even between members of the joint venture.

During the FCA's investigations on the cash card joint venture, the FCA became aware that the major banks in Finland had an agreement that debit cards could only be used for payment transactions above 5 euros. The FCA demanded the agreement to be annulled, enabling debit card payments below 5 euros as well. In practice, through this intervention the debit cards became competing payment cards for cash cards.

3. Latest developments

The cash cards did not gain notable success in the markets partially due to the introduction of the mobile payments and the cash card system will soon be abandoned. Mobile payments are nowadays used particularly in similar transactions for which the cash cards were originally planned. Quite recently, some firms have even started marketing "mobile loans" where a SMS text message functions as a loan application. The FCA is not aware of any entry barriers concerning mobile payments that would have triggered its investigations.

In 2006, the first daily consumer goods retailer chain announced that it will start its own banking operations. The Financial Supervisory Authority is expected to authorize the new bank. As a result, competition in the card business is likely to increase, particularly because the daily consumer goods chains already have popular loyalty card schemes in Finland. These loyalty schemes combined with the debit and credit functions (and bank accounts respectively) will increase competition especially between "retail banks" and the traditional incumbents.²

²

For the latest market statistics, see for instance <http://www.pankkiyhdistys.fi/english/index.html>

GERMANY

1. Overview of different payment methods used in Germany

Apart from cash payment and payment by transfer, there are different electronic payment systems in Germany.

The most common system is ELV (elektronisches Lastschriftverfahren). This is an electronic debit card system set up by retailers which is mostly operated offline and by signature. By the signature the customer authorises the retailer to withdraw a specific amount from his account. The payment card is only needed to extract the data on the bank account and the corresponding bank identification code. Since the system works offline, there is no check of the current total of the account or a possible account block. It is the cheapest but also most insecure means of payment for the retailer.

Quite similar to this is POZ (POS without payment guaranteed set up by the banks), which is to expire by the end of 2006, and OLV (Online-Lastschriftverfahren). In both cases there is an online check-up whether the card is invalid or stolen.

"Electronic cash" is the domestic debit card system in Germany for debit cards that are used with a PIN for authorisation at special POS-terminals. Meanwhile in Germany there are more than 400,000 such terminals and more than 90 Mio. "electronic cash" cards are used by bank customers. The increasing use of electronic cash and payment via debit cards is due to the fact that this means of payment is faster than cash payment and less expensive for the merchant than other card payments. A new version including a chip on the debit card also permits offline payments and payments abroad.

Credit cards in Germany usually exist as charge cards (mostly charged within a month's period), often including further services like insurances, lounges etc. As you can see from the chart below credit cards are used for a relatively small percentage of the overall payment volume in Germany. This is due to the fact that in Germany a regular bank account is provided with a (personal) drawing credit, so that there is no urgent need for the short term credit facilities that are connected with the credit card. The maximum amount the customer can overdraw his account usually relates to the monthly incoming payments or depends on an explicit agreement between the bank and customer. Furthermore banking cards allow the use of ATM and payment via ELV, POZ and EC cash.

The Kundenkarte ("Customer Card") – with or without payment function - is issued by retailers, such as the PaybackCard and the HappyDigitsCard. By offering discounts and other advantages the customer card is used as a marketing instrument, in order to bind the customer.

Finally there is the Geldkarte ("electronic purse"). This prepaid card is set by banks and allows the loading and transferring of funds in order to replace cash payments. This means of payment is not very successful at the moment. It is mainly used for low payment amounts, especially to avoid the necessity to have coins always available for automatic vending (e.g. parking fee or subway tickets).

Means of Payment	Payment volume share in 2004 (Germany)
Cash	64,9 %
Transfers	3,0 %
Electronic debit card (ELV/POZ)	16,9 %
Electronic cash (incl. EC Chip)	8,6 %
Credit card	5,0 %
Customer Card (Kundenkarte)	1,1 %
Electronic purse (Geldkarte)	0,0 %
Others	0,5 %

ATM cannot be considered as a payment system. They are more or less belonging to cash payments. Nevertheless, this sector has also generated competition issues similar to those of the genuine payment systems (see below).

2. Access conditions

The principal actors in the field of payment systems are the issuers, acquirers, and network operators/processors.

- Card issuers are required to have a full banking licence. The permission to operate banking business is given by the Federal Financial Supervisory Authority (BaFin) after an examination under the rules of the Financial Services Act (KWG) that is based on standardized and non-discriminatory criteria and deals mainly with liquidity and safety aspects.
- Acquiring companies – unless being a bank themselves - must be owned at least 51% by a bank with a full banking licence. This might be a significant market entry hindrance, but is generally accepted as non-discriminatory. Concerning credit cards, acquirers have to be licensed by a credit card organisation (e.g. Mastercard, Visa, Amex).
- Network operators - at the moment 24 in Germany - have to apply for approval by the Zentraler Kreditausschuss (ZKA), an association of five central associations of German banks, covering almost all German banks. The ZKA demands the fulfilment of mostly technical and safety conditions. This procedure takes a certain time and may be seen as costly, but is commonly also regarded as non-discriminatory.
- The specific – mostly technical and operational – requirements for "electronic cash" cards, the respective terminals and the network operation are defined by the ZKA. The POS-terminals are operated by 24 independent network operators, among them GZS, Intercard, Esso and Postbank.

Credit cards are available from all well-known providers like Mastercard, Visa, Amex etc. Each bank focused on retail banking usually issues credit cards of at least one of those credit card organizations. As regards credit card payment systems in Germany there are eight acquirers, among them Citibank, Deutsche Bank and Postbank.

3. Role of regulatory institutions

The regulatory institutions (Bundesbank, BaFin) set the overall frameworks for the finance systems, especially those concerning liquidity, liability and safety, and thus more or less the access conditions for the actors on the finance markets as a whole. The access conditions for the payments systems are set in a more detailed (and more technical) manner by the ZKA, which is no "classical" regulatory institution, but takes the form of "self regulation" by the market participants themselves. The ZKA consists of the five

major German banks' associations, namely Bundesverband der Deutschen Volksbanken und Raiffeisenbanken e. V., Bundesverband deutscher Banken e. V., Bundesverband Öffentlicher Banken Deutschlands e. V., Deutscher Sparkassen- und Giroverband e. V. und Verband deutscher Pfandbriefbanken e. V., representing almost all of the 2.200 German credit institutions.

As in most European countries the German Central Bank, the Bundesbank, monitors payment instruments and payment and securities settlement systems. This oversight is one part of the statutory tasks assigned to the European System of Central Banks (ESCB). Article 105 (2) of the EC-Treaty defines as a basic task of the ESCB the promotion of the smooth operation of payment systems. This provision is reiterated in Article 3.1 of the Statue of the ESCB.

On an international level, central banks participate in the Committee on Payment and Settlement Systems (CPSS). As a forum for G 10 central banks to discuss issues relating to payment, settlement, clearing and securities system, the CPSS also sets standards for designing and overseeing payment systems (notably the Core Principles for Systemically Important Payment Systems) and securities settlement systems (especially the CPSS/IOSCO Recommendations for Securities Settlement Systems). In addition, the CPSS provides a means for central banks to coordinate oversight.

In this international context, the Bank of International Settlement (BIS) developed "Core Principles for Systemically Important Payment Systems (Core Principles)", which have been adopted by the Governing Council of the ECB and have been transformed into the "Oversight standards for Euro Retail Payment Systems" of the European Central Bank. Standard IX of these oversight standards requires that "the system should have objective and publicly disclosed criteria for participation, which assure fair and open access". However, these standards' main intention is to avoid systemic risks for payment systems. The non-discriminatory access to payment systems is promoted for the sake of the system's efficiency. Competition issues are subordinate. Furthermore, the central bank does not have any intervening powers. The oversight of the central bank is based on "soft law".

The Federal Financial Supervisory Authority (BaFin) has an indirect influence on access to payment systems, because it issues the banking-licence, which is the central access criterion in the rules of the payment systems. According to the EUDirectives on Banking-Coordination, the status of a bank or credit institution in the Member States is regulated by law. The national laws on the legal status and supervision of credit institutions aim to protect the savings of the public and to safeguard the smooth functioning of the credit system by laying down rules for the establishment and the operation of the credit institutions as well as for the supervision of the latter. In this process of issuing the banking licence no competitive aspects are considered.

The review of the terms and condition of payment systems in the light of competition concerns is solely task of the German Bundeskartellamt. Rules of the payment systems formerly had to be notified to and approved by the Bundeskartellamt with respect to their compatibility with applicable German competition law (former §§ 1, 29 Act against Restraints of Competition). Since the Council Regulation 1/2003 EG and the new Act against Restraints of Competition came into force in May 2004 and July 2005 respectively, there is no more obligation to notify new rules to the Bundeskartellamt, since the former specific rule for credit institutions in § 29 Act against Restraints of Competition has been abolished. The approval of existing rules remains in force for a transitional period of time (until the end of 2007). Now, under the system of legal exception, the market participants themselves have to assess the eligibility of their agreements for an exemption. Any agreement between undertakings, decisions by associations of undertakings and concerted practices can be examined ex officio whether they are compatible with § 1 ff of German and Art. 81 of European competition law.

4. Fees

4.1 *General Remark*

Since the rules of the payment systems do not have to be notified to and approved by the Bundeskartellamt any more due to the coming into force of Regulation 1/2003 EG and the new Act against Restraints of Competition (see above), there is no more automatic examination of rules concerning fees with respect to their compatibility with applicable German competition law (§§ 1, 29 Act against Restraints of Competition). In general, there is no approval of fees by any part of the government nor is there an overall system for setting fees based on consultation with government. A review of pricing is only possible according to the measures of Art. 82 EC Treaty or Section 19 and 20 of the German Act against Restraints of Competition. Furthermore price setting behaviour can be discussed with relation to the cost in the context of Art. 81 (3) EC Treaty.

4.2 *Interchange Fee*

The Bundeskartellamt has not yet conducted any particular investigations on the level of interchange fees that the issuing banks charge to the acquiring institutions in Germany. The level of the interchange fee is not publicly known. The Bundeskartellamt has punctual knowledge of MIF from various cases and studies by EU-Commission. Companies partly claim that they are business secrets.

The Bundeskartellamt recently received a formal complaint from the German retailers' association concerning interchange fees in the credit card sector. Detailed investigations (price investigations including calculation of costs and benchmarking) on fees will be necessary to assess this complaint.

According to the interim results of the sector inquiry (p. 70) the Commission published this year in 20 of 25 countries of the EU the profit ratio of the issuing institutions remains positive even in the extreme situation of a "zero" interchange fee. Therefore a high number of issuing institutions would remain profitable in the situation of a complete elimination of interchange fees.

In March 2001 the ZKA applied for an exemption from § 1 German Act against Restraints of Competition for a collective agreement between German Banks on the introduction of interchange fees in the German debit card system (EC cash). The economic background of the intended common interchange fee was the desire of the banking sector to receive remuneration from retailers when using ELV (see above 1.) as a means of payment. By charging a common interchange fee the credit institutions wanted the retailers to participate in the costs for providing the infrastructure and the credit assessment that is undertaken before a debit or credit card is issued to each bank customer. It was therefore intended to redistribute the costs within the system and between its participants and to balance the costs between the issuing bank and merchant's bank.

In its assessment in the statement of objections the Bundeskartellamt considered in particular that such interchange fees are typically passed on to merchants and therefore increase costs to consumers. If German issuing banks would indeed issue ec cash cards without earning profits, it would be up to the banks to recoup these costs from cardholders subject to competitive forces. The Bundeskartellamt was furthermore of the opinion that the agreement was not necessary for the finance industry to be able to provide the POS System Service. Only the agreement on technical and operational matters and standards was considered to be indispensable to ensure the functioning of the system and the interaction of the credit institutions in particular. Since the intended agreement on interchange fees, aimed at redistributing the costs among issuer and acquirer (respectively merchant), the Bundeskartellamt could not see any rationalisation, i.e. the improvement of the relation between revenue and expenses. The intended

agreement was therefore classified as a simple cartel to regulate pricing. The application for exemption was withdrawn by the ZKA.

According to the Interim Report of the Commission based on the Sector Inquiry on Payment Cards (p. 123) a no surcharge rule is contained in the rules of the electronic cash system. This prohibition against surcharging stems from the framework agreement between issuers and merchants governing access to the electronic cash card system. Under the rules of the international mastercard network, which are applicable to the German merchant participants, the merchants must not add any surcharges to a transaction, unless a law expressly permits merchants to impose such surcharges. There is no such provision in Germany.

4.3 Merchant Fee

The level of the merchant fee for participants in the electronic cash system is publicly available: 0.3 percent of the transaction volume and 0.08 Euro per transaction for transactions up to 25.56 Euro. The Bundeskartellamt does not have any information about the development of the merchant fee level over time and in relation to the expansion of card usage.

5. Findings from merger cases

The Bundeskartellamt has to decide on a merger case affecting the market for network operator services and processing services. In this context the theory of two-sided markets was brought forward by the notifying parties as an argument to define the relevant market as consisting of issuing and acquiring processing services. In its preliminary assessment the Bundeskartellamt had some doubts whether the theory is a concept for market definition and whether the conditions for the phenomenon of the two sided markets are– or at the most in a very indirect manner – fulfilled in this context, since there is no common platform with respect to processing services. The processing services as well as the network operator service are services that support the other participants in the payment systems and allow a more efficient handling for them.

6. Competition Concerns

The sector inquiry that the commission conducted in the field of payment cards across EU 25 has revealed indications that markets are not yet competitive (e.g. large price differentials within the single market, generally high profitability over time, higher fees for SME than for large enterprises for the use of a payment card without justification by transaction volume). The inquiry has also found evidence for a number of potential structural, technical and behavioural barriers to competition (e.g. vertical integration, joint ventures between local banks to acquire merchants, divergent technical standards, agreement on preferential interchange fees between local banks, bilateral clearing arrangements between local banks) that inhibit the growth of a Single Market in payments.

More competitive payment card industries with payment systems that are compatible with one another, e.g. in the frame of a Single European Payments Area (SEPA-initiative), could create significant efficiencies for businesses, increase competitiveness and innovation. It is therefore important to take the necessary actions to remove the identified obstacles.

HUNGARY

The most important paperless payment instruments in Hungary are payment cards. Cheques are of limited usage, and alternative technologies are slow in gaining acceptance. Therefore our submission will focus on the payment card industry.

1. The payment card industry in Hungary

1.1 *Structural conditions*

The Hungarian payment card is a market in development. The payment card industry has a significant growth rate, with important industry characteristics showing significant shifts and changes every year.

1.2 *Growing and changing market*

According to 2004 data, the number of cards per capita was 0.65, while the average in the European Union exceeds one. However, the growth rate of the cards in circulation is in double digits on a yearly average: last year's growth rate was 13%. In addition to the overall growing trend, the increasing role of credit cards can be observed as well: the number of credit cards has doubled in 2005, and their share increased from 8% to 14%. Although that means that 86% of all cards are still debit cards, an increasing development of credit cards is expected in the coming years.¹

The card transaction volume is also increasing: In 2005, 209 million transactions were conducted in Hungary, with domestic and foreign issued cards, in the value of HUF 5,249 billion. The transaction number rose by 8%, the value increased by 10%, in comparison to the previous year. Hungarian cardholders used their cards on 203 million occasions inside and outside of the country, in the value of HUF 5,220 billion. The number rose by 11%, the value grew by 9%.

The share of cash withdrawal transactions continued to fall; of every one hundred transactions 55 transactions were cash withdrawals (as oppose to 58 in the previous year). In respect of purchase transactions, of every one hundred transactions, there were 41 payments through POS terminals at retail outlets, with 4 mobile phone loading at ATMs.

1.3 *Card issuance and acceptance*

There are 22 banks and one financial enterprise issuing payment cards in Hungary, The market is dominated by a large commercial bank, having a very strong position on the retail banking market: more than half of the cards are issued by this undertaking, whereas the ratio of the 8 largest banks in payment card turnover is around 90%.

Merchant acquiring is a very concentrated market in Hungary, with six credit institutions and one financial enterprise offering contracts for the acceptance of MasterCard, and five of them also for Visa

¹ Data for the industry structure is based on a publication by the National Bank of Hungary: 'The payment card business in Hungary (2005)'

cards.² However, the market is dominated by two large players, which perform acquiring for more than 95% of the transactions.

2. Fees and charges in the card payment industry

Merchant service charges are negotiated by the acquirer and the merchant. The merchant service charge consists of the acquirer's fee and the interchange fee. The acquirer's fee is expected to cover the acquirer's costs, while the interchange fee is the sum paid by the acquirer to the card issuer bank.

The ratio of the interchange fee is determined by an agreement between the banks. The level of the fee has been fixed in the middle of the 1990s, and has not been altered since then. The banks had set up a 'Payment Card Forum' that time, which elaborated the default interchange rates. This system is characterised by no differentiation between credit and debit cards, and special rates for a certain sector (petrol stations). The two large card systems, Visa and Mastercard have the same partner banks, and the interchange fees are the same in both large payment platforms, based on the above-mentioned agreement.

The interchange fee is regarded as too high compared to costs, especially in the case of debit cards. Both Visa and Mastercard are engaged into cost studies, the results of the latter are expected to be published in June 2006.

2.1 Price discrimination and 'on-us transactions'

The high concentration of the acquiring market has its effects on the price structure of the industry as well. In transactions where the issuer and the acquirer is the same bank (so called on-us transactions), the interchange fee plays no role, and the whole merchant service charge stays at the acquirer. Since the larger of the two significant acquirers is also the largest player on the card issuing market, and the other large acquirer is also an active player on the card issuing market, there is room for considering the increased use of on-us transactions.

The reason for the on-us transactions is that certain merchants, mostly large hypermarket chains have considerably larger bargaining power against the potential acquirers than smaller merchants. This results in a very significant price discrimination: acquirers claim a considerably lower merchant service charge from these stores, sometimes setting the price of the 'on-us transactions' below the interchange fee.

2.2 Consequences of too high interchange fees and price discrimination

This kind of price discrimination may have very adverse effects on competition. With the reduction of the price of 'on-us transactions' merchants will be willing to accept cheaper cards, i.e. cards issued by the acquirer. This may lead to a situation where some stores decide to accept only the acquirer's cards, thereby effecting competition on the card issuing market, since consumers may be willing to choose the bank that offers cards with a wider acceptance.

Not only price discrimination, but also the high level of interchange fees can have a negative effect on competition. A high interchange fee level leads to higher merchant service charges, thereby making the installation of a POS terminal more costly and less desirable for certain merchants. Although there have been no studies confirming that it is in fact the high interchange fee that prevents the more widespread use of POS terminals, a 2004 survey showed that the number of POS terminals per thousand inhabitants is

² JCB, Diners and Amex is also accepted in Hungary, but their share is very limited: more than 90% of the payment card transactions are completed with a card bearing a Visa, or a Mastercard logo.

quite low in Hungary (3,3)³. As a result of this, the high interchange fees may impede the widespread use of a potentially more effective payment method.

3. Competition law

There has been no recent competition supervision proceeding in Hungary in this topic, but the Gazdasági Versenyhivatal – the competition authority of Hungary (GVH) is closely monitoring this field. Mastercard was offered a possibility to present their views at the GVH, where experts from the National Bank of Hungary and the Hungarian Financial Supervisory Authority were also present.

There are several issues supporting a GVH intervention in this market, which is currently under consideration. The high level of interchange fees may hurt the interest of consumers, since as a result of the agreement, they are paying supra-competitive price for this service. The presence of price discrimination is also a signal for some possible market problems in the pricing pattern of the industry.

In addition to this, as it has already been mentioned, the high interchange fees may also prevent the widespread use of cards, and thus a cheaper and more efficient payment method. This could result in significant social costs.

The reasons against competition policy intervention are based mainly on two grounds. First is the limited ‘pass-through’, and second is the developing nature of the Hungarian payment card market.

Competition policy is targeting long-term consumer welfare, and lower prices paid by the consumers are an indication of an effective competition policy intervention. A reduction in the interchange fees, however, would not necessarily be reflected in consumer prices, as due to limited pass-through, this reduction may only result in a re-allocation of profits between the issuing banks and other members of the payment cards industry. The pass-through of cost reduction may appear on two levels.

First, there is a question of pass-through by the merchants. It can be doubted, that merchants will pass through this cost reduction on their consumers in the form of reduced prices. However, on the long run competition in the retail sector is expected to solve this problem.

A second difficulty in pass-through results from the very concentrated nature of the acquiring market. A reduction in the interchange fee may not necessarily affect the contracts between merchants and acquirers – it may very well be the case that merchant service charges remain unchanged, and a reduced interchange fee only results in an increasing profit in the acquiring market. However increasing profitability in the acquiring market is expected to induce further entry to this market, and increased competition is expected to drive prices down.

The limited maturity of the Hungarian card industry is also a factor to be considered for a competition policy intervention. Given the high concentration in the issuing market, with a reduced interchange fee, some smaller banks would necessarily find the card issuance unprofitable. This would surely result in high costs for banks that are currently shaving off some market share from the dominant market player, and thus are expected to offer a positive contribution to competition in the retail banking sector. These costs, however, may most likely be seen as temporary, and should not prevent the GVH from acting for the reduction of interchange fees.

³ The same data value is 3,6 in Slovakia, 4,3 in the Czech Republic, 10,3 in Belgium and 13,1 in Portugal.

IRELAND

Answers to Questions by Topic Area

1. Structural Conditions

1.1 *Social costs and benefits of different payment systems*

The Irish Payments Services Organisation has recently engaged consultants to estimate the cost/savings of bringing in cheque truncation and also undertake a cost/benefit analysis of significantly reducing the amount of cheques written.

1.2 *Exit/entry*

From 1996 until 2005, only one debit card was available in Ireland – the Laser card. Laser is a debit payment card owned and operated by seven financial institutions, including the five main retail banks. The fact that the Laser brand is owned and operated by the incumbent banks means that Irish banks have little or no incentive to offer any alternative debit card product to their customers. No other debit card has entered the Irish market. Apart from the lack of choice of debit cards in Ireland, Irish consumers are further disadvantaged by this arrangement by the fact that Laser cards are not accepted for payment abroad. Very recently (in the past 12 months or so), some Irish banks have started to offer a joint Laser/Maestro card which can be used in other EU countries.

1.3 *New technologies*

In general terms, undertakings which wish to offer payment functionalities of the types described above would need to be able to access the Irish payment clearing network. While, traditionally, banks and, to a lesser extent, building societies, have been the only entities which have joined the clearing system, either as full or associate members, the Competition Authority recommended in its 2005 Banking Study that other undertakings, such as credit unions and the Post Office, be permitted to join the clearing system. It has since been clarified that credit unions are indeed eligible to join the clearing system.

One retail bank in Ireland was considering offering services via mobile phones but decided against it, they say, because they felt that the current price regulation regime which applies to bank charges in Ireland could render the offering unprofitable. In Ireland, any new fees or charges to be applied by a bank with respect to current accounts and other bank products must be approved by the Financial Regulator. This legislation has been criticised as stifling innovation.

2. Fees and Charges

2.1 *Merchant charges*

The Irish Competition Authority does not have any information relating to Merchant charges.

2.2 *Interchange fees*

The Irish Competition Authority does not have any information relating to interchange fees.

2.3 *Regulation of fees*

In Ireland, all fees to be charged by a bank to consumers with respect to debit and credit cards must be approved by the Financial Regulator.¹ The Consumer Credit Act 1995 requires fees and charges to be notified to the Regulator. In evaluating these charges, the Regulator is to have regard to the following considerations: the promotion of fair competition, the commercial justification for the fees, the passing on of the costs needed to serve customers to those customers, and the effect on customers of any proposal to impose or change fees. The actual fees charges thus vary from bank to bank but tend to have similar structures.

Merchant charges are unregulated.

2.4 *No-surcharge and no-discount rule*

“No-surcharge” rules have existed in Ireland (in which a merchant cannot charge a customer using a card more than a customer using cash or by offering a cash discount below the card price) for Visa and Mastercard. Laser applies a similar rule. Mastercard no longer applies this rule (since early 2005). The Irish Competition Authority has not taken a position on these rules.

2.5 *Cost-based fees*

The Irish Competition Authority has not taken a position on cost-based fees and charges.

3. *Tying*

3.1 *Honour-all-cards rule*

Very recently (in the past 12 months or so), some Irish banks have started to offer a joint Laser/Maestro card. Given that Laser functionality is unique to Ireland, when such joint cards are used abroad, payment is automatically routed through the Maestro system. In Ireland, payment is routed through the Laser system at the moment.

3.2 *Distributional effects of merchant fees on non-cardholders*

The Irish Competition Authority has not taken a position on no-surcharge rules.

4. *Information Limits*

The Irish Competition Authority has not yet been confronted with this issue and, therefore, does not have a position on it.

¹ To be clear the Regulator does not regulate interest rates to be charged on credit cards, for obvious reasons.

5. Membership in Joint ventures: Exclusivity and Duality

5.1 *Exclusivity*

In Ireland, all card-issuing banks issue the same two credit cards (Visa and Mastercard) and the same debit card (Laser). There has been no new entry to the payment cards market. The Irish Competition Authority is not aware of any issues arising regarding exclusivity. All Irish banks issue a range of credit cards, while a smaller number issues a range of debit cards (Laser and Maestro).

5.2 *Duality*

All card-issuing banks in Ireland issue both Visa and Mastercard and sit on both boards. The Irish Competition Authority does not have information on the interchange fees of the two platforms.

6. Competition Law

6.1 *Competition law application*

There have been no competition law cases in Ireland regarding payment cards.

6.2 *Joint activity by merchants*

The Irish Competition Authority has not yet been confronted with this issue and, therefore, does not have a position on it.

ITALY

Introduction

In Italy, as in most European countries, payment cards transactions have substantially increased in volume in recent years, becoming a common retail payment instrument. Some of the features of the Italian market are comparable to those of other OECD countries. However, the Italian market of payment cards has long been smaller in comparison with other European countries, with a significant percentage of the population still rather reluctant to use cards and using cash for everyday retail transactions¹. This situation has been changing over the years. While in 1990 the percentage of non cash card transactions was 14%, in 2004 this percentage had risen to 32%².

As payments by card grow in value and importance, competition issues receive attention from regulatory and antitrust authorities. In the last few years a number of antitrust cases have dealt with some restrictive practices by card associations, including the level of the interchange fee.

1. The Italian market for credit and debit cards

While traditionally Italian consumers have been reluctant to use debit or credit cards in Italy, in recent years the market has been growing very fast and is continuing to do so. In 2004 the number of credit cards in circulation in Italy amounted to almost 27 million (increasing by 5.4% on the previous year). In the same year, the number of credit card transactions was 433.621 (15,9% more than in 2003) for a corresponding value of 42.000 million euros (19,8% more than in 2003)³. There were more than one million POS (point of sales) terminals, 8.7% more than in 2003. The rapid evolution of the market in the last four years is even more evident when considering that the number of credit cards increased by 37% with respect to the year 2000.

As in other countries, the first credit card introduced in the Italian market was Diners (1958), followed by BankAmericard (1968) and American Express (1971). The “three party system” was prevalent at the beginning, BankAmericard being the only card offered by a bank, with rather high merchant fees. The extent of the market was quite limited⁴.

Until the mid eighties American Express had a leading position in the Italian credit card market, with a share of around 50%. A significant change in the market structure followed the introduction, in 1986, of the CartaSi network, by Servizi Interbancari, a financial company owned by the leading Italian banks, providing issuing and acquiring services for both Visa and Master Card.

¹ Considering the value of credit card transactions in 2004 Italy's position among European countries was comparable to that of Germany, significantly distant from Spain (whose transaction value was more than double the Italian one), and very distant from countries like France and the UK, Assofin-CRIF-Eurisko, Observatory on Credit Cards, September 2005.

² Bank of Italy, Annual Report, May 2005.

³ Bank of Italy, Annual Report, May 2005.

⁴ At the beginning of the eighties there were only 1,6 million cards in the Italian market for a transaction value of 295 million euros, Bank of Italy, decision N. 47, 4/8/2003.

Servizi Interbancari, that changed its name in CartaSi in 2003, is a joint stock company, whose share holders are Italian banks and the Italian Bankers Association (ABI)⁵. It is a licensee of the VISA and MasterCard systems (like any other bank). Representatives of CartaSi (together with those of other domestic banks) sit both on the VISA and Europay International Boards and on the Directive Council of VISA Italy (MasterCard does not have an Italian Council). CartaSi is the main Italian network both for the issuing and acquiring sides⁶, even though it is rapidly losing market shares. The terms of the relationship between CartaSi and its member banks are contained in an internal regulation, setting rights and obligations for the banks.

On the issuing side member banks control the reliability of potential clients, they take care of all the affiliation procedures and bear the costs of judiciary actions in case of insolvency, while CartaSi prepares the affiliation forms and keeps all the records concerning the cardholders. CartaSi cards are issued on the request of member banks, and show the brand CartaSi, the networks brand (VISA or MasterCard) and the cardholder's bank brand. CartaSi pays the affiliation fee to Visa and MasterCard and bears the financial costs connected with the time difference (*free period*) between the transaction and the charging on the cardholder's account. Acquiring banks transmit the data concerning transactions made on the acquired merchant's premises to CartaSi, that collects and manages the data and pay for those services. CartaSi also has its network of agents for contacting and servicing the merchants.

CartaSi rapidly gained a leading position, reaching, in 2000, a market share of 57% on the issuing side. At the beginning of the nineties some banks started offering their own credit cards, outside the CartaSi network, gaining market shares at the expense of CartaSi, while the position of American Express (around 12% of the market) and Diners (around 5%) remained more or less stable. Indeed, while CartaSi continues to have a significant share of the Italian credit cards market, major banks are more and more issuing their own cards separately from CartaSi, while some other banks are specializing on the acquirer side also separately from CartaSi. These banks compete with CartaSi, while continuing to be members of CartaSi.

There are peculiar features in the way CartaSi works, making it a different system both from networks like VISA and MasterCard, and from proprietary systems like American Express and Diners. In fact although it is CartaSi itself, and not the member banks, to be the issuer and the acquirer for the CartaSi cards, the role of the banks is nevertheless greater than it is in proprietary systems.

The role of CartaSi in determining fees, especially on the acquiring side, has changed over time. Until 1994, merchant fees were centrally established by CartaSi, while, from that year on, probably also because of an antitrust proceeding against CartaSi (see below), banks progressively gained autonomy in determining the level of such fees.

The "four party system" became the prevalent one in Italy with entry of banks in the market. As for the domestic interchange fee, the networks (VISA and Mastercard) were unable to agree and domestic interchange fees are set at the same level of European cross border transactions⁷. As should have been expected, VISA and Master Card interchange fees, although not identical, did not seem to differ much when analysed by the Authority in a case concerning merchant fees to retail petrol distribution.

⁵ In particular the main shareholders are Intesa BCI (13,63) UniCredito (9,34), San Paolo IMI (9,25) Banca popolare dell'Emilia Romagna (6,13) Capitalia (5,99), Banca Popolare di Novara (5,65), Monte dei Paschi di Siena (5,07) and ABI and other banks with shares below 5%.

⁶ In 2003 the number of merchants acquired by CartaSi was 512.000. In the same year there were 800 member banks and about 7 million CartaSi cardholders.

⁷ European Commission Case/Comp/29.373, OJ L. 318/17.

As in many other countries, cardholders in Italy pay a fixed annual fee to the issuer (sometimes the fee is zero) and no transaction fees. On average the annual fee paid by cardholders was, around 28 euro in 2002⁸.

Merchants pay a fee to the acquiring banks and once they join a network they cannot refuse payments with cards of the network they joined (*Honour All Cards Rule*). The “*Non Discrimination Rule*” is applied too, not allowing merchants to price differently according to the chosen payment instrument. Merchant fees were strongly decreased after the entry of CartaSi in the Italian market. American Express average merchant fee that was around 3.2% in 1990 had been reduced to 2.8% in 2000. It was still higher than the merchant fee applied by CartaSi that was, in 2000, around 2%. The average merchant fee moved from 2,5% in 1998 to 1,84% in 2002.

Debit cards, introduced at later stage in the Italian market, also had a rapid expansion concentrated in the last few years. In 2004 there were around 25 million cards (4% more than in 2003) and 608.333 transactions for a corresponding value of about 41 million euros. Debit cards are generally considered an alternative, although not entirely substitutable, card payment instrument⁹. The national debit card network was developed by CO.GE.BAN, an association of banks created in 1995 by the Italian Bankers Association (ABI) in order to foster the use of debit cards in Italy. Today there are around 600 banks associated to CO.GE.BAN. In order to become a member of CO.GE.BAN it is necessary to be a bank, affiliated to ABI and with offices in Italy. CO.GE.BAN is the licensee of the Pagobancomat trademark, owned by ABI¹⁰, and it sets the rules and the technical standard for Pagobancomat cards. CO.GE.BAN does not operate directly on the issuing or acquiring side of the markets, but only, like VISA or MasterCard, as licensor of the PagoBancomat trademark to issuing and acquiring banks. . It sets the general rules that associated banks must follow both on the issuing and acquiring sides in order to be allowed to use the trademark. These rules provide that banks can charge an annual fee to cardholders but no transaction fees. On the acquiring side banks can charge a fee to merchants and impose a non discrimination rule. Finally, CO.GE.BAN. determines the value of the interchange fee paid by acquiring to issuing banks. Pagobancomat is the only national debit card network. The international debit card networks VISA Electron and Maestro are active in Italy for cards carrying these trademarks (usually foreign cards)¹¹.

2. Antitrust interventions in the card markets

In recent years the Bank of Italy, until January 12 2006 responsible for the application of the competition law on banking, and the Italian Competition Authority opened a number of antitrust proceedings in the Italian card markets: 1) cost of credit card purchases of gasoline; 2) the pricing decision of CartaSi acting as an acquirer; 3) the joint venture between CartaSi and American Express; 4) PagoBancomat services; 5) merchant fees in debit card transactions.

⁸ Bank of Italy's survey in decision. N. 47, 4/8/2003.

⁹ While with credit cards the debit can be settled in full by the end of a specified period, with debit cards the purchases are directly charged to funds in an account. Other differences are the expenditure limit (generally higher for credit cards). Credit cards can also be used as a guarantee of future payments (for example for hotel reservations, etc.) In the decisions of the Italian Competition Authority the two markets have been considered separate in view of the different characteristics of the two products.

¹⁰ ABI is the owner of the trademark Bancomat used on cards for ATM services. The trademark becomes Pagobancomat when used for payment cards.

¹¹ BancoPosta, the branch of the Italian mail company Poste Italiane offering financial services, recently introduced its debit card Postamat, affiliated to the Maestro network. In 2004 there were 4,8 million Postamat cards.

2.1 *Credit card fees in petrol retail distribution*

In 2002 the Competition Authority closed an investigation (I452-*Carte di credito*¹²) into some major companies operating in the credit card sector (Servizi Interbancari, American Express, Diners) concerning the standard conditions for the use of credit card for petrol station transactions. The same conditions were applied by all credit card companies.

These conditions were peculiar to the sector, and provided a fixed fee (about 77 eurocents) paid by cardholders for each transaction at a petrol station. On the other hand, the merchant fee applied to petrol stations was around 0.5%, a level significantly lower than the one applied in other retail sector (where the average merchant fee was above 1%). This lower level was, nonetheless, necessary, in order to convince gasoline stations, whose margins were too low to bear the costs of higher merchant fees, to accept the use of credit cards. However, a merchant fee of 0.5% was not high enough to cover all the costs on the acquiring side of the market. The commission paid by card users was, therefore, a way to compensate the issuers for the lost interchange fee on these transactions.

In connection to this VISA notified to the Authority its intention to reduce the interchange fees when applied to purchases of gasoline (I578 *VISA – Commissione Interbancaria benzine*¹³). The decision to reduce the level of the interchange fee for gasoline stations had the objective of raising the incentive for merchants to accept the use of cards as a form of payment.

2.2 *Servizi Interbancari - CartaSi*¹⁴

In August 2003 the Bank of Italy closed an investigation into the activities of Servizi Interbancari (SI) both on the issuing and on the acquiring side¹⁵. The analysis of the activities and internal rules of SI showed that, until 1994, SI had directly established the fees that issuers and acquirers were required to charge. From 1994 SI continued to suggest the relevant fees to be charged, but banks were free not to follow. A comparison of the prices for CartaSi cards offered by different banks showed that prices, in 2002, were rather differentiated. This is why the price suggestions on the issuing side were not considered restrictive. On the other hand, the Bank of Italy found that SI was organizing committees, attended by member banks, in order to discuss the evolution of merchant fees. Furthermore CartaSi had established an authorization procedure by which member banks had to be explicitly allowed to differentiate their merchant fees from the suggested one. Both the activity of these committees and the authorization procedure were considered restrictive and the Bank of Italy imposed on SI a fine of 500000 EUR.

2.3 *CartaSi – American Express*¹⁶

In 2004 the Authority concluded an investigation into an agreement voluntarily notified by CartaSi¹⁷ and American Express. The agreement concerned the creation of a cooperative joint venture, Iconcard, for the issuing and management of premium credit cards belonging to the American Express network and their

¹² Italian Competition Authority, decision no. 10904, 27/6/2002, I452, Bulletin no. 26/02

¹³ Italian Competition Authority, decision. n. 12288, 31/7/2003, I578, Bulletin 31/03.

¹⁴ Bank of Italy, provv. n. 47, 4/8/2003.

¹⁵ The Bank of Italy in its final decision agreed with the opinion that the Competition Authority prepared for the case (Italian Competition Authority, AS243, 17/5/02, Boll. 28/02.

¹⁶ Italian Competition Authority, decision no. 13434, 28/7/04, I566, Bulletin no. 31/04.

¹⁷ In 2003 Servizi Interbancari changed its name into CartaSi (which had previously been just the name of the network).

distribution through member banks of CartaSi. The investigation was extended to the “Financial Service Agreement” by which CartaSi would serve as an agent of American Express in the acquisition of merchants and would provide to American Express services for processing transaction data.

The agreements raised a number of competition problems. On the issuing side CartaSi was the market leader with a 57% share and American Express was the third player with a 12% share. On the acquiring side CartaSi held 40% of the market and American Express 12%.

The Authority concluded that the agreement could lead to a coordination of the commercial strategies of Visa, MasterCard and American Express on the market of premium cards. Furthermore the agreement could have strengthened the link between CartaSi and its member banks.

The parties, during the proceedings, introduced some changes to the notified agreement, limiting the activity of the joint venture to the issuing of four types of cards (clearly identified) and removing the exclusivity clause that allowed the distribution of the Iconcards only by CartaSi member banks. They also introduced the possibility for banks to offer other American Express cards, besides the ones that were the object of the joint ventures, and the possibility to decide freely at what price the Iconcards should be offered.

In view of the fact that the agreement had also some pro competitive effects, opening up the banks distribution channel to American Express, the Authority authorized the joint venture for three years.

The “Financial Service Agreement” by which CartaSi would acquire merchants on behalf of American Express was considered restrictive, because it could result in a coordination of merchant fees for different cards, while the provision of processing services, being an inherently technical activity, had no relevant effect on competition.

2.4 *PagoBancomat Services*

In 1998 the Bank of Italy (applying the Italian competition law) evaluated the rules of the Pagobancomat network and granted a five year exemption, in consideration of the benefits for consumers deriving from the agreements¹⁸.

In 2003 (when the 1998 exemption expired) the Bank of Italy analysed again the interchange fee set by CO.GE.BAN and exempted it for other five years after assessing that the fixed level of the interchange fee reflected the costs incurred by issuing banks¹⁹.

In a 2005 decision the Bank of Italy considered restrictive the rules by CO.GE.BAN instructing merchants and companies managing POS terminals not to install “multi bank” services for debit card transactions. These rules impeded merchants from setting up POS transactions through a number of banks rather than by way of a single pre-determined bank, so that the merchants could choose the bank through which negotiate a debit card transaction according to the bank the customer had the account with. CO.GE.BAN was instructed to eliminate these restrictions starting from October 2005.

2.5 *Merchant fees in debit cards transactions*

The Authority recently took charge of the proceeding opened against CO.GE.BAN by the Bank of Italy in 2005²⁰.

¹⁸ Bank of Italy, decision no 23, 8/10/1998.

¹⁹ Bank of Italy decision no. 49, 1/7/2004.

The proceeding is a follow up to the 2005 decision by the Bank of Italy prohibiting CO.GE.BAN from instructing retailers and companies managing POS terminals not to install "multi-bank" systems starting from October 2005.

The non-fulfilment of this condition by CO.GE.BAN led the Bank to start a non-compliance proceeding that is now conducted by the Italian Competition Authority.

The case is still pending. A decision is expected by July 2006.

²⁰

With the law n. 262 of December 28th 2005 the Italian Competition Authority became responsible for competition policy also in the banking sector. This responsibilities had originally been given to the Bank of Italy. In accordance with the new provisions, the Bank of Italy forwarded the documentation of the case to the Antitrust Authority.

KOREA

1. Introduction

In Korea, paperless payment instruments are categorized into cards (credit cards, debit cards, check cards and prepaid cards)¹⁾ and electronic money (IC card type and network type)²⁾. Among cards, credit cards have become the prime payment instrument accounting for 98 % of the total amount of card transactions. Debit cards and prepaid cards have recently seen their transaction amount increasing, but still their usage is meager.

Transaction Amount of Card & IC Card type Electronic Money

Instrument	Amount (Unit: 1 billion Won)	Proportion to the entire transaction amount	Increase/Decrease rate
			in Transaction amount (against the same period of the previous year)
Credit	947.7	98%	1.1%
Debit	0.5	0.05%	257.7%
Check	17.6	1.7%	275.6%
Prepaid	1.4	0.1%	129.0%
E-money	0.3	-	-5.2%

* Source: "Transaction & settlement in the first quarter of 2005," The Bank of Korea

This report will focus on credit cards that have become the most frequently used paperless payment instrument in Korea.

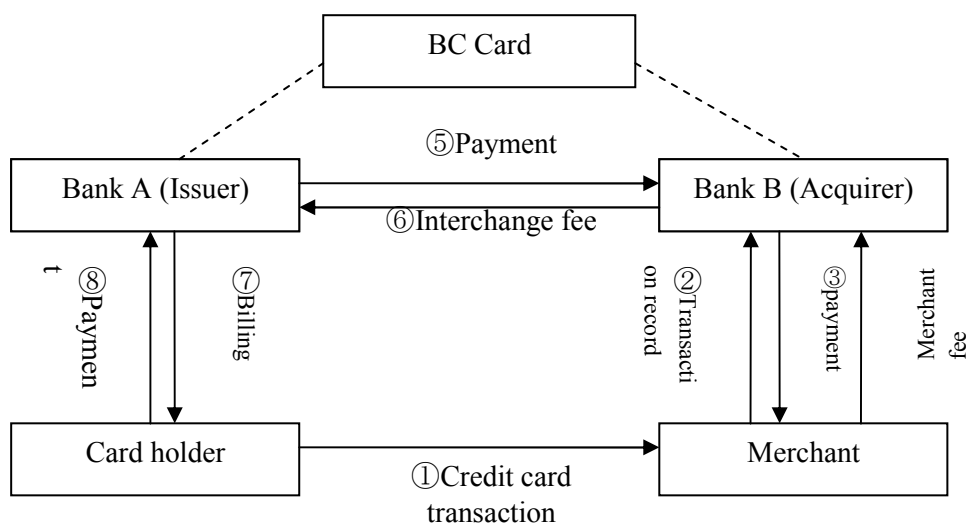
2. Credit Card Market in Korea

Credit card companies in Korea are categorized into two groups: Companies with the four party system and those with the three party system. However, in the four party system, there is no clear-cut distinction between issuing banks and acquiring banks. Rather, as member banks often carry out both issuance of cards and acquisition of transactions, in effect, the four party system in Korea works just like the three party system where issuing activities and acquiring activities are integrated. Meanwhile, the Financial Supervisory Commission adopted the so-called "Joint Use of Merchant Network" system in 1999 so that consumers using, for example, company A's card can make purchases from merchants that signed a contract with credit card company B.

2.1. Four Party System

BC Card is one of the major credit card companies that have the four party system. This company was established as a joint venture of eleven banks and they jointly use the brand name “BC Card.” Through the credit card company, the banks, on the one hand, solicit card subscribers, sign contracts with them and provide loan services, and on the other hand, solicit merchants, sign contracts and provide payment services. BC Card carries out issuance and marketing of credit cards, managing merchants, settlement of transaction, etc. The following figure is about how credit card transaction is conducted.

<Figure 1> Transaction Process of BC Card



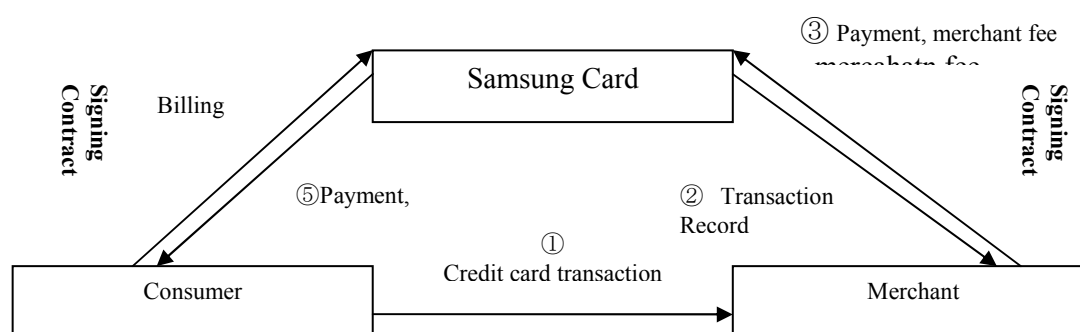
(Note) In effect, member banks sometimes serve as issuers and at other times, acquirers.

- 1 A consumer pays merchants for his/her purchase with a credit card.
- 2 The merchant provides bank B with transaction records and gets paid for the transaction from the bank.
- 3 – 4 Bank B makes a payment to the merchant, while the merchant pays merchant fee to bank B.
- 5 – 6 Bank A makes a payment to bank B, while bank B pays interchange fee to bank A.
- 7 – 8 Bank A sends the cardholder a bill indicating the total amount he/she owes and the cardholder makes a payment to bank A.

2.2 *Three party system*

In this system, a card issuer is also a processor (that integrates the issuing bank and acquiring bank activities). Under this system, transactions occur as shown in the figure 2 below.

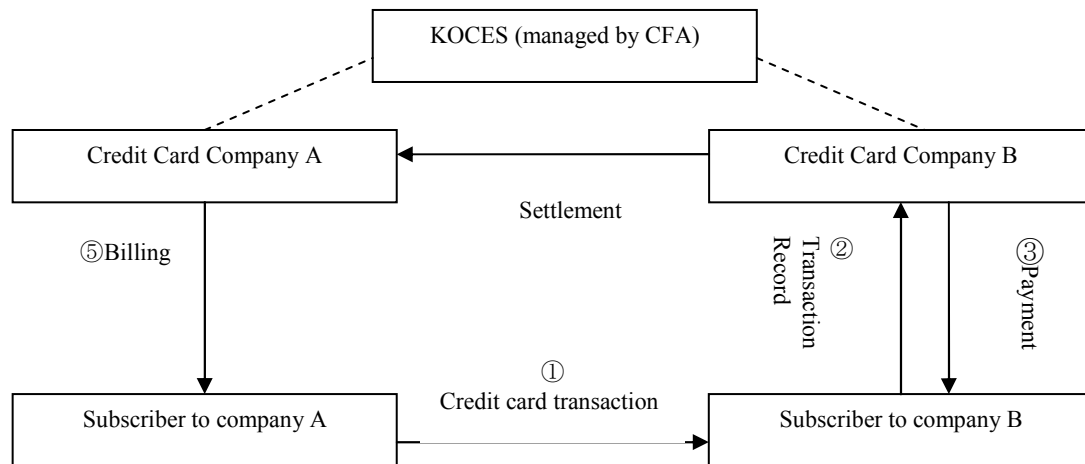
<Figure 2> Transaction Process of Three Party System



2.3 *Joint Use of Merchant Network*

In 1999, the Financial Supervisory Commission adopted the so-call “Joint Use of Merchant Network” to prevent unnecessary costs and redundant investment in the credit card industry and to make it possible for consumers to make a purchase with just one credit card even at merchants accepting other credit cards. For this network to work credit card companies’ computer systems should be linked to one another and this job was done by Korea Credit-card Electronic Settlement Service Co., Ltd (KOCES), a company established by Credit Finance Association (CFA) and seven credit card companies. KOCES is managed by CFA. Under this system, transactions occur as in the < figure 3>.

<Figure 3> Transaction process in the “Joint Use of Merchant Network” system



Under the system, consumers can pay for their purchases with A credit card at merchants that signed a contract with company B to take its credit cards. The merchants provide the transaction records to company B. Company B pays for the transaction to the merchants. Company A and B will settle their payment later.

When this system was adopted in 1999, the Financial Supervisory Commission expected that, once the system took root, merchants would not have to sign contracts with many credit card companies, thereby resulting in the so called “one merchant, one credit card company” regime, instead of “one merchant, multiple credit card companies” regime. However, even after the introduction of the system, merchants continued to sign contracts with multiple companies. So, instead of using the “Joint Use of Merchant Network” system, they continued to rely on the past system that directly linked them to individual credit card companies. As a result, the “one merchant, multiple credit card companies” regime persisted and “the Joint Use of Merchant Network” was less utilized than expected.

The reasons for less utilization are considered to include the followings:

Prior to the introduction of the Joint Use of Merchant Network system, merchants had signed contracts with a multiple number of credit card companies and had equipment in place necessary for transaction and settlement.

Getting payment from credit card companies directly took much less time than getting payment from the “Joint Use of Merchant Network.” Therefore, merchants wanted to maintain their individual contracts with multiple credit card companies.

Credit card companies also preferred direct, individual contracts with merchants as the companies could provide alliance services and so on.

The Financial Supervisory Commission adopted a measure in 2001 that allowed credit card companies to choose between using the joint merchant network and soliciting merchants on their own. Currently, credit card companies are relying on both methods.

3. Cases of Competition Law Enforcement in the Credit Card Industry

The credit card sector is exposed to various risks of competition law violations such as interest rate cartels, abuse of market dominance (for example, denying latecomers access to essential facilities) and credit card companies' abuse of dominance over merchants. Korea also had many competition violation cases. Among them, some meaningful cases will be introduced below.

3.1 *Denying Newly Created Credit Card Companies' Access to the Joint Merchant Network*

When the Joint Use of Merchant Network explained above started its operation, the Korea Credit-card Electronic-settlement Service Co., Ltd – a company established with a 100 % investment from the Credit Finance Association (CFA) and seven credit card companies - developed and operated a system that linked all credit cards accepting merchants.

Shinhan Bank, one of the member banks of a credit card company among the seven companies, planned in 1999 to establish a separate credit card company on its own to start credit card business. The bank applied for the membership of CFA requesting it to allow the bank to acquire shares of the Joint Use of Merchant Network.

The Credit Finance Association commissioned an accounting firm to calculate membership fee for Shinhan Bank and the accounting firm suggested 2.3 billion Won. However, CFA found the amount not sufficient enough, so it delayed giving an approval for the bank's membership. CFA asked other accounting firm to do the calculation work. The new accounting firm suggested a membership fee between 24.7 billion Won and 28.7 billion Won and CFA finally set the membership fee at 24.7 billion Won and notified this to Shinhan Bank. However, the bank argued that the calculation was not reasonable and suggested that CFA should take only additional expenses such as expenses necessary to set up and link computer systems. The Credit Finance Association didn't accept this, so Shinhan Bank's application for access to the Network was rejected.

On this, the KFTC ruled that, for Shinhan Bank that wanted to start its own credit card business, the Network served as an essential facility. The commission also said that CFA's denying Shinhan Bank's access to the Network by unjustifiably requesting a membership fee of 24.7 billion Won constituted unjustified restriction of competitors' business activities. Based on these judgments, the Commission imposed corrective measures and a surcharge of 3.666 billion Won on the Association.

3.2 *Price Cartel such as Interest Rate Cartel among Credit Card Companies*

In 1998, four major credit card companies increased interest rates for cash advance services & installment payment services and delinquency rates by almost the same amount around the same time. The KFTC judged this identical price increase a cartel and imposed a surcharge of 23.351 billion Won and corrective measures.

This case clearly showed how easy it is to form cartels in the credit card sector. As government approval is indispensable in starting a credit card company, entry barriers in the market are very high. Moreover, the market has oligopolistic market structure dominated by top three or four companies and, as the respondents have similar market shares, there were high incentives for them to form cartels and it was actually easy for them to do so.

3.3 *Merchant Fee Cartel among Credit Card Companies*

BC Card is a credit card company set up by eleven banks. BC Card and its eleven member banks jointly determined merchant fees for each of forty-two categories of merchants' businesses and put the decision into practice.

On this, the KFTC ruled that, even though BC Card and its member banks used the same brand name and worked with each other in issuing credit cards, managing merchants and conducting other business matters, merchant fees should not be determined by this business relationship, but by competition in the market as the merchant fee is a key factor in competition among credit card companies. Based on these considerations, the KFTC ruled that the joint pricing was a cartel and imposed a surcharge of 10.092 billion Won and corrective measures.

3.4 *Credit Card Companies' Transaction based on Restrictive Conditions against Merchants*

BC Card was set up by eleven member banks. BC Card's contracts with merchants stipulated that merchants should open a savings account in one of the member banks to settle payment for credit card transactions. As a result, only merchants that opened an account in its members' banks were registered as those that were allowed to take the company's credit cards.

The KFTC ruled that this practice put non-member banks at a disadvantage in their competition with the member banks of BC Card, thereby restricting competition in the financial market (deposit/loan). The KFTC ordered the credit card company to either delete or modify the contract term in question and also to announce to all its member merchants that the company received the corrective measure from the KFTC.

MEXICO

1. Introduction

This contribution will focus primarily on credit card payments, although debit card payments are also touched upon as they remain an important paper-less instrument that also raises competition concerns. The analysis is limited to four party or open systems for payment cards issued by commercial banks, although it also mentions some potential problems arising from the use of cards at ATMs. The document is divided as follows: section II describes the market, highlighting its size and relative importance and touching upon the regulatory framework underlying it. Section III presents potential competition problems in the market, including price and non-price behaviour, as well as reviewing potential elements that may constitute barriers to competition in card payment systems. Section IV summarises the key cases analysed by the Commission. The last section offers concluding remarks.

2. Market description¹

2.1 Organisation, business practices and concentration

The importance of payment cards in Mexico may be seen in the context of the non-cash retail payment mechanism. Mexico's retail payment structure relies heavily on cash and cheques. Cheques are the most important non-cash instrument (refer to Table 1 in the Data Appendix), even though during the past 5 years the volume of operations for cheques has remained almost constant. In 2005 there were approximately 600 million processed transactions, accounting for 50% of all non-cash retail payments. Second in importance are operations with bank payment cards, but a large proportion of them are through Automatic Teller Machine (ATM) withdrawals. Given that credit and debit cards are not extensively used in Mexico, it is not surprising then that credit card payments represent around 3% of all credit in the economy (Graph 1 in the Data Appendix). In fact, by 2005 the number of credit cards was barely above that of 1994, prior to the peso crisis.

In Mexico there are three and four party card payment systems, (an example of the former is American Express, Visa and Mastercard are examples of the latter). The present analysis concentrates general acceptance payment cards in four party payment systems. This system is organised in a manner similar to other countries: when a transaction at a point of sale (POS) is paid with a card, the merchant pays a *discount fee* to the acquiring bank. In turn, the acquiring bank pays an *interchange fee* (IF) to the card issuer. The IF is multilateral and all banks are subject to the same fee schedule, all transactions at POS are signature based, on-line and travel along the same infrastructure. All POS and banks are interconnected through two switches: e-Global, owned and servicing the two largest banks, Banamex and Bancomer; and Prosa, servicing all remaining banks and owned by a group of them. Switches perform clearing operations, which are settled at the end of day through a commercial bank (Santander-Serfin). International transactions are cleared and settled by Visa and MasterCard.

In terms of infrastructure, the Mexican network is poorly developed, in spite of experiencing high card issuing and ATM / POS deployment growth rates recently, especially during the past two years, (refer

¹ This section rests heavily on Negrín (2005).

to Table 2, Graphs 2 and 3 in the Data Appendix). In fact, the Federal Government has been trying to spur the growth of infrastructure and payment card usage through a trust fund with banking institutions (FIMPE). The following section discusses this trust in more detail. Graphs 2 and 3 show that, in spite of additional ATM deployment, there is a noticeable substitution of ATMs for POS transactions. Nevertheless, POS deployment remains underdeveloped by international standards, and usage is quite limited with respect to other countries (see Graphs 4-8).

Possible explanations for this underdevelopment lie both on the demand side (cardholders) and supply side of the market (merchants). In the case of the former, the majority of the population lacks access to financial services so that credit card usage in Mexico, although growing, lacks depth. For example, according to the CIDE-UIA National Survey of Households' Standard of Living (ENNVIH-*Encuesta Nacional Sobre Niveles de Vida de los Hogares*), which measured card ownership in 2002, only 4.8% of individuals -or 9.8% of Mexican households- owned a credit card.² Among cardholding individuals, 56% used them to buy goods and services, but 33.5% percent paid their balance in full at the end of each month. Regarding debit cards, the ENNVIIH reports that in 2002, 38.9% of individuals had savings in a bank account, which would frequently entitle them to a debit card. Nonetheless, the increased use of debit cards seems be more closely associated with increases in electronic payroll services rather than the number of deposit accounts.

On the merchant side of this two-sided market,³ the importance of Mexico's informal economy may be to blame for poor development in POS terminals, as small merchants, in particular, avoid paying taxes by using cash. For example, in the year 2000 estimates put the population employed in the informal sector at 9,107,542, which accounted for 37.8% of informal employment, 23.4% of total employment and 23.0% of Mexico's working population.⁴

2.1.1 Business practices

A distinguishing feature of Mexican four party schemes is the role played by its two card associations, Visa and MasterCard. Both provide their brand name and perform switching services for international transactions only, while the Mexican Bankers' Association (Asociación de Bancos de México or ABM) participates in setting interchange fees. Only some of the standard set of rules generally imposed by associations apply in Mexico, such as the *honour all cards rule*, the *no surcharge rule* (or, alternatively, the *no discount rule*) and the *duality rule*.

In the first case, while merchants who accept cards bearing the association brand must accept all cards, regardless of the issuer or card type. Recent regulation by the Central Bank of Mexico (Banco de México or BM) has modified this rule, allowing merchants to choose to accept credit cards only, debit cards only or both. In the case of the *no surcharge rule*, which forbids merchants to charge a higher price to card paying customers, the rule does apply but a 1994 agreement between the Federal Competition Commission (CFC or Commission) and the banks, discussed in detail in section IV, allowed banks to

² This data also refers to credit cards issued by banks and department stores.

³ Rochet and Tirole (2004), for example, define two-sided markets as a market where the platform can affect the volume of transactions by charging more to one side of the market and reducing the other side's price by an equal amount; that is, a market where the price structure matters and where the platform is designed to bring both sides on board. Thus, the platform provides a technology for solving an externality by minimising transaction costs.

⁴ The "Informal economy" includes, in addition to small businesses, work done at home (like crop raising for self-consumption) and criminal activities (like drug traffic – although this activity is not officially counted). Informal employment refers to work without medical benefits. Working population consists of individuals age 12 or older. For more details, see García-Verdú (2004).

disregard the *no discount rule*, making the *no surcharge rule* more flexible as merchants can offer discounts for cash purchases.

The *duality rule*, which is set by the platform to prevent banks from issuing cards from competing associations, does not apply in Mexico. This can be inferred from a 1996 complaint brought before the CFC (also discussed in more detail in section IV). Additionally, for certain markets deemed immature, card associations require acquiring banks to be issuers also. In terms of the setting of other commissions and fees, card association rules allow acquirers to freely determine discount rates and issuers to freely set benefits and commissions charged to cardholders.

2.1.2 Concentration

Commercial banks account for more than 50 percent of financial system assets, and the banking sector exhibits a high degree of concentration with the three largest institutions accounting for close to 60 percent of assets.⁵ Thus, concentration in the banking sector is passed on to payment cards, as can be seen in Tables 3 and 4 in the Data Appendix. The tables show that in credit cards, only two banks concentrate more than half of the issuer and acquirer market. Also, those banks that have traditionally held a larger share of the total portfolio hold an even larger share of the credit portfolio.

Moreover, the two largest banks issued around 70 percent of outstanding cards in 2005, and five banks have contracts with 93 percent of the retailers who use POS-terminals in their shops, while the two largest banks control around 60 percent of this market. As can be seen in table 3, the Herfindahl Hirschman Index (HHI) in some financial markets exceeds the limits that the CFC sets when analysing mergers that should not potentially damage competition. As a consequence, recent regulatory changes, discussed in more detail below, have sought to level the field, at least for non-banks, by lowering regulatory barriers to entry.

2.2 Regulatory framework

This section presents the regulatory framework that affects the issuing and acquiring of payment cards in Mexico, and attempts to clarify the role of the agencies involved in identifying and sanctioning anticompetitive practices in the card market.

Debit cards are associated to a deposit account so that all financial institutions that accept deposits may issue debit cards and face no restrictions in addition to those related to their entry as depositor institutions. This is not the case for credit cards, where banking and non-banking institutions (e.g. Sofoles),⁶ may issue credit cards.⁷ Interestingly, as profitable as issuing in the credit card market is generally perceived to be in Mexico, only one non-banking institution participates in the business,⁸ and not all authorised banks issue cards.

⁵ Source: CNBV, 2005.

⁶ Sociedades Financieras de Objeto Limitado (Sofoles) are credit institutions that do not take deposits and provide loans for specific purposes. They were recently authorised to provide credit cards for the first time, see Rules 8-III and 17 of the “Reglas generales a que deberán sujetarse las sociedades a que se refiere la fracción IV del artículo 103 de la Ley de Instituciones de Crédito”, issued December, 19, 2005, Federal Official Gazette.

⁷ See article 46-VII of the Law of Credit Institutions or LIC.

⁸ The Sofol, “Cetelem”, recently entered the market following a 2005 reform to the LIC, which allows non-banks to participate in the issuing business.

Specific regulation for payment cards is set out in the Law of Credit Institutions (LIC) (Article 48), which subjects interest rates, fees, commissions and all other characteristics of credit institutions services (for both banks and Sofoles) to the authority of the Central Bank of Mexico (Banco de Mexico or BM). In credit card issuing, most of the rules set up by BM have been designed to protect consumers;⁹ in fact, few industries have this level of detail in their regulation as Hynes and Posner (2001) point out. The rules, for example, indicate the content of the contracts, information that has to be provided to consumers and even set a general procedure for the calculation of interest rates. In contrast, on the acquiring side of the market there is basically no regulation.

As a consequence of the intense social debate surrounding fees and commissions in banking services, in 2004 the Mexican Congress passed the Law of Transparency and Financial Services Restructuring (LTOSF). This law broadens BM's regulatory powers by extending its responsibilities to regulate commissions and fees, into promoting transparency and eliminating discriminatory practices.

Regarding transparency, the LTOSF sets requirements in contracts and anticipates mechanisms to allow clients of credit institutions to know the fees associated with incurred transactions. It also requires financial entities to notify BM of any changes to their commissions two days before they become effective, and empowers it to issue additional information, transparency requirements, and sanctions for breaches of the law.¹⁰

In the case of discriminatory practices, the LTOSF forbids these practices between credit institutions, and considers that Financial Entities incur in "discriminatory practices" when they: (i) take any action that prevents customers of Financial Entities from performing transactions; (ii) charge different commissions depending on the issuer of payment means (like credit and debit cards, cheques and fund transfers); and (iii) take any action to prevent or inhibit their own customers from using other Financial Entities' infrastructure (Art. 8). It is interesting to note that BM has powers to regulate discrimination among payment system participants and does not need to show a finding of an actual or attempted displacement of competitors, impediment to access or establishment of exclusive advantages, as the Competition Law requires the CFC to show. Neither does the definition of discrimination contained in the LTOSF restrict BM's influence to economic agents who wield substantial market power in a predetermined relevant market, as would be the case for the competition authority.¹¹

Regarding competition, the LIC states that BM has jurisdiction to evaluate if there are "...reasonable competition conditions regarding fees and commissions on deposits, loans and other services provided by financial entities..." at the request of Condusef¹² or of any other credit institution (Art. 49). It also states that BM can start such an evaluation on its own initiative, previously requesting the opinion of the CFC both to define the relevant market and to assess whether effective competition conditions exist in this market. Based on the CFC's opinion, BM would take appropriate measures, which would prevail as long as the lack of effective competition persisted in these markets.

⁹ See "Reglas a las que habrán de sujetarse las instituciones de banca múltiple y sociedades financieras de objeto limitado en la emisión y operación de tarjetas de crédito". Last modified August, 2004.

¹⁰ The notification of changes in fees is not a formal authorisation process.

¹¹ Federal Law of Economic Competition (FLEC), articles 10, 11, 12 and 13.

¹² Condusef stands for National Commission for the Protection of Financial Services' Users. This commission has no regulatory powers. Its main function is to protect consumers from banks' abusive practices, by providing them with information, free legal advice and by mediating with the banks (Condusef Law Art. 5).

Among the regulations that BM has issued under the LTOSF to increase transparency and efficiency in payment systems are:

- Transparency:
 - Through their websites and at their branch offices, banks must inform the public about their service fees (2004);
 - BM now publishes the level of interchange fees and discount rates in order to promote competition at the acquiring level (2006).
 - Competition:
 - To promote pro-competitive credit card balance transfers, banks must receive interbank cheques and electronic transfers to pay for credit card loans provided by the receiving bank (2005);
 - To promote card acceptance, the “honour all cards” rule was modified by regulation: merchants may accept only one type of card -debit or credit- or both if they wish, while still not discriminating between issuers;

Additionally, in 2005 the LIC was reformed to allow companies currently owned by a group of banks to provide services to other non-banking firms, in an effort to reduce potential barriers to entry for non-banks. The reform opens access to the switches, Prosa and e-Global, for non-banks and allows them to become potential competitors in the card issuing business. Although the reform is a step in the right direction, a corporate governance problem may remain with the bank-owned switches.

Fear of regulation has also induced greater transparency and fee reductions by banks in payment card services. In 2004, pressure from the sectoral regulator led the ABM to abandon an IF schedule that discouraged the use of cards at POS by discriminating against small merchants by maintaining the same IF for debit and credit card transactions. Regardless of these improvements in pricing, the current IF setting mechanism is still being closely followed by both the sectoral regulator and the competition authority.

To address the lack of development of the payment system, an informal working group consisting of BM and the ABM has been established to promote payments with cards. Along the same lines, the Federal Government, through the Ministry of Finance, has launched a programme to promote the use of cards and, with tax-deductible contributions from commercial banks, has formed a trust fund (FIMPE). The programme’s two main components are: a lottery system (Boletazo) that enters every card transaction into a raffle for automobiles and other prizes; and a programme that promotes deployment of POS terminals at no cost to the merchant.

In addition to BM, the CFC has the legal authority to intervene in the payments system. While BM does this by issuing specific regulation, the Commission can do so either by evaluating competition conditions in the market which, if absent, can trigger sector-specific regulation, or by determining that anticompetitive practices exist and warning economic agents about potential actions, issuing cease and desist orders, or sanctioning accordingly. Hence, under the current legal framework, competition and banking authorities should act in a coordinated manner in the sector.

With the recent congressional approval of reforms to the Federal Law of Economic Competition (FLEC), which has been in force since 1993, the CFC will now be able to investigate additional anticompetitive practices, including discrimination in buying and selling conditions, predatory pricing and

cross subsidisation. The new law will further empower the Commission to issue binding opinions on administrative acts that unduly damage the competition process.

3. Potential competition problems

This section will touch upon some of the main challenges faced by antitrust authorities in analysing the market and investigating potential anticompetitive behaviour. It is a tentative exercise at best whose aim is to illustrate some of the elements that threaten competition conditions in the system and to recognise that enforcement or regulatory actions can also pose a threat to competition itself in a two-sided market.¹³

3.1 Price and non price features of payment systems

One of the main competition problems in the payment cards market has been the setting of the IF. In México the IF is set multilaterally by the ABM and the scale is the same for both Visa and MasterCard associations, which eliminates a layer of potential competition through “blending”.¹⁴ Until fairly recently, IFs were set according to merchant volume of sales which clearly discriminated against small and medium sellers (See Table 5). Today, the ABM sets the IF based on the merchant’s line of business. This is not only consistent with international practice, but it is deemed to be more efficient than volume discrimination and eliminates the fee bias against small merchants. (See the first columns of Tables 6 and 7 in the Data Appendix for credit and debit card fees, respectively). As can be seen in the tables, most IFs are proportional and only large scale stores have a fixed IF for debit card purchases. The IF has fallen very significantly since 2004 when the LTOSF was issued, particularly for debit cards, and starting May 2006, IFs for debit cards cannot exceed \$13.50 pesos (\$1.21 US dollars). It is worth mentioning that the mechanism to set IFs is still under review by the ABM and the regulator.

Regarding discount rates, they are set independently by each acquirer using as a floor the corresponding IF scale. Banks have to report the maximum discount rates applied to each line of business to the regulator, along with other fees and commissions. Tables 6 and 7 present the maximum merchant service fees that the 3 largest banks charge, by payment card and merchant type. It is unclear to what extent IF reductions have translated into discount rate reductions. In fact, merchant fees (discount rates) are one of the main areas of concern for regulators, since potential reductions in IFs would be irrelevant if they were not passed-on to merchants as lower discount rates. In order to promote competition in the acquiring side of the market, BM now publishes in its website the maximum discount fees charged by several acquirers, and updates it when any fee changes are reported. The decision improves transparency but does not solve the merchant’s problems in comparing acquiring services since they incur other charges that are unrelated to the discount rate such as bond guarantees for POS and payroll control.

Non-competitive practices in charges to payment cards’ users are difficult to assess, among other things, because bank services are not homogeneous. As in the case of discount rates, cardholders observe a vector of services and prices offered by each bank but lack a benchmark that summarises this multidimensional service into a single price that would allow them to compare the service.¹⁵ In fact, this is

¹³ As has been discussed extensively in the literature on two-sided markets, profit maximising prices do not track marginal costs for either group of customers, so that, contrary to Areeda and Turner, for example, a price below marginal cost may be profit maximising and not predatory (see Evans and Schmalensee (2005)).

¹⁴ See “Report on Payment Cards,” European Commission-Competition DG, April 2006.

¹⁵ Recent studies have found that consumers sometimes find charges confusing and that, even in more developed countries, there is a limited understanding of financial information. See for example, the OFT’s 2004 survey on credit cards: <http://www.of.gov.uk/NR/rdonlyres/33277732-EDE6-4DB3-849D-1A0C9032E132/0/of709.pdf>.

a trend of the sector as competition in banking all over the world is based, among other things, on product differentiation. This imposes difficulties to analyse competition in banking by strictly focusing on the level of fees. Nevertheless, in the case of charges to credit card cardholders, Table 8 in the Data Appendix presents information on fees charged by the three largest issuers. It stands out that the foreign fees,¹⁶ both for withdrawals and balance inquiries, appear to be high inducing their clients to perform transactions at the ATMs owned by the issuers. However, there is no formal study that has looked at this hypothesis yet.

Other areas of concern with respect to the non-price rules governing the merchant and card association relationship include, for instance, the *no surcharge* and/or *no discount* rules, which prevent merchants from passing on their cost of different payment methods to individual consumers. In fact, it has been suggested that allowing merchants to surcharge or discount would put downward pressure on merchant service fees. Furthermore, it would avoid cross-subsidisation from cash paying customers to cardholding ones and from other low cost payment mechanisms, such as debit cards, towards higher cost mechanisms like credit cards.¹⁷

Aside from increasing transparency in order to better understand and potentially regulate prices, the competition authority also needs to focus its efforts on evaluating the anticompetitive nature of multilateral price-setting, while recognising that multilateral price-setting may provide benefits.

3.2 *Barriers to competition*

Balto (1999) notes, for example, that the use of a market share threshold can be misleading in determining whether market power exists, because “certain inputs or distributors may be far more significant than their individual market share”, in other words, barriers to competition (entry, exit or expansion) may prove to be far more important than the relative size of each participant in the market. This is particularly true of the payment cards system where access to the switches, credit bureau and even major card schemes (e.g. Visa and MasterCard) is vital.

Additionally, barriers may result from the institutional features of Mexico’s financial system, where banks hold a prominent position, are highly concentrated and have established and maintained their holdings in companies that supply auxiliary services to themselves. As has been mentioned previously in this contribution, the governance and ownership of common infrastructures and auxiliary service providers needs to be studied carefully in order to ensure a level playing field for all platform participants, particularly when the owners of this infrastructure are also their principal users.

Although recent regulatory changes have sought to ease entry for non-banks, revealed entry continues to be limited among non-banks (Sofoles). In fact, competition seems to be focused on aspects related to access to infrastructure rather than on fees, prices, and quality of service. This underscores the centrality of infrastructure to the entry and growth of an issuer or acquirer in the market, which may prohibit access altogether, as is the case with acquiring services where only banks can offer this service, or limit the achievement of economies of scale and network externalities.

Barriers also result from card features and programmes that limit consumer mobility. The lack of comparable information about card features, and the possible bundling of these payment means with other financial instruments and services makes entry more difficult and increases switching and searching costs for consumers.

¹⁶ Foreign fees are the charges made by their own banks when a client uses an ATM that belongs to some other bank. In Mexico foreign fees include a multilateral interbank fee, which is the same for all banks.

¹⁷ It is important to mention that it has been shown theoretically that a system based in IF does not make sense if surcharges are allowed.

4. Competition analysis in the sector: the CFC case experience

4.1 *Investigation of competition conditions in commercial bank credit cards*¹⁸

In 1993, the Commission opened an investigation into competition conditions in the market for commercial bank credit cards. It observed that bank charges to merchants were the same, and that interest charges to cardholders exhibited greater similarities amongst the largest banks. In addition, the CFC noted that profit margins for credit cards was high, not only when compared with other countries' margins but relative to similar banking businesses in Mexico.

In 1994, the Commission signed an agreement with the three largest banks in Mexico: Bancomer, Banamex and Serfin (today Santander-Serfin). The banks and the CFC recognised that operating conditions for credit cards were changing significantly, particularly in the design and implementation of payment or clearing systems among banks and other participants in the credit card market. As part of the need to strengthen competition and prevent anticompetitive practices in the market, the agreement set out three main conditions for banks to fulfil:¹⁹ (1) eliminate any exchange of information with other banks or credit card payment systems that would facilitate price fixing for fees or interest charges, among others, (2) modify merchant contracts allowing them to offer discounts for cash payments while maintaining the no-surcharge rule, (3) comply with all competition laws, rulings and applicable norms.

4.2 *Credit cards: foreclosure of new entrants through exclusivities*²⁰

In 1996 American Express (Amex) opened a complaint before the CFC alleging that Visa was obstructing its access to the banking distribution channel for the issuing of credit cards. Amex had been attempting to get banks to issue American Express branded cards, and it claimed that Visa had been attempting to reach an exclusivity arrangement requiring its members not sell cards of any network competitor under threat of losing their membership.²¹

The Commission imposed cautionary measures and warned Visa about establishing exclusivity conditions until the investigation process ended. Visa informed the CFC that it had not imposed and did not plan to impose exclusivity conditions in the future. Based on Visa's response and Amex's agreement, the Plenum determined to end the investigation prematurely.

4.3 *A challenge to banks' co investment into the creation of a new switch*²²

As mentioned before, in Mexico two firms provide all banks with complementary credit card services: e-Global and Prosa. e-Global was founded in 1998 as a co-investment between Bancomer, Banamex and Bital (today HSBC).

In December 1998, another bank filed a complaint before the CFC against Bancomer, Banamex and Bital for illegally merging in e-Global. It claimed that the accused had established agreements to act jointly in supplying the following banking services: (a) centralising cheque processing, (b) operating and

¹⁸ File IO-02-93.

¹⁹ These conditions are still in place.

²⁰ File DE-06-96.

²¹ This type of exclusivity arrangement (exclusive dealing), its competitive underpinnings as well as potential anticompetitive effects, is reviewed in detail in Balto (1999).

²² File DE-58-98.

managing an ATM network, (c) operating and managing a POS network, acquiring business and debit and credit card issuing business, (d) processing intelligent cards, and (e) participating in the mortgage business.

The CFC determined that the relevant market was comprised of complementary or auxiliary banking services for electronic payment systems, where electronic payment systems included: ATM and POS switches; clearing and liquidating transactions undertaken at ATMs and POS; saving, safe-keeping and recovering electronic and manual payments in card transactions from client banks; phone authorisations of manual transactions operated by affiliated businesses on behalf of their clients; maintenance, supplies and services for POS and ATMs; and responses to client requests to clarify transactions at ATMs and POS.

Nevertheless, the Commission determined that there was insufficient evidence to uphold the accusation of an illegal merger, since the stated purpose in creating e-Global was not to diminish, harm or impede competition and free market access in the market for complementary banking services.

4.4 *Bank and merchant agreements regarding interchange fees for debit cards*²³

In 1998 the CFC investigated banking institutions, supermarket and departmental stores having learned that certain merchants and banks had signed contracts in order to reinstate debit card acceptance after a period of suspension due to disagreement about high interchange fees. The dispute had arisen because banks charged identical fees for acquiring services. The investigation sought to determine whether these contracts were a vehicle for price fixing. However, the case was closed as evidence was insufficient to support a claim of violation of the law.

4.5 *Investigation involving allegations of relative monopolistic practices in ATM services*²⁴

In November 2000, the Commission opened an ex-officio investigation of CCS México, SA de CV (CCS), Promoción y Operación, SA de CV (Prosa), Servicios Electrónicos Globales, SA de CV (e-Global) and the ABM. CCS buys, sells, monitors and maintains ATMs.

The investigation's objective was to determine whether these economic agents had incurred in relative monopolistic practices in the market for services provided by commutation systems, complementary or auxiliary processing and compensating electronic banking services undertaken through ATMs in the national territory. The practice consisted in establishing an agreement, through the ABM, that would only allow interconnection to the network for ATMs belonging to a bank and carrying the bank's institutional logo.

The CFC initially determined that this agreement could potentially harm or eliminate ATMs that were administered by non-banking institutions in the relevant market. The investigation, however, did not find sufficient elements that could prove that the ABM had in fact issued instructions or forced Prosa and e-Global to comply with said agreement.

4.6 *Allegations of price fixing in merchant fees*²⁵

In 2003, the Commission investigated possible absolute monopolistic practices (collusive behaviour) in credit card acquirer services for supermarket and department stores. The investigation revolved around the two largest participants in this market, Banamex and Bancomer, who, as has been discussed before in

²³ File IO-42-97.

²⁴ File IO-07-2002.

²⁵ File IO-04-2003.

this document, hold a sizeable share of more this service, and acquire at least 75% of merchants in this line of business.

In its consultations with banks and merchants, the CFC found that both banks charged identical fees, which raised the possibility of price fixing. Nevertheless, the need for more in-depth knowledge and understanding of the market, led to the closing of this investigation. The Plenum instructed instead an extensive study of the payments system.

5. Concluding remarks

This document presents an overview of the cards payment system in Mexico. It describes the regulatory framework underlying it and some of the principal competition concerns that are currently being analysed both by the sectoral regulator and the competition agency. The contribution also presents a number of initial statistics that are being used to understand this market, with an aim of fostering competition and discouraging anticompetitive behaviours.

The contribution discusses some of the price and non-price rules that are in effect in the market, as well as barriers to competition that may be hindering the growth of payment card systems in Mexico. Also included are a small number of cases in which the Commission has analysed the sector. Throughout the document there are short digressions into the current academic and policy discussions surrounding payments system, underscoring some of the key problems that characterise Mexico's payment cards.

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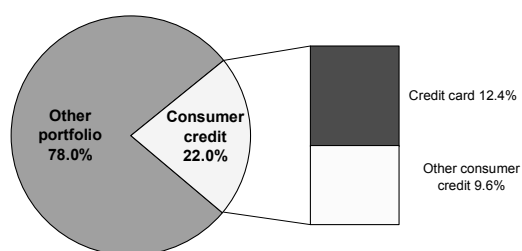
FCC case files numbers: IO-02-93, DE-06-96, IO-42-97, DE-58-98, IO-07-2002, IO-04-2003.

Data Appendix

Graphs and figures

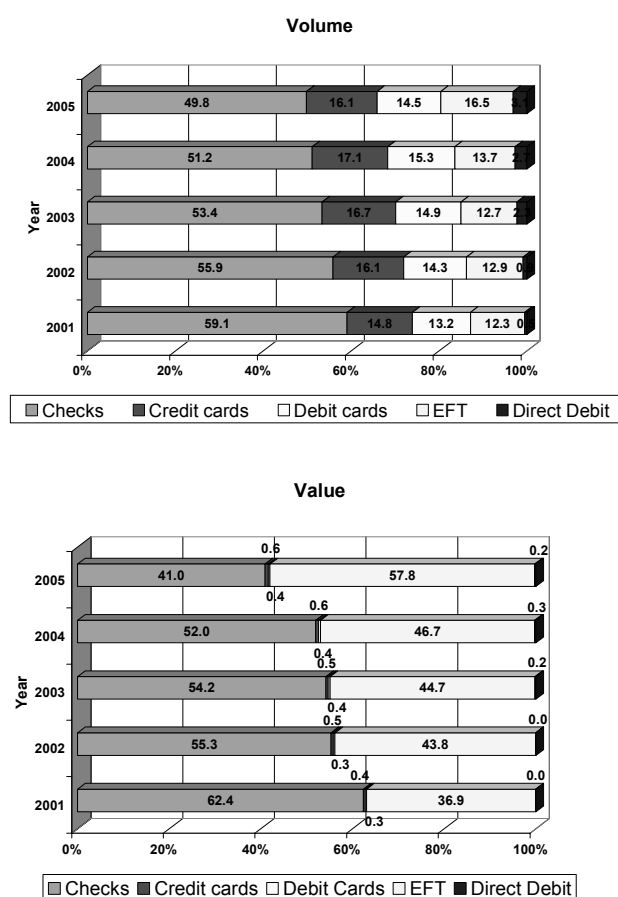
Graph 1

Credit card share in total credit portfolio, December 2005



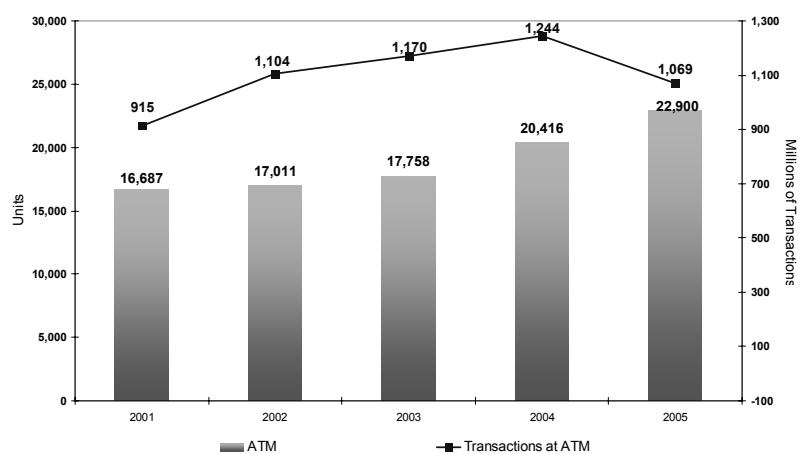
Source: National Banking and Securities Commission (CNBV) and BM

Figure 1. Structure of Non Cash Payments, Excluding Cash Withdrawals, 2001-2005



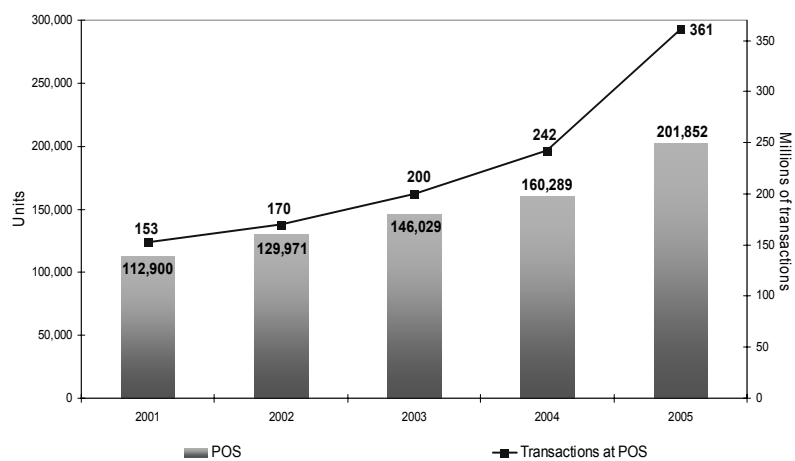
Source: Banco de México

Graph 2: Automated Teller Machines



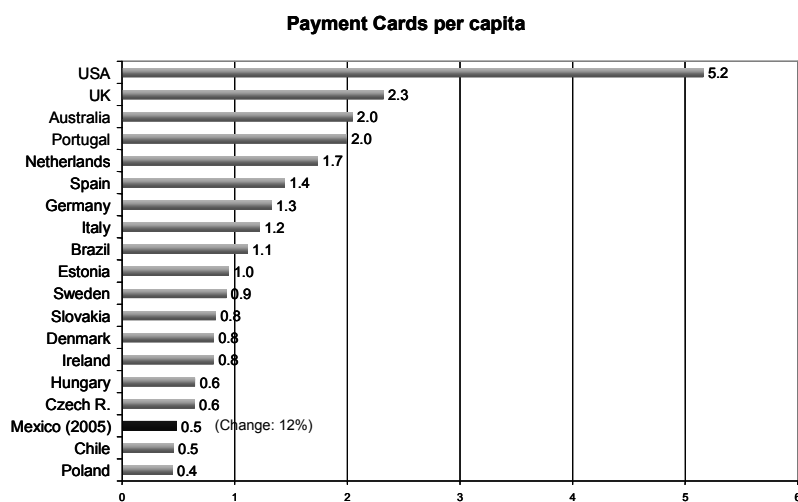
Source: Payment System Statistics, Banco de México.

Graph 3: Point of Sales Terminals



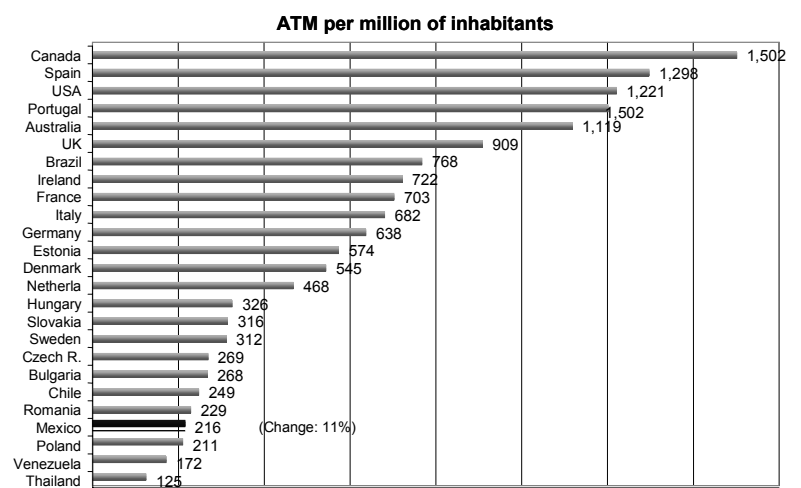
Source: Payment System Statistics, Banco de México.

Graph 4: Payment Cards in 2004, Selected Countries



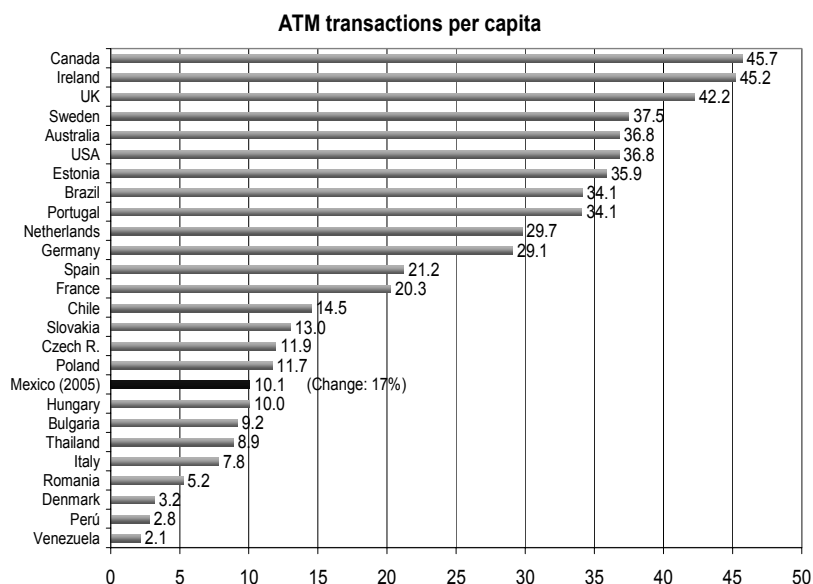
Source: European Countries: Blue Book Addendum, European Central Bank, March 2006. Non-European countries other than Mexico: Statistics on Payment and Settlement Systems for Selected Countries, Bank for International Settlements, March 2006. Mexico: Statistics on Payment Systems, Banco de México.

Graph 5: ATM in 2004, Selected Countries



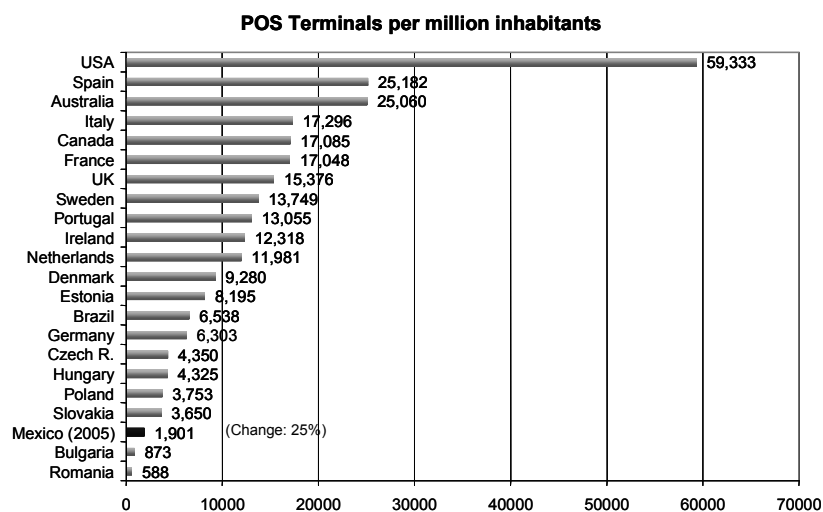
Source: European Countries: Blue Book Addendum, European Central Bank, March 2006. Non-European countries other than Mexico: Statistics on Payment and Settlement Systems for Selected Countries, Bank for International Settlements, March 2006. Mexico: Payment System Statistics, Banco de México.

Graph 6: ATM transactions in 2004, Selected Countries



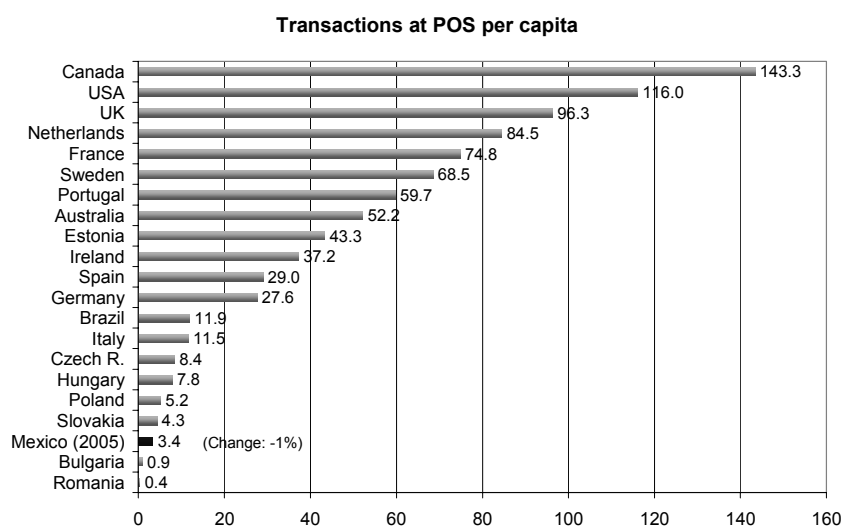
Source: European Countries: Blue Book Addendum, European Central Bank, March 2006. Non-European countries other than Mexico: Statistics on Payment and Settlement Systems for Selected Countries, Bank for International Settlements, March 2006. Mexico: Payment System Statistics, Banco de México.

Graph 7: POS Terminals in 2004, Selected Countries



Source: European Countries: Blue Book Addendum, European Central Bank, March 2006. Non-European countries other than Mexico: Statistics on Payment and Settlement Systems for Selected Countries, Bank for International Settlements, March 2006. Mexico: Payment System Statistics, Banco de México.

Graph 8: POS transactions in 2004, Selected Countries



Source: European Countries: Blue Book Addendum, European Central Bank, March 2006. Non-European countries other than Mexico: Statistics on Payment and Settlement Systems for Selected Countries, Bank for International Settlements, March 2006. Mexico: Payment System Statistics, Banco de México.

Tables

Table 1
Payment Systems in Mexico (2005)

Payment Systems in México (2005)					
System	Daily Average Volume (Thousands of Operations)	Percentage of Operations	Daily Average Value (millions de MXP)	Percentage of Value	Daily Average Value per transaction (MXP)
Large Value PS	32	0.44%	2,198,643	95.67%	69,298,338
Retail PS	7,139	99.56%	99,577	4.33%	13,948
TOTAL	7,171	100%	2,298,220	100%	320,488

Retail Payment Systems in Mexico (2005)					
System	Daily Average Volume (Thousands of Operations)	Percentage of Operations	Daily Average Value (millions de MXP)	Percentage of Value	Daily Average Value per operation (MXP)
Checks	2,310	32.35%	39,577	39.75%	17,135
EFT	764	10.69%	55,817	56.05%	73,105
Direct Debit	146	2.04%	204	0.20%	1,400
Card payment in ATM	2,930	41.04%	3,357	3.37%	1,146
Card payment in POS	990	13.87%	621	0.62%	627
TOTAL	7,139	100%	99,577	100%	13,948

Table 2
Number of Debit and Credit Cards

Payment Card	2001	2002	2003	2004	2005
Credit	6,080,481	7,822,364	9,403,201	11,649,617	14,740,309
Debit	29,759,551	32,972,637	32,191,744	31,788,759	34,301,268

Source: Payment System Statistics, Banco de México

Table 3
Market concentrated by 2 and 5 largest issuers and acquirers, 2005

	Issuing	Acquiring
Market share of the 2 largest banks	58.50%	55.80%
Market share of the 5 largest banks	92.80%	90.50%
HHI*	2099	2095

*Note: In merger analysis the CFC considers that competition should not be damaged unless any of the following conditions holds: the HHI increases by 75 points, the HHI exceeds 2000 points, the Dominance Index (DI, which is a Herfindahl Index of herfindahls) falls, or the DI is below 2,500 points. Refer to CFC criterion published in the Federal Official Gazette 24 July, 1998.

Source: Banco de México.

Table 4

Market participation of 5 largest banks, 2005

<i>Bank</i>	Share of total portfolio		Share in credit card portfolio	
	<i>individual</i>	<i>cumulative</i>	<i>individual</i>	<i>cumulative</i>
BBVA-Bancomer	27%	27%	33%	33%
Banamex-Citibank	17%	44%	35%	68%
Santander-Serfin	14%	59%	15%	83%
HSBC	11%	70%	5%	88%
Banorte	9%	79%	4%	92%
Others	21%	100%	8%	100%

Source: Banco de México.

Table 5

Interchange fees by turnover, 2004-2005

Charge level	Annual turnover	Interchange fee		
	Million USD	Previous	Actual	Feb-05
	(max, min)			
1	>60	2.00%	2.00%	1.80%
2	(20, 60)	2.40%	2.40%	2.20%
3	(2, 20)	2.75%	2.75%	2.50%
4	(0.4, 2)	3.00%	3.00%	2.70%
5	<0.4	3.50%		

Source: Banco de México.

Table 6

IFs and discount rates for credit cards by line of business, May, 2006

Line of business	IF	Maximum discount rate		
		Banamex	BBVA-Bancomer	Santander-Serfin
Gasoline stations	1.1%	1.25%	1.25%	2.1%
Universities and government	1.25%	1.8%	1.85%	2.5%
Large-scale surfaces, fast food, pharmacies, tolls, parking	1.75%	2.05-2.3%	2.35%	3.25
Supermarkets, ground transportation, car rental, travel agencies, hotel, entertainment, air transportation	1.8%	2.25-2.5%	2.4%	3.2%
Telecommunications, insurance, hospitals, restaurants, retail sales, others	1.95%	2.0-2.95%	2.55%	3.3%

Note: Disaggregated information is presented for the three largest acquiring banks.

Sources: Banco de México and Asociación de Bancos de México.

Table 7

Maximum IFs and discount rates for debit cards by line of business (US dollars), May 2006

Line of business	Maximum IF \$1.21	Discount rate		
		Banamex	BBVA- Bancomer	Santander- Serfin
Gasoline stations		.8%	1.25%	2.1%
Universities and government		1.3%	1.85%	2.5%
Large-scale surfaces		\$0.31	\$0.44	\$0.36
Fast food		1.45%	1.35%	2.25%
Pharmacies, tolls, parking		1.6%	1.6%	2.5%
Supermarkets, passenger ground transportation, car rental, travel agencies, hotels, entertainment		1.50-1.80%	1.70%	2.50%
Air transportation		1.05%	1.35%	2.05%
Telecommunications, insurance, hospitals, restaurants, retail sales, others		1.65-2.15%	1.75%	2.50%

Note: Disaggregated information is presented for the three largest issuers.

Sources: Banco de México and Asociación de Bancos de México.

Table 8

Credit card user fees (US dollars), May 2006

Type of fee	Banamex	Bancomer	SantanderSe		
			rfin	Banorte	HSBC
Account opening fees	\$ 0	\$ 0	\$ 0	\$ 0	\$ 7.66
Annual fees	\$ 44.68	\$ 46.46	\$ 52.27	\$ 41.64	\$ 43.66
Additional annual fees	\$ 22.34	\$ 22.79	\$ 29.93	\$ 29.13	\$ 24.72
Lost card replacement fee	\$ 11.62	\$ 11.62	\$ 10.97	\$ 21.76	\$ 11.91
Cash advances fees (% of amount)	6 %	6 %	5 %	5.5 %	10 %
Fees for withdrawals in third party ATMs	\$ 1.52	\$ 1.79	\$ 1.03	N.A.	\$ 1.70
Fees for balance inquiries in third party ATMs*	\$ 0.54	\$ 0.89	\$ 0.31	N.A.	\$ 0.71
Fees for invalid clarification procedures	\$ 0	\$ 17.87	\$ 14.95	\$ 8.94	N.A.

* Note: this fee is divided between the ATM owner and the issuing bank. For example, a Banamex card holder who chose to withdraw funds from a third party ATM would be charged \$17 pesos (\$1.52 US dollars): the third party ATM would keep \$7.25 and Banamex would keep the remaining \$9.75 pesos.

Sources: Banco de México, Condusef and banks' Internet pages.

NETHERLANDS

1. Point of sale payment products in the Netherlands

“Cash and electronic payment instruments are commonly used to make payments at points of sale (pos). The debit card (brand name ‘PIN’), the electronic purse (brand name ‘Chipknip’) and the credit card are the most generally used electronic instruments. Internationally, large differences exist between types and functionalities of e.g. debit cards. The debit card used in the Netherlands is a PIN type one. Identification takes place via a P(ersonal) I(dentification) N(umber), removing the need for a signature. The pos-terminal establishes a connection with the bank account of the consumer via the central processor Interpay. The consumer’s bank checks the consumer’s account, and provided the balance is sufficient, authorises the transfer. Next, the consumer’s account is debited. The merchant’s account is credited after the clearing and settlement process, usually within one day. Thus, authorisation and debiting is effected on an on-line basis. By contrast, authorisation is entirely absent in case of an *electronic purse* transaction (except for loading e-money to the purse). The payment is made out of the prepaid balance stored on the card. The merchant transfers the e-purse receipts (via Interpay, after clearing and settlement) to his bank account, for instance once a day. The range of *credit cards* on the Dutch market is rather heterogeneous with respect to the services provided by the different schemes. The credit cards commonly used in the Netherlands are actually deferred-debit cards. The cardholder’s account is usually debited once a month, so the consumer enjoys a period of free credit. Debiting can take place later, but then interest is due. Credit cards include a PIN, but it is used only for atm cash withdrawals. In pos situations no PIN is used; identification is established with the consumer’s signature. Atm cash withdrawals with the credit card are infrequent because of the high fees levied. Nearly all atm withdrawals are effected with debit cards. Consumers in the Netherlands are not explicitly charged for these services, even if a bank’s customer uses another bank’s atm. The latter cash withdrawals are processed through the network of the central processor Interpay. The absence of per-transaction fees holds more generally: as a rule, consumers are not explicitly charged for pos payments.

However, an increasing number of merchants charge a small fee (eur 0.10 – 0.20) for debit card payments of purchases below a certain amount, often Eur 10.

To give an impression of the relative importance of the individual payment instruments and their development over time, Table 2.1 presents numbers of transactions and amounts for the three electronic payment instruments. The use of electronic payment products, in terms of both numbers of transactions and amounts concerned, has increased strongly. This applies especially to the debit card, which since 1996 has shown a 20% average annual increase in the number of transactions. In 2002, the number of debit card transactions first exceeded the one billion level and the amounts involved exceeded Eur 50 billion in value. The number of e-purse transactions has remained relatively low. The strong increase in 2002 of e-purse use was driven partly by the introduction of the Euro. Table 1 also shows that the use of cheques was very substantial in the mid-nineties, but declined gradually later on. On January 1st 2002, cheques were taken off the market.

Table 1. Key figures for electronic pos payments

Million of transactions	1996	1997	1998	1999	2000	2001	2002	2003	2004
Debit Card	371	486	595	700	802	954	1.069	1.157	1.247
Credit card	32	39	42	44	47	48	46	44	49
E-purse	1	6	17	22	25	31	87	109	127
Cheques	86	67	48	29	14	5	0	0	0
Total	490	598	702	795	888	1.038	1.202	1.310	1.423

Sales, eur billion	1996	1997	1998	1999	2000	2001	2002	2003	2004
Debit Card*	17,4	22,3	27,4	32,2	37,3	43,4	50,6	58,2	56,7
Credit card	2,7	3,4	3,9	4,4	5,2	5,3	5,3	4,9	5,3
E-purse	0	0,1	0,1	0,1	0,1	0,1	0,2	0,3	0,4
Cheques	6,1	4,7	3,5	2,2	1,1	0,5	0	0	0
Total	26,2	30,5	34,9	38,9	43,7	49,3	56,1	63,4	62,4

Source: DNB * Unadjusted for cash-back transactions. In 2002, about eur 3.4 billion was withdrawn through cash-back facilities.

Though the number of electronic payments has increased strongly, the bulk of pos payments are made in cash. The number of cash payments is not accurately known, in contrast to electronic transaction numbers. A large variety of sources, including e.g. surveys among merchants (see e.g. hbd, 2002), has led to an estimate of about 7,000 million cash payments in 2002. Hence about 85% of all pos transactions is paid with cash. The share of debit card transactions in 2002 was 13%. In terms of the amounts involved, however, the share of the debit card was much larger. As total retail sales ran to eur 120 billion in 2002, about 40% of total pos purchases were paid with debit cards. The continued buoyant growth in the number of electronic payments is an indication that they are increasingly replacing cash payments. Further evidence on this hypothesis is provided by the number of cash withdrawals and the amounts involved. In 2002, the number of cash withdrawals from atms and at bank counters decreased for the first time ever, while in 2003 the amounts thus withdrawn began to decline, also for the first time. Other indicators, like the development of banknotes in circulation, confirm the decline in cash use.¹

Table 2. Cost measures for the payment products

	Cash	Debit card	E-purse	Credit Card
Total costs per transaction (eur)	0,300	0,486	0,931	3,587
Retail sector	0,164	0,236	0,149	0,239
Banking sector	0,126	0,250	0,782	3,348
DNB/KNM	0,10	-	-	-

Source: DNB

As pointed out in fragment of the DNB-study above, there are in general only three card products in the Netherlands. Two of those, the debit card and e-purse system are (indirectly) owned by the largest banks. There is little competition between these card products, because of the differentiated use. Cash and the e-purse are preferably used for small amounts (Eur 0-15), while debit cards are used for payment

¹ Dutch Central Bank, Occasional Studies Vol.3/Nr. 3 (2005), Payments are no free lunch, Hans Brits and Carlo Winder.

transactions over Eur 10. Credit cards are hardly used in the Netherlands (compare table 1). When credit cards are used (e.g. in restaurants and hotels) it is mostly for payments over Eur 50. From the key figures above it can be deduced that with respect to the use of cards, the debit card is by far the most popular payment product in the Netherlands. In 2004 87,6 % of all point of sale transactions with a card, was performed with a debit card. Due to this fact the NMa has studied the debit card system more closely than the e-purse and credit card schemes that exist in the Netherlands. Because of this our comments will focus on the Dutch debit card scheme.

2. Market structure and recent developments

Virtually all payment processing services (transfers, debit card and e-purse payments) are offered by Interpay Nederland B.V.(Interpay), the only national payments facility which is owned by the 8 major banks in the Netherlands. Interpay is also the main facility for transfer services between banks. The Netherlands has one debit card (PIN) payment system, whereas numerous systems exist alongside each other in other countries (such as Germany and the United Kingdom). Interpay has a facilitating role here for clearing between banks and for years it also set the rules and technical standards that go with it.

Almost all payment products are collectively owned by the major banks through a mutual subsidiary. In the past Interpay was the owner of these products. In 2005 Interpay has transferred the ownership of the payment products debit card (PIN) and the e-purse (Chipknip) to a new company called "Currence", which is owned by the same eight banks as Interpay. The transfer of the ownership of the brands and certifying/regulatory activities was meant to separate these from the payment processing activities. These changes were made as a result of the publication of the so called "Wellink Report" written by a research-group (the Wellink Working Group) that was led by the president of the Dutch Central Bank, Mr. Wellink. Based on the outcome of this report, the Dutch Central Bank published recommendations with the aim to improve transparency and general efficiency of the payment system in the Netherlands.

Currence acts not only as the brand owner and administrator of national collective payment products, but also develops the regulations, grants licences and certificates and monitors the compliance of regulations by the participants. Since the establishment of Currence, banks must obtain a licence from Currence in order to carry out issuing and acquiring with regard to collective payment products in the Netherlands. Currence also certifies third parties (such as processors, terminal and card suppliers) who want to offer other services within the Dutch electronic payments system. Currence also sets the (technical) standards for point-of-sale terminals that are supplied in the Netherlands by specialised companies, such as CCV and Alphyra. It can be concluded that Currence is the sole institution in the Netherlands which can give market parties and new entrants access to the market of collective payment products, by granting licences or certificates.

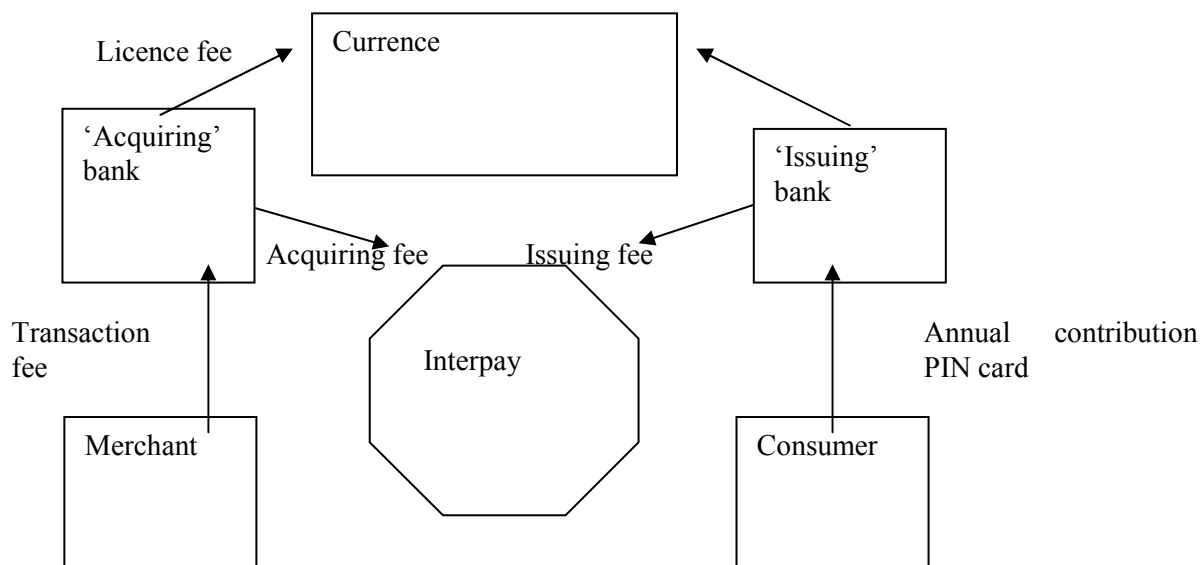
So far, several non-banks have approached Currence to get access to the market. Since their cases are still a subject of study to Currence, for the moment no final conclusions can be drawn on the impact of the institutional changes on the access to the market for non-bank players.

As explained above data switching and clearing of electronic payment transactions (except for credit card transactions) are activities that are solely carried out by Interpay. For debit card transactions data first goes from the shop's point-of-sale terminal to Interpay, which then forwards this data to the bank of the consumer. Issuing and acquiring banks pay Interpay a fee for the services provided. The settlement of the transactions is done by the Dutch central bank. Viewed internationally, the fee charged to merchants for debit card transactions is low.² It must be noted though that due to differences in payment systems, a

² The international comparison of fees is based on the final report of the Wellink Working Group, *Tariefstructuren en infrastructuur in het Nederlandse massale betalingsverkeer*, March 2002, p. 84.

comparison of debit card fees is not possible. Figure 1 gives an overview of the present debit card payment system in the Netherlands.

Figure 1: The Dutch Debit card payment system



In the past Interpay's role was also to acquire merchants for the acceptance and processing of debit card and e-purse transactions. As of 1 March 2004, Interpay's contracts, for the acceptance and processing of PIN transactions, with merchants have been transferred to the banks. The aim of this operation is to promote competition between the banks in relation to debit card payments. After the transfer, merchants are free, in principle, to negotiate new conditions with any bank.

The transfer of PIN contracts from Interpay to the banks was completed on 1 September 2005. In the past year, the Financial Sector Monitor (FSM)³ carried out research into the effects of this transfer. The main question was what effect this change in the structure of payment services has had on the prices which merchants pay for domestic debit card (PIN) transactions. In mid-2005, FSM analysed the average PIN fees charged on the basis of a questionnaire sent to the banks. The conclusion is that the larger merchants with more than one million transactions a year pay lower fees on average than they did before the transfer, while smaller merchants pay more. On average fees are decreasing. In addition, it emerged from the research that there are differences between banks with regard to the average fees charged and that the number of types of contract after the transfer increased. The study by the FSM presents a picture of a market in which for the time being there is limited, but burgeoning, competition. It is not yet certain that this development will persevere to reach a situation in which there is active competition. NMa therefore also intends to pay the necessary attention to this market in 2006. Within this framework, FSM's monitoring activities will continue this year.

³

The FSM is part of the of the Netherlands Competition Authority (NMa). The FSM consists of a group of specialists within NMa assigned the task of monitoring the financial sector on a permanent basis from the perspective of competition.

Table 3. Average domestic debit card (PIN) fees for merchants (in eurocents, excl. VAT)

	Interpay (2003)		Banks (2005)
	Tariff excluding the national discount	Tariff including the national discount ¹	
Number of PIN transactions per year			
1-100,000	7.5	6.38	6.56
100,000-500,000	7.0	5.95	6.48
500,000-1,000,000	6.6	5.61	5.97
1000,000-5,000,000	6.3	5.36	4.92
>5,000,000	5.91	5.03	4.73

Source: Financial Sector Monitor 2005, Chapter 3: Effects of the transfer of PIN contracts.

(1) In 2003 1,157 billion PIN transactions were realised, on the basis of which the National Discount amounted to 15%. This discount was settled in arrears and applied to the entire market.

2.1 Barriers to entry

Basically a supplier of payment services that intends to offer its services by means of the national payment system has to get a licence from Currence. The rules and regulations from Currence see to financial as well as technical standards that have to be met, but are differentiated for different roles (acquirers, issuers and processors). As far as the role of issuers and acquirers is concerned, according to the rules and regulations, only banks get access to the market. This is due to the fact that the regulations of Currence deem a banking licence of the Dutch Central Bank necessary to obtain a licence for this role. It seems reasonable that suppliers of deposit-based payment service should have a banking licence. However, it can not be stated beforehand that all products that are to be introduced in the national payment system should be deposit-based. In principle, there should be room for introduction of non-deposit based products in the market, also by non-bank suppliers.

To enter the Dutch payments market as issuer or acquirer, as stated above banks must at least have a banking licence of the Dutch Central Bank and they must have access to the Interpay circuit in order to effect payments. In principle, these (exogenous) barriers to entry are not insurmountable barriers for bona fide potential entrants. For a bank, it is almost impossible to enter the electronic payments market with only one or a few banking products linked to a current account. In addition, the margins that can be obtained from this individual activity are too small. The need for potential entrants to offer an integrated range of products is a high endogenous barrier to entry⁴. A bank will probably first enter the savings or credit market and then extend its activities to the payments market.⁵

Competition on the payments market (issuing of cards) relates mainly to acquiring new account holders who enter the market, such as young people, students and start-up companies. In this regard, reputation and brand recognition are important assets for a bank. The necessary investments in time and funds may be regarded as an endogenous barrier to entry. Since the reputation and brand recognition of a bank is of considerable importance, it is not easy for foreign entrants to establish relationships with business customers.⁶

⁴ See, for instance, Central Planning Bureau, *Tight Oligopolies*, February 2003, pp. 92-93.

⁵ To illustrate this, a foreign bank which has a Dutch banking license and which already offers savings products in the Netherlands regards payments as expensive and complex (Volkskrant, 'Turkse prijsvechters slaan hun vleugels uit', 23 July 2003). The Belgian banking and insurance group Argenta also intends to enter the market in November 2003 with an integrated range of savings, credit and payment products (*De Telegraaf*, 2 September 2003, 'Argenta opent jacht op Nederlands spaargeld').

⁶ See, for instance, J. Gual, *Deregulation, Integration and Market Structure in European Banking*, IESE, Barcelona, 1999; Central Planning Bureau, *Competition and Stability in Banking*, December 2001,

It is argued that the branch network which large established domestic banks have, gives them such a position on the market that it may be regarded as a potential barrier to entry for new entrants.⁷ However, in the light of closures of branch offices of banks, the lack of a branch office network will be regarded as a decreasing endogenous barrier to entry. Furthermore technological advances in the area of new software applications and the emergence of the Internet have resulted in the emergence of new paperless payment instruments in the form of electronic money and Internet banking. As a result, the necessity of having branch offices has also decreased.⁸

Especially in payment services, scale economies are huge. As customers generally demand a full-service assortment of banks, smaller banks have to limit themselves to niche markets. This is certainly an important entry barrier and determinant of the stable oligopoly in the banking sector.

2.2 *New technologies*

In the Netherlands, there are few real innovations, and most innovations are rapidly copied by all banks. This seems to be a disincentive to innovate. In 2005 though a new payment standard, termed iDEAL, was introduced for paying over the internet in the Netherlands. Four major banks, ING, ABN AMRO, Postbank and Rabobank developed a new standard for safe payment via the Internet. iDEAL has been developed to enable consumers to pay for on-line purchases via the internet banking module of their own bank. By routing the payment procedure via the customer's own familiar internet banking environment, paying over the Internet has been made safe. The banks trust that this will dispel the feeling of insecurity consumers have about paying over the Internet (by credit card).

So far however, there has been no significant entry of non-bank suppliers on the national payment market, although several Dutch telecom operators with important networks have informally mentioned that they would be willing to offer new payment products (for example payments by mobile phone) if they can get direct access (in any way) to the current account of their customers. Until now this is still a prerogative of the Dutch banks. Some non-bank companies have also announced they would like to process pos-payments for merchants.

3. *Fees and charges*

In principle, the fees of the various banks and other parties are easy to obtain. However, banks often link numerous products to a current account or offer them as a package, which results in a range of different products and fees. The actual fees to be paid are not fixed in the case of companies. Often they are the result of bilateral negotiations between the bank and the company. The diversity of services linked to the current account and the method of pricing the services, which often differs from one bank to the next, makes it difficult for private individuals and business customers to make compare the offers of the various providers.

paragraph 5.3; Central Planning Bureau, *Tight Oligopolies*, February 2003; Switching Costs Working Group of the Market Forces, Deregulation and Legislative Quality Project, *Kosten noch moeite. Dremfels voor de switchende consument*, June 2003.

⁷ J. Gual, *Deregulation, Integration and Market Structure in European Banking*, IESE, Barcelona, 1999, p. 9.

⁸ P. van Cayseele and H. Degryse, 'De nieuwe economie en bancaire marktstructuren', Leuvense economische standpunten 2000/98, CES, September 2000. See also D. Heremans and P. van Cayseele, 'Concentratie en concurrentie in de Belgische financiële sector', Leuvense economische standpunten 1996/82, CES, June 1996, pp. 19-20 and *NBV Bulletin*, No. 2, July 2002, p. 5.

Transaction-related fees are not or are hardly ever charged to consumers. Direct pricing in the case of consumers is limited to an annual contribution for the possession of a debit card or credit card. Indirect fees are mainly charged in the form of assigning value dates and a loss of interest income on positive current-account balances. Although companies are partly confronted with transaction-related fees (for instance, for the transmission of data in the case of debit card and credit card payments and cash deposits and the withdrawal of change), they are also confronted with indirect fees in the form of a loss of interest income and the assignment of value dates.⁹

3.1 Merchant charges

In the Netherlands debit card transactions fees for merchants have decreased over the past years, as the number of debit card transactions by consumers has increased substantially. We have no research on trends in fees for e-purse and credit card transactions. Research in the Interpay-case¹⁰ showed that merchants, with respect to debit cards, consider it inconceivable not to accept debit cards in retail trade. In answer to the question as to what considerations play a role in a merchant's decision on whether or not to offer PIN facilities, the following considerations, amongst others, were mentioned by the respondents: improving one's own competitive position relative to other merchants, preventing a loss of turnover, stimulating impulsive purchases, presenting an image of customer friendliness, lower costs than those associated with other over-the-counter methods of payment, such as credit cards, less susceptibility to fraud, providing security for both the customer and for staff, and the possibility of unmanned sales outlets. Furthermore, in practice by offering PIN facilities larger merchants prevent a deterioration in their competitive position. Research shows that only 20% of consumers accept the absence of PIN facilities at large merchants or the fact that a large merchant charges a fee for PIN transactions.

3.2 Regulation of fees

Fees involved in card transactions are not regulated in the Netherlands. At the moment there is no statutory basis to regulate transaction fees. To our knowledge the only parts of fees for card transactions that have been set, based on consultation with the Dutch Government (¹The Netherlands Competition Authority) were Multilateral Interchange Fees (MIF).

3.3 Interchange fees

Over the past years the NMa was frequently asked for an exemption of Section 6 (1) of the Dutch Competition Act¹¹ with respect to the introduction of a MIF for different payment products. Since 2003 the NMa has been looking closely at the setting of MIF, in the light of the two-sided market theory. In recently handled cases the NMa has requested the parties to give quantitative information e.g. about demand curves and the assignment of costs, to prove that the set MIF was necessary in these specific cases. As they could not deliver sufficient evidence for the necessity or the level of the MIF, the NMa has not exempted any MIF since 2003.

In a growing number of competition-related cases the central question addressed was what the effect of such collectively determined fees is on the cost of electronic payments by consumers and merchants. As of yet there is little empirical research which can answer this question. There is however a growing body of economics literature relating to electronic payment systems. In this literature, the MIF is placed within the

⁹ Wellink Working Group, *Tariefstructuren en infrastructuur in het Nederlandse massale betalingsverkeer*, March 2002, chapter 3.

¹⁰ Decision of the Director-General of the NMa in Case 2910 of 28 April 2004, Interpay.

¹¹ The equivalent of Article 81(1)EC.

framework of two-sided markets. To obtain a better insight into the role of these fees, FSM carried out a study in 2005 into two-sided markets and MIF.

From the study by the FSM it can be concluded that both a consumer and retailer attach a relative value to card payments compared to payments by other means. Similarly, for an issuer and acquirer relative marginal costs are associated with card payments. From a total welfare perspective, it is optimal if a card payment originates when the consumers and merchants joint value exceeds the issuer's and acquirer's joint marginal costs. However, from an individual rationality point of view, a card payment only occurs when both the issuer charges less than the consumer's value and the acquirer charges less than the retailer's value.

Considering the situation that a card payment is optimal from a total welfare perspective, but the transaction does not occur because the issuer charges more than the consumer's value. In such a case a (multilateral) interchange fee paid by the acquirer may¹² cause the optimal transaction to occur. Consequently, a rightly determined interchange fee can increase welfare compared to a situation without an interchange fee.

On the other hand, it is easily seen that an incorrectly set interchange fee can also cause welfare to decrease compared to a situation without an interchange fee. Furthermore, the welfare increasing level of an interchange fee depends in a complex way on many factors including the degree of cross subsidisation, the level of start-up fees, the number of active platforms, the cost of payments by other means, the price elasticities of consumers and merchants, the relationship between issuing and acquiring activities of banks and the relationship between total demand for card payments and the prices on both sides of the market. Finally, there is no guarantee that a collectively determined interchange fee has the right level from a welfare perspective.

With respect to the question on interchange fees it follows that in our opinion a general view with respect to the value of interchange fees can not be taken. The same holds with respect to the consequences of constraining interchange fees or limiting them to zero. In the near future the NMa expects to be able to assess a MIF for a specific payment product on the basis of sufficient quantitative data. An important part of this data can probably be derived from the joint study by the Dutch Banking Association and the Dutch Central Bank into the costs and benefits of the Dutch payment products, of which the final report is due by the end June 2006.

3.4 Cost based fees

At this moment the Dutch banks together with merchant organisations are investigating options to stimulate consumers to use the most efficient payment product. This action is a result of the recommendations of the Dutch supervisors and the Covenant¹³ the major banks agreed on with merchant organisations to stimulate cost efficient use of payment products. To affect this behaviour the banks have agreed to investigate options to make the costs of the different payment products more transparent and to eliminate cross-subsidising as much as possible. The jointly performed study by the Dutch Banking Association and the Dutch Central Bank into the costs and benefits of the Dutch payment products will probably form the basis of the investigated options.

¹² Depending on whether the fee is such that the price charged by the acquirer remains less than the retailer's value.

¹³ Payment Services Covenant, November 17, 2005.

4. Competition law application

- Decision of the Director-General of NMa in Case 81 of 4 July 2001, Agreement in Relation to a Joint Deposit Giro Collection Form Procedure

Application from exemption by Interpay on behalf of the participating banks for the Agreement in Relation to a Joint Deposit Giro Collection Form Procedure whereby a multilateral interchange fee was introduced for costs incurred by a bank in relation to giro collection forms. An exemption was granted by the Director-General of NMa for a period of five years, amongst others because the MIF was determined on the level of half of the costs of the most efficient bank.

- Decision of the Director-General of NMa in Case 82 of 24 July 2002, Agreement in Relation to a Joint Debt Collection Procedure.

Application for exemption for an agreement between banks in which agreements were reached in relation to transfers. The crediting bank under the agreement would pay the debiting bank a multilateral interchange fee for the transactions carried out and the costs incurred. The Director-General of NMa granted an exemption for a period of five years, amongst others because the MIF was determined on the level of the costs of the most efficient bank. The exemption is subject to an obligation to periodically report on the cost levels of the participating banks.

- Decision of the Director-General of NMa in Case 84 of 24 October 2002, Joint Operating Agreement in Relation to Cash Dispensers

Application for an exemption for an agreement which governs guest use of cash dispensers of a different bank. As payment for the guest use, the banks were to pay each other a multilateral inter-bank fee. The Director-General of NMa did not grant exemption for the continuity fee included in the agreement, because this goes further than is necessary to achieve the advantages. An exemption was granted for the other provisions of the agreement for a period of five years, amongst others because the MIF was determined on the level of the costs of the most efficient bank. The exemption is subject to an obligation to periodically report on the cost levels of the participating banks.

- Decision of the Director-General of NMa in Case 2978 of 28 April 2003, Superunie vs. Interpay Complaint submitted by Coöperatieve Inkoopvereniging Superunie B.A. against Interpay. Interpay allegedly abused its dominant position by charging companies, which are competitors, different fees for the same services and granting Ahold a special discount. According to the Director-General of NMa, prohibited discrimination in terms of Section 24 of the Competition Act¹⁴ had not been proven. The complaint by Superunie was therefore rejected.

- Decision of the Director-General of NMa in Case 3035 of 13 August 2003, Agreement on Telegiro Payment Advice

Application for exemption for an agreement governing express payments by means of Telegiro. The participating banks have agreed that they will pay each other a multilateral interchange fee if the customer opts to have the recipient advised of deposits. The Director-

¹⁴

The equivalent of Article 82EC.

General of NMa rejected the application for exemption since it did not satisfy each of the conditions of Section 17 of the Competition Act¹⁵. Especially the necessity of the MIF was not sufficiently proven by the applicants.

- Decision of the Director-General of the NMa in Case 2910 of 28 April 2004, Interpay (which was reviewed in December 2005, see underneath). The NMa fined Interpay for infringement of Section 24 (1)) of the Competition Act by charging excessive fees for the provision of network services for debit card transactions. In addition, NMa fined the eight banks which set up Interpay for infringement of Section 6 (1) of the Competition Act. With regard to the sale of network services for debit-card transactions, the banks have eliminated competition amongst themselves by using Interpay as a central payments office. In its assessment, NMa acknowledged that Interpay has incurred considerable expense in setting up the network necessary to provide merchants with network services. This network has made it possible for widespread use to be made of debit card transactions speedily and securely. In its assessment of the fees, NMa took into account the costs incurred by Interpay in doing so. Despite this, Interpay's fees are so high that since the introduction of the 1997 Competition Act they have generated a return which is five to seven times higher than the benchmark set by the NMa. NMa therefore concluded that this constituted an abuse of a dominant position.
- Informal opinion of the NMa on the establishment of Currence by Interpay

On 17 May 2005 the NMa published an informal opinion on the establishment of Brands & Licences Betalingsverkeer Nederland B.V. (presently known as Currence) and its activities. The NMa stated that the establishment as well as the proposed activities seem to be in accordance with the Dutch Competition Act.

Based on the information supplied by Currence, the NMa stated that the procedure for admittance which Currence will employ, seems to be sufficiently independent and transparent. The demands to be met by the (potential) parties on the market in order to qualify for a license or certificate, seem to be objective and do not exceed demands necessary for a proper functioning of the Dutch electronic payments system.

The NMa emphasized that Currence should operate completely independent whilst performing its certifying activities, to the extent that no single undertaking can influence the decision as to whether (potential) parties will be admitted to the market. This is particularly important since the stockholders of Interpay are the same as those of Currence. Interpay is the only processor for PIN and Chipknip transactions on the Dutch market. Several parties are eager to enter this market. And the eight banks who own the stocks of both companies all sell products with the brandnames PIN and Chipknip. To rule out the option of these stockholders abusing their position within Currence by preventing others from entering their own and Interpay's market, the NMa pointed out that the governance within Currence should prevent this. The stockholders themselves should not be able to influence the company's decisions on whether or not they grant a certificate/license. The Supervisory Board should not be allowed to influence this process either or it should consist of at least 50% independent members, which was not the case at the moment the informal opinion of the NMa was published.

- Informal opinion of the NMa on the 'Payment Services Covenant, November 2005'

¹⁵

The equivalent of Article 81 (3) EC.

In November 2005 eight Dutch banks and undertakings which offer their customers the possibility of PIN payments closed an 'Over-the-Counter Payment Services Covenant', that consists of three agreements:

- a discount of at least 1 eurocent per transaction on the individually negotiated PIN fees retrospectively from 1 January 2005;
 - the set up of a EUR 10 million "innovation fund" to promote more efficient payments traffic (financed by the banks);
 - the intention to develop innovative plans jointly to make the payments behaviour of consumers and business account holders more efficient. On the basis of information provided by the parties, NMa indicated in an informal opinion that the discount scheme proposed in the Covenant did not restrict competition. Within the framework of its regulatory tasks, NMa will monitor market developments.
- Review of the Decision of the Director-General of the NMa in Case 2910 of 28 April 2004, Interpay, December 2005

In December 2005, following the administrative appeal procedure, the NMa confirmed that the eight banks which established Interpay had infringed the prohibition on cartels. The fines which were imposed earlier on these parties were reduced to EUR 14 million (previously EUR 17 million).

It was also decided not to impose a fine on Interpay for abusing its dominant position by charging excessive PIN fees. In the latter case (against Interpay), NMa reached the conclusion that a further investigation was necessary to prove that the fees were excessive. Taking all the circumstances into account, NMa did not carry out a further investigation. Apart from the fact that such an investigation would be time-consuming and very difficult to carry out, resulting in legal uncertainty for the parties involved and other interested parties for a lengthy period, the action taken by NMa reflected a number of new circumstances:

- the 'Payment Services Covenant 2005';
- recent research by the NMa showed that the market for network services for PIN payments had improved;
- it was no longer Interpay but the separate banks which offer merchants PIN services in competition with each other. As a result, the average PIN fees had fallen substantially.

Since these developments had substantially changed market conditions, the NMa decided not to conduct any further investigation.

POLAND

Competition in payment systems has many special features, due to the specificity of the market in which it takes place. Payment systems markets are characterised by complicated interactions between market participants, giving rise to network externalities and problems with coordination of the behaviour of market players. Given the fact that historic reasons may still play a role in current financial market practice, payment systems may sometimes function in less-than-efficient way, due to intransparency of the ways of covering costs, cross-subsidisation or maintaining in place arrangements which may be a relic of different market conditions. Another important feature of payment systems is that operating them gives rise to economies of scale, which on the one hand rewards greater participation in the system, but on the other may limit possibilities for competition.

Polish payment systems market has been developing fast since the beginning of the 1990s. Retail payments, almost exclusively cash-based at that time, have witnessed entry of payment cards, making electronic payments more and more widespread form of concluding transactions. There are also signals that mobile payments may be introduced, though they are still at an incipient stage. Legal framework is conducive to competition, allowing non-banking entities to provide payment and settlement services. There are, however, specific barriers to development of new payment instruments, which are mainly due to relatively low income of consumers and low utilisation of banking services.

Polish competition law does not raise barriers for the creation of new payment instruments either. It has been proposed that one of such instruments may be created by a joint venture of merchants, which, however, may be regarded as a competition problem. Under Polish provisions benefits of the new venture to economy would have to be assessed. It seems that properly structured joint ventures might promote technical progress and benefit consumers, while not eliminating competition in the market, but rather strengthening it. It would be important for such ventures, however, to act on a non-discriminatory basis, to avoid putting other retailers at a disadvantage.

The assessment of merchant joint ventures is also likely to be done on the basis of the European Community law, since the agreement would probably be capable of appreciably affecting trade between the EC Member States. As the latter may not prohibit agreements affecting intra-community trade which are compatible with the EC law, the Polish competition authority would be bound to look at the joint venture from this perspective. Therefore EC competition law would have to be taken into account while structuring joint ventures to launch new payment instruments.

Polish payment cards market is characterised by a competitive acquiring sector. There are several institutions active in this business, some of them independent from banks, like e.g. the biggest acquirer in the Polish market. Competitive market structure results in competitive prices for acquiring services – according to the data gathered by the competition authority, margins on transactions with large retailers are low, although smaller merchants are offered significantly worse conditions. According to the data of the National Bank of Poland, the number of cards in use, having grown dynamically in the last decade, now stands at over 20 million, with almost 80 thousand merchants accepting card payments. It may indicate that, at least in large cities and for large retailers, the option of paying with a card has become a standard.

Interchange fees (IF) flowing from merchants to card issuers are a well-established element of the payment card networks and they are present in Poland as well. Card associations consider them an important mechanism allowing to balance the demands of cardholders and merchants, maximising thus the sum of the benefits derived from the payment cards system by its participants. On the other hand,

merchants, who ultimately pay the interchange fee, contend that it is a result of a price-fixing agreement, as it is determined collectively by banks - members of card networks. In merchants' view the fee is too high and harmful to consumers, to whom it is at least in part passed on by means of higher retail prices. Another potentially harmful effect of high interchange fees, it has been argued, may come from their dampening impact on competition between acquirers, as it effectively fixes a large part (sometimes significantly over 90%) of their costs.

Interchange fees, as has been demonstrated in theoretical literature, are certainly capable of being beneficial to the network participants, especially when there exist strong externalities associated with their behaviour, which is the case in payments systems, where merchants decision to accept cards benefit card users and vice versa. Theory, however, does not provide precise guidance on the direction in which the fees should flow, let alone on their level.

There are, however, arguments aiming to show that card issuers may in fact be in a position to impose unnecessarily high interchange fees. Merchants, afraid of losing some of their customers, may find it more profitable to raise prices in response to higher interchange fees, than to refuse to accept cards altogether. Under such circumstances banks would be able to exercise their collective market power, imposing higher fees on retailers, which might lead to higher retail prices. Some analyses, studying profitability of card issuing, seem to indicate that this scenario might at least in part be true. The results of the EC Sector Inquiry in retail banking show for instance that this activity is very profitable indeed (especially so in Poland) and, with very few exceptions, would still entail positive profits even if there were no interchange fees.

Therefore there may be a case for constraining interchange fees, though it is not easy to determine at what level they should be set. One of the possibilities, already in use in some jurisdictions, is basing the IF on costs of the issuing banks. It seems to be an appealing approach, as it allows to provide an objective base for the fees charged by the banks and has been tried in some countries.

There are, however, at least two problems with basing interchange fee on costs of the issuers. The first one is practical – it is not easy to agree what costs should be included in the formula. While card associations contend that virtually all cost which can be attributed to card operations should be recovered by the banks, retailers contest the view that all of these cost benefit them. Even when the cost categories are agreed, there is also a possibility that issuing banks would attempt to artificially inflate the IF cost base. Finally, it is dubious, whether such an approach stimulates the issuing banks to lower their costs, since these are covered by interchange fees anyway.

The second problem is that the theory of two-sided markets, which is so far the best reflection of the card networks, does not support the cost-based approach (at least based on issuers' costs only), as not taking into account demand conditions and effects of the interchange fee on card holders.

Setting the interchange fee at zero, although it avoids some of the above-mentioned problems and is relatively easy to introduce, seems only one of many possibilities and there are no specific reasons to believe that this would be the best option. It might lead to banks allocating their costs on the card-holders' side, which could result in a decrease in cards usage. On the other hand, there are examples of card networks functioning with very low or even negative interchange fees, which may indicate that such a danger might be overstated. On the whole, however, setting the interchange fee at zero may require more arguments than just simplicity of this procedure.

The fees involved in card transactions are an outcome of collective decisions of the card network participants and have not been subject to regulation by Polish public authorities, which has not intervened in other banking fees either, as banks, according to the law, are free to collect fees for their services.

Should there be a need of intervention, the most competent authority to undertake such a task would be the National Bank of Poland, which exercises oversight of the proper functioning of payment systems in Poland. Current legal provisions, however, do not provide for a possibility of an intervention in the level of fees collected by Polish banks. Interchange fees are being, however, contested on antitrust grounds, which may lead to a public intervention, though it is hard to say what form it might take, if any.

Almost all of the cards in Poland are issued by banks within Visa or MasterCard systems, which started operating in 1993 and 1994 respectively. The Polish card market experienced a period of very dynamic growth after 1995, which, although it slightly slowed around 2002, is still significant – last year the value of card transactions grew by 18%. The expansion of cards does not seem to have been a response to any perceived inadequacies of other payment instruments, like e.g. having to accept cheques at a par. Much more likely explanation is that cards are simply a more convenient and profitable means of payment, allowing the banks to reduce their overall costs of handling transactions and to charge merchants additional fees. The IF rates in Poland until recently have been decided by banks without specific reference to any benchmark. In 2005 both Visa and MasterCard produced cost analyses, on which they base their interchange fees now.

The no-surcharge rule is effective in Visa system, while MasterCard lifted it in 2005. It has been argued that allowing merchants to reflect costs of payment instruments may lead to more rational consumer choices with respect to the payment method used. However, as studies (e.g. in Sweden and the Netherlands) and anecdotal evidence show, even when surcharging is allowed, it is rarely widespread, owing to costs associated with surcharging and possible consumer dissatisfaction. Although it is allowed in Poland with respect to MasterCard cards, this practice does not seem popular, however some shops with high value products may surcharge their card-paying customers.

Most of the Polish card-issuing banks are members of both Visa and MasterCard. On the one hand it allows them to extend their range of products offered to customers and increase the scope of the card network. On the other hand, it raises fears of inter-system competition being dampened, as the competing platforms have largely the same members. The interchange fees used in both systems have been on a quite similar level, although there was a period of significant divergence, ended by an increase in lower interchange fees. It is not easy to assess whether this convergence has been a result of membership duality or simply a consequence of offering similar products in similar market conditions. It is possible that interchange fees converge, because the banks choose to promote products with higher IF, forcing association with a lower fee to raise it. It must be noted, however, that in Poland interchange fees have been decreasing in the long run, although at a slow rate.

Polish card networks have for a long time kept interchange fee rates secret from merchants. This practice does not seem justified. It puts merchants at a disadvantage in negotiations with acquirers, because of the uncertainty with respect to the actual costs of acquiring services. Under such secrecy regulations merchants are not able to tell what part of the merchant service charge is due to the interchange fee, which may be problematic especially for smaller merchants with weaker bargaining power. Recently, main card associations in Poland have been lifting the clause preventing the disclosure of IF rates to merchants.

There were no complaints to the Polish authorities concerning agreements seeking to exclude from the platform issuers of the competing cards. Such clauses do not seem justified, especially in the light of the duality of membership in Visa and MasterCard, and would probably be prohibited as an unnecessary restriction of competition.

In 2001 the association of Polish retailers filed a complaint against Visa and MasterCard card-issuing banks, accusing the latter of, *inter alia*, price-fixing and creating barriers to entry to the payment cards market. The proceedings are still on-going. The main focus of the investigation is whether multilateral

determination of interchange fees can be exempted from the general prohibition of agreements restricting competition. The arguments of the parties to a large extent mirror what has been said in similar proceedings before other competition authorities.

SWEDEN

1. Fees and Charges

Sweden has had a relatively concentrated market for card payment systems. Issuing of VISA and MasterCard branded cards is made by the five large full service banks and a number of smaller issuers with varying degrees of other services. The five large banks have issued more than 90 percent of the Visa and MasterCard payment cards and do approximately 95 percent of the acquiring.

A Herfindahl index, i.e. squared “market shares” of number of issued cards and number of point of sales acquiring for Sweden amounts to 2860 for acquiring, 3030 for issued debit cards and 2110 for issuing of deferred debit and credit card. These numbers show that there is fairly high concentration in card payment markets in Sweden. It would be more correct to use the value of payment card sales but those figures are not available.

The Swedish payment card systems exhibit a few interesting characteristics that make them different from most other markets;

- More than 90 percent of the transactions are governed by bilateral agreements between an issuer and an acquirer rather than multilateral agreements.

Bilateral interchange fees are negotiated between pairs of issuer and acquirer. When an issuer and an acquirer do not agree bilaterally, the fallback is to trade at the multilateral interchange fee (MIF).

- The fallback MIF used for national transactions in Sweden is the European one, e.g. for VISA approx €0.27 for debit- and 0.70% for deferred debit and credit cards, and for MasterCard approx 0.70% for deferred debit and credit cards.

A large majority of purchases within the VISA and MasterCard systems are made with debit cards, which account for some 95 percent of the value compared to only 5 percent for deferred debit and credit cards.

- The bilaterally negotiated interchange fees on debit card are on average substantially lower than the debit card MIF.
- The BIFs for deferred debit and credit card are on average higher than the MIF for deferred debit and credit card.

The MIF is determined by the card associations, which are in effect run by the large players. If they decline an entrant bilateral agreements they can in effect maintain an entry barrier.

Since 95 percent of transactions are made with debit cards, acquirers without bilateral agreements are at a significant competitive disadvantage. The five large banks use debit card merchant fees that are in fact much lower than the MIF, leaving no margin for an acquirer trading at the MIF. Thus, more than 95 percent of the acquiring is made by the five major banks. This could pose a problem in terms of higher merchant fees and lack of alternatives.

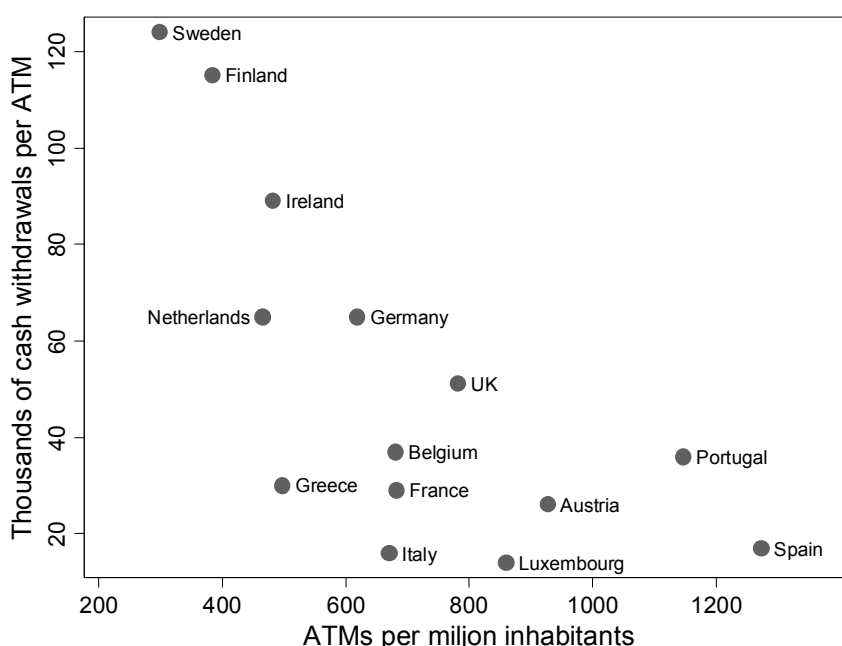
On the issuing side there has been some recent, if minor, entry. There are a handful of “new” issuers but they still cover only around five percent of card transactions. Some of the new issuers are also acquirers and are trading under bilateral agreements with the five major full service banks.

2. Social Costs

Sweden has a relatively large use of cash. ATM withdrawals are free to the consumer. Suggestions and attempts by banks to start charging for cash withdrawals have met public outcry.

Free cash withdrawals have resulted in a relatively scarce supply of ATMs and queuing (which is of course a cost to the individual consumer) in front of ATMs, something that is not commonly seen elsewhere. There has also been a series of armed robberies of armoured vehicles carrying cash.

Figure1. Number of ATMs and withdrawals among the EU14*, 2003



Sources: European Central Bank, 2005, Blue Book 2005, Payment and Securities Settlement systems in the European Union. *) No data available for Denmark

An attempt to introduce cash cards in 1998, which was backed by the large banks, failed and was abandoned in 2004.

A recent in depth study of social costs of retail payment services has been done by the Swedish Central Bank.

Do Prices Reflect Cost? A Study of the Price-and Cost Structure of Retail Payment Services in the Swedish Banking Sector 2002, Gabriela Guibourg and Björn Segendorff, Sveriges Riksbank Working Paper Series 172, October 2004.

It can be downloaded from www.riksbank.com, the Swedish central bank's website in English. The main results are that variable costs are poorly reflected in transaction fees towards both consumers and corporate customers and there exist large cross subsidies between different payment services, foremost

from acquiring card payments to cash distribution to the public, while payment services as a whole is not subsidized.

Table 1 below show costs of different payment services split with variable unit costs and fixed costs distributed per unit. The costs can be compared with the price data given in Table 2.

Table 1. The average bank's fixed-, variable and unit costs per payment transaction, 2002.

Payment service		Costs (SEK)			Volumes (thousands)
		Fixed/unit	Var/unit	Unit costs	
Card issuers	Debet	0,43	0,23	0,66	98834
	Charge/credit	0,62	2,85	3,46	13419
Acquirers	Debet	0,09	1,09	1,18	98834
	Charge/credit	0,09	1,09	1,18	13419
Credit transfers (outgoing)	Paper based	0,25	1,76	2,01	51228
	OTC	1,89	4,72	6,62	644
	Electronic	0,41	0,80	1,21	66353
	Direct debits	0,25	-0,02	0,24	27405
Credit transfers (incoming)	Credit transfers	0,16	0,74	0,90	118225
	Direct debits	0,16	1,01	1,17	27405
Dataclearing	Internet	0,28	0,30	0,57	31473
	Received	0,05	0,18	0,23	17123
Cash Withdrawals	OC/OT	4,50	1,37	5,87	38301
	OC/FT	0,08	5,61	5,69	30841
	FC/OT	5,15	-3,18	1,97	30841
	OTC	10,98	0,06	11,04	11170
Cheque		18,05	1,97	20,02	932

With few exceptions, consumers do not face any variable fees and therefore receive insufficient price signals in their choice of payment instruments.

Table 2. The average bank's fixed and variable fees per transaction in 2002.

Payment service		Representative bank's fees per transaction			
		Average fixed fee	Average Variable fee	Consumers variable fee	Corporate customers variable fee
Card issuers	Debit	1,76	0,00	0,00	0,00
	Charge & credit	2,54	0,00	0,00	0,00
Acquirers	Debit	0,00	2,04	-	2,04
	Charge & credit	0,00	22,01	-	22,01
Credit transfers outgoing	Paper based	2,86	0,44	0,00	1,26
	Over the counter	0,00	41,93	41,93	41,93
	Electronic	4,02	0,17	0,00	0,34
	Direct debits	0,00	0,00	0,00	-
Credit transfers incoming	Credit transfers	0,00	0,00	0,00	0,00
	Direct debits	0,00	1,50	-	1,50
Dataclearing	Internet	0,00	0,00	0,00	0,00
	Received	0,00	0,00	0,00	0,00
Cash Withdrawals	ATM-OC/OT	1,65	0,00	0,00	0,00
	ATM-OC/FT	1,65	0,00	0,00	0,00
	ATM-FC/OT	-	0,00	0,00	0,00
	Over the counter	0,00	0,00	0,00	0,00
Cheque	Issuing	0,00	24,82	24,82	24,82

The authors conclude that every bank would gain from a joint shift to more cost based pricing, but that they may be locked in a prisoner's dilemma regarding e.g. introducing fees for ATM withdrawals.

3. Competition law application

The Swedish Competition Authority turned down applications for negative clearance for the Visa (Case No. 1341/93) and Europay (Case No. 1833/93) systems in December 1994 and June 1995 respectively, on the grounds that their non-discrimination rules and the multilateral interchange fees were anti-competitive. Following the Authority's decision, Visa (Case No. 359/95 and 490/95) and Europay (Case No. 784/96) submitted fresh applications that also included notifications for individual exemptions.

The Visa cases were notifications for negative clearance/individual exemption for the non-discrimination rule and the rules regarding a national multilateral interchange fee as applied in the Visa system. The cases started in May of 1995 and the Swedish Competition Authority decided to stay the proceedings while waiting for the decisions from the European Commission. The cases were re-opened on 31 of May 2001.

The notifications from Visa were confined to:

- The Non-Discrimination Rule (NDR) as stated in Visa International Operating Regulations (section 5.2.C) and,
- the default fee set by the Visa EU Regional Board in relation to consumer card transactions (including mail order/telephone order transactions). (If Visa members have no bilateral agreements for domestic interchange, the default fee set by the Visa EU regional board in relation to intra-regional transactions also applies to domestic transactions.)

On 24th of June 2004 negative clearance was granted for the NDR, but there was no decision on the MIF.

The case 784/1996 was a notification for negative clearance/individual exemption for the non-discrimination rule as applied in the Europay system. The case started in July of 1996. The Swedish Competition Authority decided to stay the proceedings while waiting for the decisions from the European Commission and the case was re-opened on 31 of May 2001. The notification was confined to a domestic NDR based on the NDR of Europay International.

On 24th of June 2004 negative clearance was granted for the NDR.

SWITZERLAND

1. Introduction

The Swiss payment sector has been the object of various investigations of the Swiss Competition Commission (ComCo) in the past years. The first procedures were opened on the base of alleged abusive behaviour of acquirers regarding the no-discrimination rule in “three- and four-party” card schemes. A few years later, the ComCo opened an investigation against “four-party” card schemes in Switzerland which addressed prices in the credit card industry in general and domestic interchange fees in particular. A decision in this matter was taken in December 2005 and will be commented hereafter (see section 2.2). Table 1 gives an overview of these and other investigations in the payment card sector, their content, state of the procedure and the bibliography of published decisions.¹

Date	Title	Content	State of the procedure	Published
1999 - 2002	Credit cards – No-Discrimination Rule	abuse (collective dominance acquirers)	decision 18.11.2002 appeal in front of the Federal Court of Appeals is ongoing	RPW/DPC 2003/1, 106 (ComCo) RPW/DPC 2005/3, 530 (Reko ²)
since 2002	Debit cards – No-Discrimination Rule	abuse of dominant position	investigation suspended until final decision in the credit card case	
2003 - 2005	Credit cards – Domestic Multilateral Interchange Fee	cartel (issuers & acquirers)	decision 05.12.2005	RPW/DPC 2006/1
2003 - 2005	Credit cards – Merchant Service Charge	abuse of dominant position: - predatory pricing - bundling	- preliminary decision on provisional remedies - preliminary investigation closed without followings	RPW/DPC 2004/4, 1002 (ComCo) RPW/DPC 2004/2, 625 (Reko) RPW/DPC 2004/4, 1193 (BGer ³) forthcoming
since 2004	Debit cards - Domestic Multilateral Interchange Fee	cartel (issuers & acquirers)	preliminary investigation, ongoing	

¹ All decisions are published on our homepage:
<http://www.weko.admin.ch/publikationen/00212/index.html?lang=de>

² Appeals Commission for Competition Matters

³ Federal Court of Appeals

Table 1. Investigations of the ComCo in the payment industry

Date	Title	Content	State of the procedure	Published
since 2005	ATM Service Fee	cartel	preliminary investigation, closed without followings	forthcoming
since 2005	ep2-specification	Abuse of dominant position	notification, ongoing	

One of the major challenges when confronted with payment card markets in antitrust cases is the question whether different means of payment (e.g. cash, debit cards and credit cards) are substitutable or, in other words, the delimitation of the relevant market. Parties to payment card investigations regularly claim an integral market for means of payment, which in its effect attenuates possible unlawful behaviour. This because the potential concurrence of different means of payment has a disciplinary effect on the market, which reduces the possibility of abusive behaviour by a dominant actor or harmful agreements between market participants.

The question which products are part of a market is in the end an empirical one, depending in the first place on the demand and supply substitutability between different goods and services. However, due to the lack of reliable data and conceptual problems with methods such as the SSNIP test (e.g. the famous “cellophane fallacy”), it is often not possible to work empirically and/or to come to unambiguous conclusions. The payment sector is no exception in this context.

In its investigations the ComCo came to the result that there is no integral market for means of payment at the time. In particular credit and debit cards are not to a sufficient degree substitutable with other means of payment, such as e.g. cash, giro transactions and checks, to allow for the definition of a single market for means of payment. The ComCo even judged the available evidence strong enough to delimitate individual markets for credit and debit cards. Without entering into details, this appraisal was based on the different card-specific properties and services of credit and debit cards for merchants and consumers in general and questionnaires answered by approximately 200 merchants. This position was confirmed by the Appeals Commission for Competition Matters (see RPW/DPC 2005/3, p. 530). The latter went – in an *obiter dictum* – even further, arguing for the delimitation of separate markets for each credit and debit card brand.

Following the practice of market delimitation in the payment card sector of the ComCo, we will treat the markets for credit and debit cards separately in what follows. The credit card market will be the subject of section 2, while debit cards are treated in section 3. Section 4 treats new technologies in the payment sector and related antitrust concerns. Section 5 finally contains a summary and some concluding remarks.

2. Competition in the Credit Card System

2.1 The Swiss Credit Card Market

Four credit card schemes (Visa, MasterCard, American Express and Diners Club) are currently operating in Switzerland. Visa and MasterCard are organized as “four-party” systems, whereas American Express and Diners Club operate as “three-party” systems. JCB cards – another global “three-party” system – are accepted by relatively few merchants and are not issued in Switzerland. With a market share of 85%-95%, MasterCard and Visa are by far the most important players in the market. Considering their market-share of 0%-10% and their relative small acceptance as compared to Visa and MasterCard, the “three-party” schemes American Express and Diners Club can be considered as niche players. Further,

from an antitrust perspective, “four-party” systems cause the major problems.⁴ In the following the focus will therefore be on these systems.

Since 1998 all issuers and acquirers of Visa and MasterCard cards offer both brands (so called “dual branding”). The products of Visa and MasterCard are widely standardized and the prices for the cards are basically identical (see examples in table 2). There are neither for the issuers nor for the acquirers significant differences in the costs and benefits the two brands generate. As a consequence there are no incentives to favour one brand over the other, i.e. competition between the two brands is more or less non-existent. The two brands will therefore not be treated separately in what follows.

Table 2. Price comparison between Visa and MasterCard (2002)⁵

	Visa	MasterCard
Standard / Classic	100 CHF	100 CHF
Gold	170 – 200 CHF	170 – 200 CHF

In a “four-party” network different interactions can be identified. First, there is a contractual relationship between the merchant and the acquirer regarding the authorization of the transaction and the payment of the merchant (acquiring market). Second, the issuer delivers cards to cardholders in return for the payment of annual fees and other fees (issuing market). Finally, the acquirer transfers the transaction data to the issuer who forwards the money to the merchant. As the domestic interchange fee proved to have an impact on both the acquiring and the issuing market, we will in the following focus on those two markets.

2.1.1 Acquiring Market

Until the middle of 2003 three domestic companies were operating in the Swiss acquiring market: Telekurs Multipay⁶, UBS Card Center and Cornèr Banca. In May 2003 UBS Card Center sold its acquiring business to Telekurs Multipay, reducing the number of domestic actors in the market to two. Further, in July 2005, Aduno (a subsidiary of the issuer Visa; see section 2.1.2) assumed the acquiring business of Cornèr Banca. Currently there are consequently two domestic acquirers for Visa and MasterCard, Telekurs Multipay and Aduno, both “dual branding”.

Besides these two domestic acquirers, there are approximately another ten foreign acquirers operating in Switzerland. Most of these companies do however not actively acquire merchants. So far they mainly concluded contracts with a few multinational companies having subsidiaries in Switzerland. In the last few years only the two German acquirers B&S Card Service GmbH and ConCardis GmbH started with increasing success to actively acquire merchants. As can be seen in table 3, their market share is however rather small. In contrast, Telekurs Multipay, being the dominant player in the market, holds a market share of 70%-80%.

⁴ Since “three -party” card schemes are vertically integrated, the possibility of unlawful agreements within a system is limited.

⁵ Without co-branded cards, commercial cards, cards in foreign currencies and UBS Eurocards of the former Payserv.

⁶ Telekurs Multipay is a joint venture owned by the Swiss banks, including three out of the four domestic issuers.

Table 3. Market shares of Visa and MasterCard acquirers

Acquirer	<i>Market Shares 2003</i>		
	Visa	MC	Visa & MC
Telekurs Multipay	40%-50%	90%-100%	70%-80%
Cornèr Banca	50%-60%	0%-5%	20%-30%
B&S Card Service, ConCardis	0%-5%	0%-5%	0%-5%

The average merchant service charge (MSC) in Switzerland decreased in the last few years by 5%-10%. This development was mainly due to the market entry of the two German acquirers and indicates the existence of a certain degree of price competition in the acquiring business. It is however unlikely that this price competition will weaken the strong position of Telekurs Multipay in the near future. Telekurs Multipay is not only the dominant player in the credit card but also in the debit card acquiring business and the POS terminal market, which creates a substantial advantage over its competitors. Although new companies cropped up in all the mentioned markets, they will most likely need time to catch up with Telekurs Multipay.

2.1.2 Issuing Market

Four domestic companies are active in the market for the issuing of Visa and MasterCard credit cards: Cornèr Banca, Credit Suisse, Viseca⁷ and UBS. All of them issue both brands of credit cards. The respective market shares of the four issuers can be found in table 4.

Table 4. Market shares of Visa and MasterCard issuers

Issuer	<i>Market Shares 2003 (Visa & MC)</i>	
UBS	30%-40%	
Viseca	20%-30%	
Credit Suisse	20%-30%	
Cornèr Banca	10%-20%	

These market shares remained basically constant over the last five years and the market is characterized by a relatively strong concentration with a HHI-coefficient of more than 2800. New market entries were not observed in the last years. Several reasons can explain this fact: First, all major Swiss banks issue credit cards either directly or via the joint venture Viseca. Second, a potential cross border issuer would be obliged to adopt the "Swiss Domestic Rules" (SDR) which may cause considerable costs. The SDR ask e.g. for the support of the authorizing process in four languages (German, French, Italian and

⁷ Viseca is a joint venture of the cantonal banks, the Raiffeisen Group, the RBA Banks, Migrosbank, Bank Coop and several private and merchant banks.

English). Last, the credit card penetration in Switzerland is likely to be near its saturation point, promising no opportunities for ample profits.⁸

The annual card fees in Switzerland, in particular in comparison with other EU countries, seem very high (ca. 2.5 times higher than the EU average).⁹ Such direct price comparisons are however to be treated with caution. First, they do not account for possible perquisites and rebates. Second, the conditions in the credit card business can vary substantially across countries. The option for revolving credits is for example only reluctantly used in Switzerland, reducing potential incomes from interest payments.

Nevertheless, official list prices can provide an indication for the degree of price competition in a market. These list prices for different brands and types of credit cards remained remarkably constant in the last decade. For a Visa or MasterCard Standard credit card e.g. all four issuers charge uniformly CHF 100 since 1997 (see as well table 2). All of the few price alignments occurring in the last years were price increases leading to an equalization of list prices. Furthermore, an analysis of the average net earnings per credit card (consisting of annual fees, interest payments and other credit card-related earnings, such as commissions from cash withdraws etc.), revealed a constant increase in overall card fees, resulting in a substantial increase of average industry profit. To sum up, the credit card issuing market in Switzerland is currently not characterized by strong price competition.

2.2 *Interchange Fees*

The domestic multilateral interchange fees (DMIF) in the “four-party” systems of Visa and MasterCard were the subject of a recent decision by the ComCo (see table 1). These fees were multilaterally agreed between the domestic issuers and acquirers in two separate committees. Since all Swiss issuers and acquirers are licensees of Visa and MasterCard, the members of the two committees were however identical. Not surprisingly the domestic sector- and transaction-specific interchange fees of the two credit card schemes were nearly identical.

The ComCo argued that the DMIF is not an end price. It is however a component of the price. It amounted on average to around 70% of the MSC that merchants had to pay to the acquirers. Among the card issuers, around a fifth of the revenues came from the DMIF and consequently they potentially had a considerable influence on the level of the card fees. Based on these facts, the ComCo judged the fixing of the DMIF by these committees as a price-fixing agreement. Under the Swiss Cartel Act (ACart) a price-fixing agreement is presumed to be unlawful and is threatened by sanctions. In the present case, the legal presumption of eliminated competition (see art. 5 para. 3 ACart) could however be reversed due to the existing price competition in the acquiring market (see section 2.1.1). Yet, the remaining competition in the credit card industry was - in the opinion of the ComCo – not strong enough to exclude a significant affection of competition (see art. 5 para. 2 ACart).

The ComCo examined therefore whether in a “four-party” system, the multilateral procedure can have advantages of efficiency (compared to a bilateral system) and if yes, whether the multilateral negotiations result in a level of the DMIF which is economical efficient.

⁸ While writing this report Migros and Coop, the two largest Swiss retail chains, announced plans to issue credit cards in the future. This credit card would however be linked to existing customer care programs. Since the details of these projects are however still vague, we will not consider their potential effect on the market in what follows.

⁹ See e.g. Retail Banking Research (2003): Payment Cards in Europe 2004, Executive Summary, Figure 4, p. 8.

2.2.1 *Multilateral Negotiations of the DMIF*

One could assume that the elimination of multilateral negotiations of the DMIF promotes competition in the credit card business, resulting in market-based levels of interchange fees. However, it has to be noted that the relationship between issuers and acquirers is not a common relationship as usually observed in markets. Due to the “Honour-all-cards rule” (HACR)¹⁰ in the “four-party” systems, each acquirer is obliged to conclude an agreement with each issuer. The justification of the HACR is as follows: One of the most important characteristics of payment cards of the schemes Visa and MasterCard is that they are nearly globally accepted. In case an acquirer, respectively a merchant could freely choose to accept only certain payment cards issued by certain companies, the aggregate value of a payment card system would drastically be reduced. The HACR was therefore not challenged by the ComCo.

The result of bilateral negotiations (with the HACR in place) on the DMIF is difficult to predict. However, the following points have to be considered:¹¹

- *Transaction costs*: Bilateral negotiations can create substantial transaction costs. These costs are likely to increase exponentially with the number of involved actors in the market. As we have seen, in Switzerland the number of domestic issuers and acquirers is relatively small. However, given the fact that approximately ten foreign acquirers are operating in the domestic market, transaction costs could also in Switzerland amount to an important factor.
- *Hold-up problem*: Due to the HACR, the issuers possess considerable negotiation power, which they could use to enforce undesirable high levels of interchange fees.
- *Market entry barriers*: Multilateral negotiated interchange fees facilitate market entry, since a new entrant can simply adopt the valid DMIF without potentially long-winded negotiations with each issuer. Further, in a bilateral system without obligation to contract each issuer has the power to prevent new market entries.

Consequently, it is well conceivable that a system of multilateral negotiations on the DMIF is, for efficiency reasons, superior to a bilateral system. In particular, in a bilateral system it cannot be excluded that, due to the negotiation power of the issuers, the DMIF would be increased to an inefficient level.

In general, these drawbacks of bilateral negotiations could be avoided by introducing a default rate of the DMIF which enters into force in case of failed negotiations. However, it is predictable that on the one hand in bilateral negotiations an acquirer would never accept an interchange fee which is higher than the default rate. On the other hand, for an issuer there is hardly an incentive to offer a DMIF which is lower than the default rate. Thus, one can assume that in effect only the default rate would be applied, eliminating all potential efficiencies of bilateral negotiations.

For these reasons, the ComCo refrained from forcing the domestic acquirers and issuers to abandon the system of multilateral negotiations of the DMIF. However, as we show in the next section, the fact that a multilateral agreement on the DMIF has potential advantages of efficiency compared to a bilateral system does not automatically imply that such an agreement results in an economical optimal DMIF.

¹⁰ The HACR stipulates that an acquirer must accept all payment cards from a certain card scheme regardless of the issuing company.

¹¹ See also J. Small and J. Wright, *The bilateral negotiation of Interchange Fees in Payment Schemes*, mimeo, NECG and University of Auckland, September 2001.

2.2.2 *Do Multilateral Negotiations Result in an Optimal Level of the DMIF?*

In the recent economic literature, several theories of the role of interchange fees in “four-party” systems can be found. In essence these theories advocate that there is a good chance that multilateral negotiations result in adequate levels of interchange fees, rendering unnecessary any form of market intervention.¹² In particular the three following approaches can be distinguished:

- *service-orientated view*
- *joint-production view*
- *network-orientated view*

In its decision the ComCo analyzed whether these theories are in line with the actual developments in the market. The base for this analysis was the fact that the domestic standard interchange fee for MasterCard was increased in Switzerland by roughly 20% in the recent past, which caused an increase in the average DMIF.

Service-orientated View

According to this view, interchange fees represent a compensation for certain services (e.g. transaction processing or fraud prevention) provided by the issuers to the acquirers, from which the merchants profit as well. It is basically an argument which stipulates the existence of a wholesale market. In this scenario interchange fees should be in due proportion to the provided services.

In Switzerland the average unit costs of the issuers (costs per credit card) were decreasing in recent years. Furthermore, there were no signs of new or improved services provided by the issuers to the acquirers. In a competitive market, one would therefore expect decreasing - or at least stable - interchange fees. An increase in the average DMIF is however not compatible with the service-orientated view.

Joint-production View

The joint-production view holds that the issuers and the acquirers jointly provide payment services to merchants and card holders. The interchange fee serves as a mean to allocate a fair share of the aggregate costs and benefits to the issuers and acquirers.

As the service-orientated view, this view seems to contradict the actual developments in the market. As mentioned above, the issuers increased their margins in the last years, while the acquirers faced shrinking margins. According to the joint-production view this would imply a decrease not however an increase in the DMIF as observed in reality.

Network-orientated View

According to this view, a “four-party” system exhibits the characteristics of a network, or more specific, of a two-sided market. To make it attractive for consumers to hold a certain credit card it is essential that a sufficient number of merchants accept this credit card. By the same token, it gets more attractive for the merchants to accept credit cards the more diffused they are in the population. The two sides of the market, issuing and acquiring, are consequently interdependent.

¹² For an overview see e.g. J.-Ch. Rochet and J. Tirole, *The Theory of Interchange Fees: A Synthesis of Recent Contributions*, *Review of Network Economics*, Vol. 2, Issue 2, p. 97-124, June 2003.

According to the theory of two-sided markets, the interchange fee ensures an optimal dispersion of a credit card scheme by influencing and balancing the equilibriums in the two markets as well as internalizing network-externalities. The mechanism can be described as follows: An increase in the interchange fee raises the profits of the issuers. Under the assumption of competitive markets, at least a part of these higher profits will be passed on to the card holders in the form of lower card fees. This raises *ceteris paribus* the demand for credit cards. On the acquiring side, an increase in the interchange fee lowers profits. If the market is competitive, acquirers will have to increase the MSC, which lowers the acceptance of credit cards in the system. Of course, a decrease of the interchange fee will have the opposite effect.

For the existence of a two-sided market the following conditions must apply:

- *There are two distinct groups of customers which jointly use an end product offered via a platform.*
- *The utility of one customer group increases when the number of participants of the other customer group rises and vice versa, i.e. there are network externalities. These externalities cannot be internalized without the platform.*

By differentiating prices, the demanded quantities of the two customer groups can be optimized. Rochet and Tirole (2004) specify this condition to the effect that the aggregate demand on the platform can be influenced by adjusting customer-specific prices while the aggregate price level remains constant.

Without entering into a formal discussion, the welfare maximizing interchange fee in such a two-sided market is determined by several economic factors, such as demand elasticity on the issuing and acquiring side, costs of the issuers and acquirers, net utility of the two customer groups etc.

Unfortunately the information to determine empirically the welfare maximizing interchange fee(s) is hardly ever available. An empirical approach to check whether an interchange fee is welfare maximizing is therefore, at least within the scope of an antitrust procedure, not a realistic option. Given that markets are - at least to a certain degree - competitive, the theory of two-sided markets nevertheless allows the formulation of a simple hypothesis:

If interchange fees serve to balance the two markets and thereby optimize the aggregate system, each increase (decrease) of the interchange fee should cause – *ceteris paribus* – an increase (decrease) in the average MSC and a decrease (increase) in the average card holder fees.

In Switzerland the increase of the average DMIF did not result in a decrease of average card fees. In contrary, as noted above, the official list prices for different brands and types of credit cards remained constant in the last decade, while actual card fees (including, interest payments and other credit card-related earnings) increased. This implies that the increased revenues from the DMIF were not passed on to the card holders. On the acquiring side, in spite of the increasing DMIF-payments, a decreasing average MSC was observed. Yet, this could be the result of the increased price competition in the acquiring market, overcompensating the “balancing effect”.

Conclusions

The above conducted analysis does of course not allow the conclusion that the three discussed theoretical approaches are wrong. The analysis only suggests that they cannot explain the actual developments in the Swiss credit card business and that the DMIF is consequently not or only by pure coincidence set at an efficient level. We believe that this result is mainly due to the following specificities of the Swiss credit card industry:

- Due to the lack of price competition between issuers, increases in the DMIF are not passed on to final consumers through reductions of card fees, but simply used as a device to increase profits.
- Since in Switzerland, the domestic acquirers are possessed by the issuers, profits can be shifted between the two sides of the market by means of the DMIF. At the same time, an increase in the DMIF, as well as a high DMIF in general, deters market entry by foreign acquirers since profit opportunities are reduced.
- Because of the so-called “no-discrimination rule”, which prohibits merchants to surcharge (see section 2.3), final consumers do not receive a price signal when choosing between the available means of payment. Therefore, final consumers do not take the effective cost of the different means of payment into account, i.e. they are not price-sensitive.

However, as noted above, the ComCo accepted in principal the superiority of multilateral over bilateral negotiations of the DMIF. For this reason, the ComCo did not prohibit the multilateral agreement of the DMIF as such but decided to introduce - by accepting an amicable settlement¹³ – a procedure, which preserves the advantages of the multilateral system while objectifying the DMIF in a transparent way.¹⁴

2.2.3 *Objectified Procedure for fixing Domestic Multilateral Interchange Fees*

The chosen objectified procedure aims at limiting the level of the DMIF to the cost that are necessarily linked to the functioning of the network, whereby the effective network costs incurred by the issuers constitute an upper limit for the DMIF. According to the agreed procedure, the costs of services from which in the first place the card holders benefit (such as costs of the interest-free period until the card holder is billed, interest costs of credits in the case of part payment, etc.) must not be taken into account in the calculation of the average DMIF. The ascertainment of the network costs is based on a precise definition of the cost elements that are allowed to be taken into account and is verified by a firm of auditors.¹⁵

As mentioned, the calculation method of the DMIF constitutes an upper limit for the average DMIF. Acquirers and issuers are free to multilaterally negotiate a lower average DMIF and to set transaction- and sector-specific domestic interchange fees as they like, as long as their weighted average (by transaction volumes) does not exceed the average DMIF.¹⁶

The amicable settlement will lead to a substantial, step-by-step reduction in the average DMIF, from a current [1.65 – 1.7%] to maximal [1.3 – 1.35%] in the next three years. The system inherently sets a dynamic incentive for further cost reductions on the issuing side in the future (yardstick competition). Since the upper limit of the DMIF is calculated as an average, some issuers will not be able to fully cover their network costs. They will face a strong incentive to reduce network costs. The earnings from the

¹³ The subject matter of an amicable settlement is the measures that eliminate a probable restraint of competition under the ACart. In reaching such a settlement, it is not only necessary to state what an undertaking must not do as far as competition law is concerned, but also what is still possible such that competition is not seriously harmed or justified on the grounds of economic efficiency under art. 5 para. 2 of the ACart.

¹⁴ The approval to the amicable settlement has been limited by the ComCo to four years.

¹⁵ The cost table is published in English with the amicable settlement on our website: <http://www.weko.admin.ch/news/00008/Amicable-Settlement-KK-E.pdf?lang=en>

¹⁶ See Article A of the amicable settlement: <http://www.weko.admin.ch/news/00008/Amicable-Settlement-KK-E.pdf?lang=en>

DMIF will for other issuers be higher than the actual network costs, i.e. they earn a rent. By saving on network costs, these issuers can even increase this rent.

2.3 *No-Discrimination Rule*

The credit card acceptance agreement of the acquirer includes a ban on price discrimination ("No-discrimination rule", NDR). It prohibits the merchant from charging different prices depending on the method of payment. The merchant is thus not allowed to pass on the MSC (or part of it) to the credit card holder or to grant a discount to customers who use a different method of payment. As a consequence, final consumers do not receive a price signal when choosing between the available means of payment. Therefore, final consumers do not take the effective cost of the different means of payment into account, i.e. they are not price-sensitive. By abolishing the NDR, competition between the various methods of payment is increased and potential undesired cross-subsidies between card users and non-card users are removed.

The NDR was already the subject matter of proceedings before the ComCo. In November 2002, the ComCo ruled that the NDR infringed the ACart. Following an appeal by the acquirers against this decision, the Competition Appeals Commission referred the case back to the ComCo for re-examination in June 2005. The reason for this decision was mainly related to the change in market conditions in the acquiring business that had taken place in the intervening period. The case is currently pending before the Swiss Federal Supreme Court.

However, besides the above described objectified procedure for fixing the DMIF, a second important element for the acceptance of an amicable settlement by the ComCo in the credit card case was the commitment of the domestic issuers and acquirers to abolish the NDR. Thus, today the NDR is no longer valid for "four-party" systems in Switzerland although the original case is still pending before the Swiss Federal Supreme Court.¹⁷

It is clearly too early to assess in detail the effects of the abolishment of the NDR in Switzerland. In general two opposite tendencies can however be observed at the time: On the one hand certain industries, as e.g. the travel industry, have started to pass on the MSC to their customers, without decreasing prices. On the other hand, industries - in particular the retail industry - which traditionally granted discounts for cash payment on request (even though this was not allowed), seem in the moment even more inclined to allow for such rebates. In other industries the abolishment of the NDR will most likely have no effect, at least not in the short term. At the end of the day the crucial factor will be the reaction of the consumers. If they consequently demand for discounts and favour inexpensive means of payment, a positive overall effect on the price level can be expected. In addition, to ensure that the choice of means of payment by the consumers is not artificially restricted in certain markets, it is of importance that the decision to surcharge or to grant discounts, is made by the individual undertakings and not by industry associations or other possible cartelistic organisations.

2.4 *Transparency Rules*

The MSC consists basically of two components: the interchange fee and the compensation for the services of the acquirer. As noted above, the share of the interchange fee amounted in Switzerland on average to around 70% of the MSC. Before the amicable settlement the fraction of the interchange fee, which can differ substantially by industry and transaction type, of the MSC was however not apparent for a merchant. As a consequence, the possibility of an individual merchant to judge the adequacy of his MSC

¹⁷ In this context, it has to be noted that the three-party scheme American Express abolished as well the NDR in 2006.

was very limited. This in turn restricted significantly his ability to negotiate a favourable MSC. Of course in this system there was as well not much of an incentive for the acquirers to stand up for moderate interchange fees.

As a third element of the amicable settlement the ComCo required therefore the adoption of the obligation for the acquirers to disclose the applied levels of the sector- and transaction-specific interchange fees vis-à-vis the merchant on request.

2.5 Conclusions

The Swiss credit card market with its few actors is very concentrated. Only in the acquiring business market entries were observed in the recent past. Although these new players introduced a certain degree of price competition in the acquiring market, their market shares are still very moderate. To promote competition in the credit card business the ComCo implemented in the context of the amicable settlement several measures: First, since the analysis conducted by the ComCo showed that the practice to determine the DMIF did not have the expected effect on the pricing policy of the acquirers and in particular of the issuers, an objectified procedure to fix the DMIF was adopted. This procedure will lead to a reduction of the DMIF, which should in turn have an effect on the MSC and on the end price paid by consumers. Second, to increase competition between different methods of payment and allow consumers to observe price signals, the NDR was abolished. Third, to increase the negotiation power of merchants and their associations, transparency rules were introduced.

The effect of these measures, individually or as a whole, remains to be seen. To allow for the correction of potential erroneous trends, the ComCo has limited its approval of the amicable settlement to four years. After this period the ComCo will re-evaluate the acquiring and the issuing market in general as well as the effects of the objectified procedure in particular. If necessary, corrections for possible introduced inefficiencies in the credit card system will be adopted.

3. Competition in the Debit Card System

3.1 The Swiss Debit Card Market

In 1988 the Swiss banks and Telekurs Multipay introduced the debit card scheme “ec-direct/Maestro”. “ec-direct” was the national system used for domestic transactions, while Maestro (the debit card scheme of MasterCard International) ensured the trans-boundary compatibility of the card. However, following a decision of MasterCard International, the brand “ec-direct” had to be abolished at the beginning of 2005 and Maestro was also introduced for domestic transactions.

Besides Maestro, a “four-party” system, there are two more “three-party” systems operating in Switzerland: Postcard and M-Card. Postcard is issued by Postfinance (a division of Swiss Post) and offers similar services as Maestro. M-Card is a product of Migros, a large Swiss retail store chain with its own bank (Migrosbank), which offers the service of cashless shopping in Migros stores and several other stores as well as cash withdraw in Migros stores and from Migrosbank- and Postfinance-ATMs. Visa Electron, the debit card of Visa International, is accepted by most Swiss merchants, however not issued by Swiss banks so far.

In 2003 Maestro held a market share (in terms of number of issued cards and transaction volume) of approximately 50%-60%. Postcard, the second largest debit card scheme, held a market share of ca. 30%-40%. The market share of M-Card finally amounted to 0%-10%. The respective market shares are summarized in table 5.

Table 5. Market shares of different debit card schemes

Market Shares (2003)	
Maestro Card	50%-60%
Postcard	30%-40%
M-Card	0%-10%

Since the recent procedures of the ComCo concerned in the first place the “four-party” system of Maestro, with its market share the dominant debit card scheme in Switzerland, we will focus on Maestro in what follows.

3.1.1 Acquiring Market

Telekurs Multipay was until recently the only acquirer for Maestro. With the abolishment of the brand “ec/direct” market entries of domestic and foreign acquirers can however be expected. Several Swiss and cross-border companies have applied and received licenses from MasterCard Europe for the acquiring of Maestro in Switzerland. Whether these new actors will be able to challenge the monopoly of Telekurs Multipay remains to be seen. An important advantage for Telekurs Multipay definitely is the existing merchant network for Maestro, Visa and MasterCard and its very strong position in the POS terminal market.

3.1.2 Issuing Market

Currently, approximately 140 Banks issue Maestro cards in Switzerland. Unfortunately the exact market shares of these issuers are not available. It can however be estimated that less than 10 issuers (including the three largest Swiss banks UBS, Credit Suisse and ZKB) hold more than 50% of the market. Thus, although the number of Maestro issuers is fairly high, market concentration might still be considerable.

Annual card fees for Maestro Cards vary between 20 and 40 CHF. Compared with the annual fees for credit cards this seems moderate. Price comparisons between different issuers and different payment cards are however a difficult task. Since debit cards are always linked to a bank account of the issuing company, a simple comparison of annual card fees can be misleading. To judge the attractiveness of the prices for debit cards, one has to consider other fees as well, such as e.g. account management fees, deposit interest, ATM service fees. In general, the whole relationship between the bank and its customer has to be taken into account.

3.2 Interchange Fees

When the debit card scheme “ec-direct/Maestro” was first introduced in 1988, the Swiss banks financed the setup and the operation of the system. There was no MSC and no interchange fee. According to the Swiss banks and Telekurs Multipay the increasing usage of the system caused however a rising deficit. As a consequence, in 2000 a fix transaction fee was introduced to compensate Telekurs Multipay for its services. With the change from “ec-direct/Maestro” to Maestro in 2005 the Swiss banks considered the adoption of interchange fees to reduce respectively eliminate their alleged deficit.

The intention to introduce multilateral agreed domestic interchange fees (DMIF) was notified to the Secretariat of the ComCo and triggered the opening of a preliminary investigation, which is still pending.

Whether the ComCo would agree to the introduction of a (possibly objectified) DMIF in the Swiss debit card sector remains an open question at the time.

From a theoretical point of view, the adoption of an objectified procedure for the fixing of the DMIF in analogy to the credit card case would be a challenging project. Due to the above mentioned bundling of debit cards with bank accounts, the ascertainment of the network costs of the Maestro system on the issuing side is much more complex than in credit card systems. To give a little example, on the monthly bank statement, debit card transaction and other bank transactions are usually listed. How to reasonably split the costs for the producing and the mailing of these bank statements in debit card induced network cost and other costs? Further, the alleged deficit of the banks is most likely only a technical and not a real deficit. It is sensible to assume that the banks covered the deficit so far through other revenues, such as account management fees and the interest spread on deposits. This implies, that in the case of the introduction of an interchange fee, an adequate decrease of other, bank account related revenues should take place.

To sum up, despite the structural similarities, an objectified procedure to fix a DMIF in a “four-party” debit card system is much more complex than in a “four-party” credit card system. In particular such an undertaking would require a comprehensive cost analysis not only of the debit card network costs but as well of bank account related fees and revenues. Whether such an in essence regulatory approach to retail bank fees and revenues is in the interest of the banks and the antitrust agency remains an open question at the time.

3.3 *No-Discrimination Rule*

In Switzerland, the NDR was not only valid for credit cards but also for debit cards. However, Telekurs Multipay and Aduno are acquiring for Visa, MasterCard and Maestro and the general contract terms are basically the same for all three products. Thus, when meeting their obligations from the amicable settlement for credit cards, Telekurs Multipay and Aduno annulled the NDR for all its marketed payment cards. Since Telekurs Multipay and Aduno are the only domestic acquirers for Maestro, the effect of this annulment covers presumably most of the Maestro business in Switzerland.

But in principle, there is at the moment no formal decision that prohibits a no-discrimination clause for debit cards in Switzerland. Thus, other debit card schemes such as the Postcard still impose a NDR in their contracts. New market participants could do the same even with the Maestro card. However, as mentioned above, the NDR in credit card schemes is currently pending before the Swiss Federal Supreme Court. In case the Court considers the NDR as an infringement of the ACart, this decision would most probably be applicable in analogy to debit card schemes. The risk of being sanctioned by the ComCo for market participants imposing a NDR is consequently considerable.

4. New Technologies

The prevailing technology for card-based financial transactions at the point of sale (POS) in Switzerland is called EMV/ep2. EMV is the international specification, which describes the structure and interaction between chip cards and the payment terminal. ep2 is the domestic processing protocol for EMV-transactions for terminals, a standardized technology, which sets the basic technical guidelines for actors in the electronic payment business for the development of products and services (soft- and hardware). EMV is consequently part of the ep2-specification, which implies that all ep2-terminals are also EMV-compatible.

The project to develop the ep2-specification was launched in 1996 by Telekurs Multipay, Postfinance and the VEZ¹⁸, with the goal to standardize the transaction process of the card issuers. This corresponded to the desire of the Swiss retailers for an EMV-compatible system, which allows the processing of as many payment cards as possible. Or in other words, for POS-terminals, which can process all kinds of payment cards. Over the time other issuers and acquirers for credit and debit cards joined the project, which was organized as a loose cooperation. The ep2-technology is today the relevant standard in Switzerland, although there is no obligation to work with this specification. However, for new developments and services which are not ep2-conform there is basically no market.

The development of a common standard for the processing of payment cards surely leads to some important efficiency gains in the industry and seems to be unique in Europe. Besides these efficiency gains there is however as well a considerable potential for market distortions since the property and usage rights of ep2 belong to the project members. In particular, for terminal producers and acquirers market entry may considerably be hampered for several reasons:

- First, selective access to the ep2-specifications can be used to deter market entry of new terminal producers.
- Second, even if the ep2-specifications were freely available, for many foreign terminal producers it is not worth to produce a special, ep2-conform terminal only for the relatively small Swiss market.
- Third, for all new products based on the ep2-standards, there is a certification procedure. Although this procedure is in the first place meant to ensure certain quality standards, it may at the same time restrict incentives for innovations and deter market entry. This because in the certification procedure every new terminal (hard- and software) is examined and tested by members of the ep2-project, implying that new technological developments have to be revealed to potential competitors. Further, there is the possibility that the certification procedure is strategically used to deter or delay the market introduction of new products.
- Fourth, foreign acquirers which do not have access to the ep2-specifications are basically depending on the routing service of a domestic company. Simply put, they must route their transactions over the server of a company which is able to translate the ep2-protocol in the “language” of the foreign acquirer. This service was so far mainly provided by Telekurs Card Solutions, a terminal producer and subsidiary of the Telekurs Group, thus a potential competitor.

To summarize, the establishment of common technical standards can lead to substantial efficiency gains. This, on the one hand, for the merchants, who can process all payment cards on a single terminal. On the other hand they facilitate the introduction of new technological developments, since applicability in the whole domestic electronic payment sector is guaranteed. The above mentioned potential market distortions are the back side of a dominant and proprietary technological standard and have lead to antitrust concerns in Switzerland. There are however relatively simple remedies for most of these concerns: Most important is the free access (e.g. against an adequate license fee) to the ep2-specifications for all interested domestic and foreign actors. Second, a standardized and objectified certification procedure is necessary. In Switzerland, the members of the ep2-project started, in cooperation with the Secretariat of the ComCo, to adopt these remedies.

¹⁸ VEZ (“Verein für Elektronische Zahlungsmittel”) is an association specialized on electronic payment means, representing the Swiss retailers.

5. Summary and Conclusions

The Swiss Competition Authority has been very active in the payment card market in the last years. The decision of the ComCo of 5 December 2005 on the interchange change fee and the NDR in “four-party” schemes was a first step towards possible solutions to enhance competition in the payment card sector.

In the credit card case, it surely is too early to assess the effects of the introduction of an objectified procedure. The step-by-step reduction of the DMIF started in April 2006. A new cost analysis will be conducted in 2010. In the same year, the ComCo will evaluate the effects of the decision and correct – if necessary – potential erroneous trends. Whether a similar procedure would be accepted by the ComCo in a debit card system remains to be seen. Since debit cards are linked to bank accounts, a proper definition of a cost-table would require a comprehensive cost analysis not only of the debit card network costs but as well of bank account related fees and revenues.

Concerning no-discrimination rules in payment card systems, the investigations conducted by the ComCo led to the conclusion that there are no economic efficiency reasons justifying such rules. The NDR should therefore be abolished in credit and debit card systems. The effect of the abolition of the NDR will crucially depend on the reaction of the consumers. It is to assume that consumers have to get used to price differentiation between different means of payment at the point of sale and to eventually pay higher prices when using their credit card for certain goods and services. Therefore, noticeable effects on the competition between the different means of payment are most likely not to be expected in the short term.

The electronic payment sector seems to be a relatively dynamic sector. The introduction of new products, such as payment functions on cell phones etc., are regularly announced. In order to grant an unrestricted development of the industry, it is important to identify possible market entry barriers, such as proprietary and technical standards, and to implement adequate remedies at an early stage.

The payment card sector remains a difficult sector for antitrust authorities. Due to the special structure of the markets, common antitrust instruments often do not lead to desirable results. In such a framework, the optimal choice between “laissez-faire”, antitrust remedies and market regulation needs careful consideration and remains a challenging task.

TURKEY

In recent years, payment card transactions have substantially increased in volume in Turkey similar to many countries, while check and cash usage have decreased. At the Turkish Competition Authority (TCA), department no: 4 is the responsible body for this sector. Turkey has had important competition law cases related to payment cards. TCA has come across with interesting cases related to payment card transactions and has paved a long way in establishing the level playing field for the players of this sector. Below are given two important cases from Turkish jurisdiction.

The first case (Benkar Decision) is experienced in the market called "credit cards availing payment in installments". These cards are specific to Turkey especially due to high inflation rates in the country. Not only consumers but also stores take advantage of such system.

The second case (BKM Decision) is related to the "interchange fees". In Turkey, the inter-connected infrastructure underlying card payments has been co-ordinated through "Interbank Card Centre (BKM)" which is a joint stock company carrying out clearing transactions between banks in the card payment system.

1. Sample Cases:

1.1 *Benkar Fiba Decision (Joint Venture) (dated 18.09.2001; no: 01-44/433-111) & Benkar Investigation (dated 15.8.2003; no: 03-57/671-304)*

In year 1998, Benkar Consumer Financing and Card Services (Benkar hereinafter) was the first undertaking in Turkey to launch a shopping cards' system named "Advantage Card" which allows consumers to shop and pay in installments in member stores. Benkar, being the dominant undertaking, was dealing with the exclusive agreements in the market of credit cards that enable consumers to shop and pay in installments where the Advantage Card is valid. This system was called "web". Benkar was accepting stores into its web by concluding exclusive agreements with the owners of these stores. Because of the high inflation rates in Turkey at that time, this system became widespread among the consumers.

This case was initiated via the request of the parties concerning the authorization of the joint venture to be established between Benkar of Boyner Holding A.Ş., and Fiba Bank A.Ş. of Fiba Holding A.Ş. (Fiba Bank hereinafter) in the field of consumer financing and banking services.

Under the Turkish Competition Act no: 4054, mergers and acquisitions are dealt within the framework of **Article 7** of this Act and the Communiqué No:1997/1¹ issued on the basis of this Article. Article 7 prohibits those mergers, acquisitions and joint ventures that create a dominant position or strengthen an existing dominance as a result of which effective competition is significantly impeded in the country or in a part of it.

The transaction was assessed to be falling under Communiqué No: 1997/1 having regard to the total turnovers and market shares of the parties. The relevant market was defined as "credit cards availing payment in installments". These cards can be used only at the member shops, and have a tighter area of use

¹ Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board, Amended by the Competition Board Communiqués No. 1998/2, 1998/6 and 2000/2.

when compared to normal credit cards. The geographical market was determined as the territory of Turkish Republic due to the usage of those cards only within Turkey.

During the evaluation process, initially the market share was assessed in order to determine whether a dominant position was created or strengthened in the relevant market, and thus whether competition was significantly restricted. Therefore, market shares and entry barriers were checked. The market share of Benkar was %72.9 and % 64.4% in years 2000 and 2001 respectively. Moreover, risks arising from network effects were examined with regards to market entry. The Board, which is the responsible body for the application of the aforementioned Act, decided that Benkar benefited from its incumbent firm position in the relevant market, thus attained a quite high market share. This position helps Benkar to put in place easily an obligation on the firms signing the "Advantage Card" contract not to become a member of any other card systems. This was concluded to be an entry barrier as it created hardship for new entrants to find shops or chain of shops to become their own member.

Consequently, the Board decided to authorize the joint venture process, to which Benkar was a party, on the condition that the "exclusivity to one party"² clause imposed by Benkar on members should be removed. This exclusivity clause was removed by withdrawing the prior negative clearance decision.

Furthermore, according to the exclusive agreement in force at that time, when a store becomes a part of Benkar web system, that store could no more be a part of another system that provides similar system and services. Benkar at that epoch had the widest store network, especially among textile shops. Thus, it was benefiting from the network externalities to a great extent. In addition to that, those member stores (most of which are either small or medium sized shops working on their behalf and on a local basis) or store chains (those are relatively bigger enterprises which are working nation wide) were prevented from having membership agreements with banks that offer a similar system on better terms. Therefore, not only the store and store chains, but also consumers were suffering. On one hand, store and store chains were suffering because they had to obey the requirements that were imposed by Benkar, which was not a bank but actually acting as a financial undertaking with respect to commissions and fees. On the other hand, consumers holding Benkar cards would not be able to access the better terms that could be provided by other credit cards issued by banks. This was, in return, were preventing those consumers who prefer to shop and pay in installments in an inflationist environment. Therefore, the TCA ruled that the exclusivity imposed by Benkar formed a serious barrier to entry into the relevant market and it would be especially hard for the undertakings (in this case the banks) that were willing to enter into this new type of credit card market system to find stores or store chains to be a part of their system. The Board pointed out the fact that this exclusivity was narrowing the alternative of not only those banks that were trying to set up similar systems in the market but also the small or medium sized shops. The Board informed all the banks actively taking part in the relevant market that such an exclusivity clause is forbidden and every bank could negotiate directly in the market to have memberships.

This decision is noteworthy from another perspective as well. Although it was not directly aiming to protect SMEs, as seen from the consequences of the Board decision, it not only enabled the consumers to reach better terms with respect to opportunities from the usage of alternative cards, but also indirectly protected the competitiveness of small or medium sized shops by giving them the chance to choose among various alternatives.

However, Benkar continued its infringement of the Law on the Protection of Competition no 4054 via application of its exclusivity clauses. Thus, the Competition Board initiated an investigation. During the investigation process, Benkar was sold to HSBC Bank. At the end of the investigation, all such practices

² I.e., Benkar was free to conclude agreements to increase the number of members of its web, whereas member stores could not join another payment system.

were eliminated in the relevant market. At the same time, with the entry of more and more banks into this market, a level playing field was sustained for the players of this market.

1.2. *Interbank Card Centre (BKM) Decision (dated 01.07.2005; no: 05-43/602-153)*

Upon the complaint of Turkish Union of Employers of Gasoline Dealers and Gas Companies (TABGİS), the TCA initiated an investigation against Interbank Card Centre (BKM) in order to determine whether there is an infringement of competition through fixing clearing commission rate by the banks under the body of BKM.

Article 4 of the Turkish Competition Act no. 4054 aims at preventing the distortion or restriction of competition directly or indirectly in a particular market for goods or services by agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings; whereas, **Article 5** empowers the TCA to issue both individual and block exemptions on the basis of the certain criteria. According to this article those agreements, concerted practices, and the decisions of associations of undertakings that prevent or distort competition according to article 4 can be exempted on an individual basis or through block exemptions on the condition that specific criteria are satisfied. Thus, the TCA can grant *individual* or *block exemptions*, when the relevant conditions foreseen in the Law are fulfilled³.

In the investigation process, BKM requested for exemption for its practice of fixing a common clearing commission and as a result, assessment for exemption is included in the investigation proceedings. In the Decision, the relevant market for fixing clearing commission rate is determined as “market for payment services by credit cards”.

BKM is a joint stock company carrying out clearing transactions between banks in the card payment system. In card transactions, BKM’s Board of Directors determines the clearing commission rate paid by the acquiring bank to the issuing bank. Issuing banks are those which publish credit cards and distribute them to customers; acquiring banks are those which provide point of sale (POS) terminals for member stores by means of making agreements with these stores against a certain amount of commission (member store commission). Clearing commission obtained by issuing banks from acquiring banks are reflected on acquiring banks as cost and acquiring banks reflect this cost to member stores as member store commission. Clearing commission rate is equally applied among all of the banks. Essentially, clearing commission is a service cost reflected first by the issuing bank to the acquiring bank and then by the acquiring bank to the member store within member store commission; therefore it has a nature of price.

In card payment systems, clearing commission determined by banks together with financial institutions is a practice that takes attention of competition authorities and that has been the subject of a number of cases throughout the world. In this framework, in the mentioned decision of the Competition Board, international approaches are taken into consideration by assessing NaBanco Decision in USA, Visa International-clearing commission Decision of EU, Mastercard Decision by OFT in England and regulations by the Central Bank of Australia.

³

Those conditions are:

“...a) Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,
b) Benefiting the consumer from the above-mentioned,
c) Not eliminating competition in a significant part of the relevant market,
d) Not limiting competition more than what is compulsory for achieving the goals set out in (a) and (b).”

In the defenses of BKM, it is generally argued that fixing clearing commission rates by BKM is not contrary to the Act No. 4054 and exemption via Article 5 of the aforementioned Act should be given to the application of fixing common clearing commission rate. Moreover, it is argued that each of the items contained in the fixed clearing commission rate is an element of cost in terms of issuing banks. In this frame, it is stated that BKM needs a centralized clearing commission rate; in addition, payment guarantee provided by issuing bank includes risks such as fraud in the card market and as a result constitutes a high-cost item; besides, funding costs resulting from the period between shopping date and payment date are a burden for issuing banks.

During the investigation process, it is established that clearing commission fixes a part of the costs and the income of issuing and acquiring banks; determining a common clearing commission rate among banks affect competition at issuing and acquiring levels; issuing banks cannot follow an individual pricing policy for the services they provide for acquiring banks and that clearing commission which is the base price for member store commission is an important element of cost in respect of member stores. In this frame, it is concluded that BKM's fixing clearing commission rates in the framework of the authority within the Company's Main Agreement has a nature of a decision of an association of undertakings, which includes price fixing according to Article 4 of the Act No. 4054 and that this practice is contrary to the law.

In the assessment of exemption included in the Decision, it is stated that fixing common clearing commission rates in credit card payment systems, as seen in other countries, can be granted exemption generally in respect of competition law practices. In addition, it is evaluated that fixing a clearing commission rate through mutual agreements between banks included in the system requires a lot of agreements and is not practical and it is stated that fixing a clearing commission rate commonly can be granted exemption provided that a cost-based approach is adopted. Moreover in the investigation stage, BKM is required to have a consultancy firm make a clearing commission formulation study in order to fix clearing commission rate by a more objective method. For exemption assessment, the Competition Board predicates on this study, which is established to be more objective in comparison with previous clearing commission rate fixing methods. In this frame, it is stated in the Decision that certain cost items in the formula should be adjusted in order to grant exemption to the clearing commission formula proposed by the consultancy firm.

In this framework, as a result of the investigation made about Interbank Card Center Inc. the decision dated 01.07.2005 and No. 05-43/652-153 is taken by the Competition Board. It is decided that;

3. Fixing a common clearing commission by BKM's Board of Directors means a decision of an association of undertakings within the scope of the Act No. 4054 on the Protection of Competition and it is contrary to Article 4 thereof,
4. Therefore, according to Article 16(2) of the Act (According to Communiqué No. 2005 /2 amended by the Communiqué No. 2005/3), BKM is imposed at discretion an administrative fine of 5.800 YTL which is the minimum fine amount,
5. As a result of peculiar conditions of card payment systems market, the application of fixing clearing commission rate commonly can be granted exemption within the scope of Article 5 if certain conditions are fulfilled; however in its present form, these requirements are not fulfilled,
6. In order to grant exemption to common clearing commission application within the scope of Article 5 of the Act, in case overnight interest rate determined by the Turkish Central Bank is taken as a basis in the formula applied by BKM for the calculation of funding cost and sunk cost is not taken into consideration in operational costs item, individual exemption might be granted,

7. These amendments should be made within 90 days and documented to the TCA, in case the practice continues without making the adjustments required by the TCA, an investigation will be initiated and the concerned party will be informed that proceedings will be carried out according to Article 16 and 17 of the Act No. 4054,
8. The period of exemption will be set as 2 years after fulfilment of necessary requirements is documented,
9. According to Article 19 of the Act No. 4054, it is irrelevant to impose, because of periods of limitation, the administrative fine which should be imposed on BKM according to Article 16(1)(c) of the Act No. 4054 since BKM has not notified, within due time, its decisions related to fixing a common clearing commission rate which have a nature of a decision of an association of undertakings,
10. In respect of proper functioning of credit card payment system, Competition Board opinion about the need to give Banking Regulation and Supervision Agency the power of regulating and monitoring related to the functioning of credit card system in the prepared draft of “Act on Debit Cards and Credit Cards” will be sent to Banking Regulation and Supervision Agency according to the Articles 27(g) and 30(f) of the Act,
11. Competition Board opinion about abolishing the provision “where goods and services are bought with credit card, the seller or the provider cannot require an additional payment under commission or a similar name” included in Article 10/A (amended by the Act No. 4822) of the Consumer Protection Act No. 4077 will be sent to the Ministry of Industry and Commerce according to Articles 27(g) and 30(f) of the Act.

UNITED KINGDOM

1. Background information: market structure

1.1 *Payment card usage*

Customers in the United Kingdom ('UK') use three main methods for making spontaneous payments: cash, cheques and payment cards. The four main types of payment cards are: credit cards, charge cards, store cards and debit cards.

Payment cards are widely held and used in the UK,¹ where there are more credit cards in issue than debit cards, and credit cards are used extensively for purchase transactions.² This presents a striking contrast to almost all other European countries where credit card usage is comparatively uncommon and purchases made using payment cards are carried out predominantly using immediate debit cards, charge cards or deferred debit cards, which are far more widespread on the Continent than in the UK. In recent years, the UK has accounted for more than 75 per cent of credit card spending in Western Europe.³

1.2 *Payment card schemes*

MasterCard and Visa are the principal credit and charge card schemes in the UK and have many members in common, including all the main banks.⁴ American Express ('Amex') and Diners Club International ('Diners') have a significant share of the relatively small number of UK charge card transactions.⁵ Amex also issues a small number of credit cards and is seeking to expand its share of the credit card market in the UK. Visa (Visa debit and Electron cards), MasterCard (Maestro cards) and S2 Card Services (Switch/Maestro and Solo cards) operate debit card schemes in the UK. Since 2002, members of the Switch scheme have been in the process of migrating to MasterCard's Maestro brand in place of the Switch brand and of moving to a new transaction processing system operated by MasterCard. In effect, Switch has become the UK domestic Maestro debit card scheme run by S2 Card Services.

1.3 *The issuing market for debit and credit cards⁶*

Debit cards are linked to current accounts and the principal debit card issuers in the UK are the main banks: Lloyds TSB, Barclays, the Royal Bank of Scotland (including NatWest), HSBC and HBOS. These banks account for more than three-quarters of the debit card issuing market. Despite the relatively high levels of concentration, competition has led debit card issuers to offer incentives such as money back current accounts and customised debit cards in order to increase the appeal of their current accounts.

¹ They are used for spontaneous payments by UK consumers as much as cash and cheques in terms of value.

² *Credit and Debit Cards*, Mintel Finance Intelligence, July 2005, pages 18-20 (based on the *APACS Plastic Card Review 2005*).

³ See *Western European Cards and Payments Databook 2004*, Datamonitor, October 2004.

⁴ Visa and MasterCard account for about two-thirds and one-third respectively of UK credit card business, whether measured by number of credit cards in issue or the volume and value of credit card transactions.

⁵ *UK Plastic Cards 2005*, Datamonitor, June 2005, page 141 and Figure 37. A large proportion of charge cards are commercial cards.

⁶ *Credit and Debit Cards*, Mintel Finance Intelligence, July 2005, pages 27-38.

Further differentiation of current accounts through debit card offerings might be expected if more current account providers follow suit.

The five main UK banks also have a significant share (roughly sixty-five per cent) of the UK credit card issuing market. Access rules – for example, that a prospective member must be an appropriately regulated financial institution and a member's application must be approved by the board of members of the scheme – may act as a barrier to entry. However, in addition to banks, there has been a growing and diverse range of credit card issuers in the UK in recent years, including building societies (e.g. Nationwide), specialist card issuers (e.g. MBNA and Capital One), retailers (e.g. Tesco Personal Finance and Sainsbury's Bank) and online financial providers (e.g. Egg). In particular, two US specialist credit card issuers, MBNA (with a 10.7 per cent market share) and Capital One (with a 7.7 per cent market share), have established themselves as significant players in the UK credit card issuing market.

Another US bank, Morgan Stanley, entered the UK credit card market in 1999 and has issued MasterCard cards. However, Morgan Stanley has been prevented from joining the Visa scheme in the UK under a Visa rule which prohibits competitor schemes from becoming members of Visa – Morgan Stanley operates the Discover scheme in the US. Morgan Stanley has complained to the European Commission ('EC') about its exclusion from the Visa scheme, and the EC issued a statement of objections ('SO') against Visa in the summer of 2004.⁷ In particular, Morgan Stanley is concerned that its exclusion from the Visa scheme in the UK has prevented it from entering the merchant acquiring market since an acquirer needs to be able to acquire purchase transactions made with both MasterCard and Visa cards.

Intuitively, one might expect the credit card issuing market to be imperfectly competitive, and less competitive than the acquiring market, given that issuing services are characterised by extensive product differentiation and the buyers (cardholders) are individuals, many of whom have proportionately high search and switching costs (compared with those of many retailers). However, once there is no annual fee for credit cards, as is usual in the UK,⁸ non-price competition may be more common. A mixture of price and non-price competition has occurred. For example, more than half of all cards offer an introductory zero per cent transfer rate and some now allow cardholders to transfer other card balances onto these cards for an interest-free period. Also loyalty and reward schemes, which have been introduced by a number of issuers, encourage consumers to hold particular cards and to use those cards more frequently.

1.4 The merchant acquiring market for payment cards

The merchant acquiring market for Visa and MasterCard debit and credit card transactions in the UK is highly concentrated. In 1997 and 1998, the three largest acquirers, NatWest Streamline, Barclays and HSBC, accounted for over eighty-five per cent by volume of credit and debit card transactions acquired in the UK. There were a number of smaller acquirers but none had a market share of more than five per cent.⁹ The merchant acquiring market in the UK has remained relatively concentrated, although it is less concentrated than in a number of other EU countries.¹⁰

⁷ EC press release of 3 August 2004, IP/04/1016. The EC has not yet made a decision in this case.

⁸ See *Moneyfacts*, May 2006, pages 57-60.

⁹ Don Cruickshank, *Competition in UK Banking – A Report of the Chancellor of the Exchequer* (March 2000) (the '*Cruickshank Report*'), D2.3 and Chart D2.1.

¹⁰ According to the EC, *Interim Report I Payment Cards* (April 2006), page 84, in 2004, Belgium, Denmark, Malta and the Netherlands all had a single acquirer. Following an investigation by the Dutch competition authority in 2004, there is no longer a single acquirer for domestic cards in the Netherlands.

As with issuing, access rules may act as a barrier to entry to the merchant acquiring market.¹¹ In particular, MasterCard's and Visa's 'no acquiring without issuing' rule prevented specialist acquirers from entering the market, but both MasterCard and Visa have rescinded this rule. EuroConex, a specialist acquirer, has bought and operates the acquiring businesses of the Bank of Ireland, Alliance & Leicester and Citibank Card Acceptance Service, and has a notable share of the merchant acquiring market in the UK.¹²

According to the Cruickshank Report, the average level of Merchant Service Charges (MSCs) for both Visa and MasterCard decreased between 1993 and 1998¹³, and this downward trend has continued. The fall in the level of MSCs may indicate an element of competition in the merchant acquiring market, although price competition is limited to that part of the MSC not constituted by the interchange fee.¹⁴

2. Fee regulation for payment cards

Fees related to payment cards charged by banks in the UK have not been regulated but they are, and always have been, subject to competition and general consumer law. Each bank has set its own fees unilaterally or in accordance with MasterCard and/or Visa scheme rules: this includes interchange fees and default charges. Interchange fees have been subjected to scrutiny under competition law as noted elsewhere in this paper. Work under other legislation has looked at issues such as the level of default charges for credit cards.¹⁵

2.1 The Payment Systems Task Force

The March 2000 report by Don Cruickshank to the Chancellor of the Exchequer, Competition in UK Banking (the Cruickshank report) came as part of a Government review of the UK banking sector. The report found barriers to entry and anti-competitive practices in the provision of payment services, which raise prices to consumers, add to business costs, and stifle innovation. Because of their very nature, payment systems involve a degree of co-operation between organisations that would otherwise compete against each other. The Cruickshank report concluded that this led to a dampening of competition which was exacerbated by the way in which payment schemes were governed and run.

The Cruickshank report noted that payment schemes in the United Kingdom were governed by the banks that owned them (mutual governance). As many of the same banks appeared on the governing boards of the various payment schemes, Cruickshank concluded that there was a reduced incentive for those schemes to compete with each other, either by entering each other's markets, or by introducing new products. Mutual governance also made competition within a scheme more difficult: because decisions were taken by consensus, it was impossible for one subset of banks to introduce an innovative product

¹¹ See above for the way in which Visa's 'no competitor' rule has effectively excluded Morgan Stanley from the UK acquiring market.

¹² The banks, whose acquiring business EuroConex has bought, act as the sponsor of EuroConex in respect of the MasterCard and Visa scheme rules. But EuroConex manages the acquiring relationship providing operational support, relationship management and merchant recruitment, as well as back office processing.

¹³ See the *Cruickshank Report*, Chart D2.5. The prices charged to retailers varied considerably, suggesting that the largest group of retailers, i.e. small retailers processing few transactions, were paying significantly higher MSCs – paragraph D2.30.

¹⁴ The fall in the level of MSCs may also reflect a fall in the level of interchange fees and advances in the technology for processing transactions.

¹⁵ OFT Press release on credit card default charges
(05/04/2006): <http://www.of.gov.uk/News/Press+releases/2006/68-06.htm>

unless all banks supported the introduction. This led to the Cruickshank report's conclusion that 'many schemes moved at the pace of the slowest member'.

The work of the Task Force is based mainly, but not exclusively, on the issues raised by the Cruickshank report. These issues include governance, access, wholesale pricing, innovation, and price transparency of payment systems. The Task Force is looking at how much change there has been in relation to the concerns raised in the Cruickshank report, and whether there should be more. It also aims to secure agreement on putting in place the conditions necessary for an innovative, user-facing industry. As a result of the extensive research and consultation undertaken by the Task Force and its Working Groups, the arrangements stemming from this process will be sustainable in terms of both the products and processes and in new governance provisions put in place.

The Task Force is chaired by the OFT, and brings together payment systems industry, retail, consumer and business representatives to ensure decisions that are reached benefit all sectors of the UK economy. The Bank of England and HM Treasury sit on the Task Force, as observers.

Agreement has been reached on implementing faster clearing of electronic payments for internet and telephone banking, as well as an improved service for standing orders. The industry has agreed that this new service will be in place by the end of 2007 and has proposed that customers will be able to transfer funds in a matter of hours and, potentially, in near real time. The Task Force has published two Working Group reports (BACS Access and Governance and LINK Access and Governance), and set up a new Working Group to look at Cheques. Work on implementing the recommendations in these reports continues.

The Task Force will continue to look at access and governance issues relating to payment schemes and to debit and credit cards. It will not, however, consider interchange fee issues.

The OFT has carried out its work on interchange fees for payment cards under competition law - the Chapter I prohibition of the Competition Act 1998 ('CA98') and Article 81 of the EC Treaty. This has focused on multilateral interchange fees ('MIFs') for purchase transactions made using MasterCard and Visa credit and charge cards.¹⁶ The OFT has also issued a decision on interchange fees for ATM cash withdrawals in the LINK network.¹⁷

3. Interchange fees for MasterCard and Visa credit and charge card transactions

3.1 OFT investigations

On 6 September 2005, the OFT issued an infringement decision (under Article 81 of the EC Treaty and the Chapter I prohibition of the CA98) against the rule of MasterCard UK Members Forum Limited ('MMF') which set the MIF paid on purchases in the UK made using UK-issued MasterCard consumer credit and charge cards between 1 March 2000 and 18 November 2004,¹⁸ when the MMF rule was rescinded and new arrangements for setting UK domestic MIFs were put in place by MasterCard. Appeals against the OFT's Decision were lodged with the Competition Appeal Tribunal ('CAT') by MMF, MasterCard International/MasterCard Europe and the Royal Bank of Scotland Group. Visa and the British

¹⁶ See Part C of this paper. The OFT has not investigated interchange fees for purchases made using MasterCard and Visa immediate debit cards, or the fees charged by Visa and MasterCard for cash withdrawals made using a credit card. Also, the OFT has not investigated merchant fees for transactions made using Amex and Diners credit and charge cards.

¹⁷ See Part D of this paper.

¹⁸ <http://www.of.gov.uk/Business/Competition+Act/Decisions/Mastercard.htm>

Retail Consortium have been given the right to intervene in the appeal proceedings. The OFT's Defence was filed on 28 February 2006.¹⁹

On 19 October 2005, the OFT issued an SO against Visa and its members (under Article 81 of the EC Treaty and the Chapter I prohibition of the Competition Act), regarding an agreement on Visa's domestic MIF applicable to consumer credit card, charge card and deferred debit card transactions in the UK.²⁰ This follows the same principles as those set out in the MasterCard Decision. The OFT has extended the time by which Visa can respond to the SO until after the completion of the appeal proceedings against the MasterCard Decision.

On 2 February 2006, the OFT announced that it has launched an investigation into MasterCard's new arrangements for setting the MIFs that apply to UK domestic transactions made using UK-issued MasterCard consumer and commercial credit and charge cards, introduced by MasterCard on 18 November 2004.²¹ The development of the investigation will be related to the outcome of the appeals proceedings against the MasterCard Decision.

3.2 *The OFT's approach to credit card and charge card interchange fees in four-party payment card systems*

3.2.1 *Market definition*

Demand for credit card transactions is two-sided, from merchants on one side and from cardholders on the other side. The OFT does not accept the argument that the starting point for the definition of the relevant market in a four-party credit card scheme should be the scheme as a whole rather than any discrete part of it. In the OFT's view, a four-party credit card scheme can be seen as providing a platform on which distinct services can be provided to different sets of customers - acquiring services to merchants and issuing services to cardholders - but not a single product. Accordingly, in the MasterCard decision, the OFT has identified separate relevant product markets: an acquiring market for the provision of acquiring services to merchants; and an issuing market for the provision of issuing services to cardholders.²²

3.2.2 *Restriction of competition*

The OFT considers that there are two principal ways in which an agreement on interchange fees in a four-party credit card system is likely to restrict competition and fall within Article 81(1) of the EC Treaty and/or the Chapter I prohibition of the CA98.

First, where there is a collective agreement between banks, or a scheme rule applicable to member banks, setting the level of a MIF, this is likely to restrict competition in that it alters the relationship between issuers and acquirers by leading to a collective agreement to make a financial transfer when no

¹⁹ The Defence confirms the main findings of the Decision, i.e. that the MMF MIF agreement is an appreciable restriction of competition (because of the collective price restriction and the extraneous costs restriction) and does not qualify for an individual exemption. However, the Defence reaches these conclusions by a different route and hence differs from the Decision in certain respects, for example, in relation to: the counterfactual for the collective price restriction; the exemption conditions; and the appropriate level for a credit/charge card MIF.

²⁰ <http://www.offt.gov.uk/News/Press+releases/2005/195-05.htm>

²¹ <http://www.offt.gov.uk/News/Press+releases/2006/20-06.htm>

MasterCard's new arrangements for setting UK domestic MIFs are business secrets.

²² The OFT also identified a wholesale market for the provision of card transaction services between issuers and acquirers.

transfer is objectively necessary and when otherwise costs would lie where they fall between acquirers and issuers. In turn this will increase the price paid by merchants for acquiring services because the MIF, as a standard cost for acquirers, acts as a de facto floor on the level of MSCs charged by acquirers to merchants.²³

Secondly, a MIF agreement is likely to infringe competition law where it leads to the recovery of more costs than are necessary to be recovered to support the payment transmission function of a four-party system credit card. Any additional costs over and above this level are referred to as 'extraneous costs' in the MasterCard decision.

Recovering extraneous costs through the MIF results in acquirers paying a higher MIF to issuers and in merchants paying higher MSCs to acquirers. Merchants can recover the cost of the higher MSCs by imposing a surcharge, since surcharging for credit card transactions has been permitted in the UK since March 1991.²⁴ In practice, however, surcharging is only common in certain sectors such as taxis, ticket agencies and travel agents. This is likely to reflect the fact that there are transaction and information costs incurred in surcharging; and that many merchants fear the potential loss of customers were they to impose a surcharge. Instead, merchants are most likely to recover the cost of the higher MSCs by increasing the retail prices charged to all consumers, including those consumers who do not use credit cards. Therefore, the effect of a higher MIF, caused by the recovery of extraneous costs, is ultimately like the imposition a 'tax' on merchants in the form of higher MSCs and on all consumers, including those who do not use credit cards, in the form of higher retail prices. In particular, consumers on lower incomes or with a poor credit history who do not have access to credit cards still have to bear some of the costs of the MIF through higher retail prices charged by merchants that accept credit cards.

The inclusion of extraneous costs in the MIF provides a large flow of revenue to card issuers and the incentive to induce customers to hold and use credit cards, for example, through advertising, reward schemes and funding the provision of an interest-free period. This has the effect of distorting competition between credit cards and alternative methods of payment which are less expensive for merchants to accept, such as debit cards or cash, to the detriment of economic efficiency.²⁵ Credit card cardholders are encouraged to use a method of payment that is beneficial for them but which imposes increased costs on merchants and the generality of consumers.

The recovery of extraneous costs through the MIF also leads to a distortion of competition between issuers within a four-party credit card system. If the interchange fees received by the issuing banks were reduced, it is likely that this would stimulate individual issuers to pursue different, and more diverse, methods of recovering extraneous costs, as opposed to the uniform approach arising from the MIF, thereby intensifying competition in the issuing market.

²³ The OFT estimates that between 2001 and 2003, the MasterCard MIF, on average, accounted for 80 per cent of the level of the MSC for purchases made using MasterCard credit cards.

²⁴ When the Credit Cards (Price Discrimination) Order 1990 (SI 1990 2159) took effect. The Order made illegal rules in the MasterCard and Visa schemes, known as the 'no-surcharge', or 'no-discrimination' rules, which prohibited merchants from surcharging for card payments, or from allowing a discount for cash payments.

²⁵ Surveys conducted by the British Retail Consortium have shown that for large retailers the cost of accepting payment by cash or debit card is similar, and much less than the cost of accepting payment by credit or charge card.

3.2.3 *Exemption conditions*

For a MIF to satisfy the exemption conditions under Article 81(3) of the EC Treaty and section 9 of the CA98, it would be necessary to demonstrate that it is set at a level which benefits consumers, for example that merchants (who are consumers of credit card services) would be worse off as a result of reduced credit card usage if the MIF were set at a lower level.

The OFT does not consider that merchants collectively benefit from the use of credit cards at the expense of lower cost methods of payment such as debit cards. Moreover, it is sceptical that if MIF levels were to be reduced substantially (or even set at zero), four-party credit card schemes would contract significantly or that there would be a significant migration to (more expensive) three-party systems. Rather, the OFT considers it likely that, as in Australia where MIF levels were reduced significantly in 2003,²⁶ four-party credit card schemes would continue to operate at more or less the same level as before the MIF reduction, and that issuers would make up for lost MIF revenue by, for example, reducing reward schemes, or introducing measures whereby cardholders who benefited from such schemes paid for them; and charging (or increasing) annual fees to cardholders.

4. **The Link decision²⁷**

LINK operates a branded national network of ATMs. It is owned by its shareholder members who, in the main, comprise the major financial institutions (i.e. banks and building societies) operating in the UK. LINK provides the central switch facility through which the information flow passes for transactions where the card issuer and the ATM owner are different. These are referred to as ‘shared transactions’.²⁸

In its decision, dated 16 October 2001, the OFT concluded that the LINK rule setting a MIF for shared transactions, payable by the card issuer to the ATM owner, restricted competition and fell within the Chapter I prohibition of the CA98.²⁹ The MIF had three potentially adverse effects on competition: the restriction of LINK members’ ability to set their own prices;³⁰ the distortion of members’ behaviour towards their customers; and the restriction of competition amongst payment systems, for example by acting as a common price floor for other banking services.

However, the OFT found that the LINK MIF agreement brought benefits which would not otherwise be achieved and which outweighed its anti-competitive effects, and therefore granted it an individual exemption under section 9 of the CA98. The following were identified as being among the benefits of the LINK agreement: ATMs are made accessible to the vast majority of UK cardholders, regardless of which bank or building society they are with; and by spreading the cost for providing services among all the members, the number of ATMs can be increased and smaller card issuers are not disadvantaged. Also, the

²⁶ For details on Australia, see the website of the Reserve Bank of Australia at: <http://www.rba.gov.au>

²⁷ <http://www.ofc.gov.uk/Business/Competition+Act/Decisions/LINK+Interchange+Network+Limited.htm>

²⁸ For a large number of ATM transactions, the card issuer is the same as the ATM owner and the information flow takes place within one bank or building society ATM network. These are referred to as ‘us-on-us’ transactions, for which no MIF is charged under the LINK rules.

²⁹ The MIF is only paid for debit card transactions. Where credit or charge cards are used for ATM cash withdrawals a separate fee (usually referred to as a service charge) is paid by the card issuer to the ATM owner and typically is recovered from the cardholder.

³⁰ ATM owners and card issuers can negotiate a bilateral interchange fee different from the MIF but in practice only a small minority do. An ATM owner can also charge customers directly for the use of its ATM but if it does so it cannot receive any interchange fee.

OFT considered that at the time of the decision the methodology used to derive the MIF was unlikely to result in the MIF being set at a level higher than was necessary for cost recovery.

The exemption was given for five years until October 2006, when it will lapse.

5. Store cards

The OFT referred the supply of store card services to the Competition Commission following a study into the sector. The study concluded that there were features of the sector, both in the supply of store card credit to consumers and in the supply of store card services to retailers that appeared to prevent, restrict or distort competition, including a lack of transparency for consumers in the way store cards were offered and used. Most store cards had an APR of around 10 percentage points above those available with credit cards, and it was not clear whether the rates were disciplined by competitive pressure. The gap between rates on store card borrowing and credit card borrowing may be more than could be explained by additional costs or the value of other benefits to store card holders. Consumers appeared to find it difficult to assess the costs and benefits of using store cards.

The OFT also had concerns with the supply of store card services to retailers, specifically the ability of new store card providers to enter the market or of existing providers to expand market share, possibly caused by significant costs for retailers wishing to switch to another provider, the duration of existing contracts some of which are over 10 years, plus widespread use of exclusivity terms.

In its report published in March 2006, the Competition Commission confirmed its provisional conclusions reached in September 2005 that there was an adverse effect on competition in connection with the supply of consumer credit through store cards and associated insurance in the UK:

- Annual Percentage Rates (APRs) were, on average, 10 to 20 per cent too high, and
- the level of consumer detriment was at least £55 million a year, and may be significantly more.

As for remedies, the Commission proposed that store card credit providers must:

- warn cardholders on monthly statements that cheaper credit may be available elsewhere where APRs are 25 per cent or above and that cheaper credit may be available elsewhere,
- give more and better information on all monthly statements,
- offer cardholders the option to pay by direct debit, and
- offer payment protection insurance separately from other elements of store card insurance.

The OFT is currently considering the implementation of the Competition Commission's proposed remedies.

UNITED STATES

Payment cards are ubiquitous in the United States. Last year, U.S. card issuers mailed an estimated 3 billion credit card solicitations.¹ As the number of cards and transaction volume have grown, so have interchange fees in most payment categories.² And so have the legal challenges to the card associations' conduct. In the United States, there are numerous antitrust challenges to the Visa and MasterCard bank card associations, with merchants now challenging the associations' interchange fees and various association rules. A similar challenge to Visa's interchange fees failed in the early 1980s. But the merchants in the pending litigation argue that changes in the industry and the legal landscape have eroded the persuasiveness of that ruling. Meanwhile, debit cards have experienced explosive growth in the U.S. And Visa has garnered a significant share of debit payment card volume as a result of issuing agreements it entered with many of the largest banks in which those banks dedicate significant debit volume to Visa. The one constant in this industry is change.

1. The Payment Card Industry in the U.S.

There are four different types of general purpose payment cards in the United States: (1) credit cards; (2) charge cards;³ (3) Signature debit cards (also called off-line debit cards); and (4) PIN debit cards (also called on-line debit cards). While U.S. consumers can pay for goods and services using cash or checks, they are increasingly using payment cards for these purposes. By 2001, 76% of U.S. households held at least one general purpose credit card, and usage of such cards accounted for almost 20% of U.S. personal consumption expenditures.⁴ Today, almost 700 million general purpose credit cards are now in circulation in the U.S.⁵

An even more recent phenomenon is the explosive growth of debit cards in the United States. The Federal Reserve recently reported that consumer use of debit cards surpassed general purpose credit card use for the first time in 2003, and it estimated that the number of debit transactions would grow by 20%

¹ Laura Leist, *Paper: Attack the Stack, Emerge Victor*, SEATTLE POST-INTELLIGENCER, Apr. 15, 2006, at 4.

² Interchange fees are set by the associations' board of directors, which are comprised primarily of the banks that issue cards to card holders ("issuing banks"). These fees are paid, indirectly, to the issuing banks by merchants who accept the cards as a means of payment. The fees vary by, *inter alia*, merchant category and type of payment card.

³ General purpose charge cards, such as the American Express "green card," are accepted by a variety of merchants and require the card holder to pay the full statement amount upon receipt of the statement, thus extending credit to a card holder for only about a month. General purpose credit cards, such as a Visa or MasterCard bank card, allow the card holder to pay only a small portion of the total amount charged on the card during the statement period, and thus allow a card holder to access extended credit for a prolonged period of time. Together, credit and charge cards are sometimes referred to as "general purpose cards." Because general purpose cards are accepted by a variety of unrelated merchants, they are fundamentally different from proprietary merchant cards that are only accepted at a single merchant's store locations.

⁴ Tom Brown & Lacey Plache, *Paying With Plastic: Maybe Not So Crazy*, 73 U. CHI. L. REV. 63 (2006).

⁵ Robin Sidel, "Credit-card issuers' problem: people are paying bills" THE WALL STREET JOURNAL, May 25, 2006.

from 2003 to 2004.⁶ There are two types of debit cards in the United States: PIN and Signature. Most U.S. checking account holders are issued a debit card that can access their account, both for cash withdrawals at ATM machines and for consumer payments at the point of sale. At the point of sale, the debit card can typically access the cardholder's account through one or more PIN debit networks and through the Visa and/or MasterCard networks. The networks over which a debit transaction can be routed are designated by trademarks (called "bugs" or "flags") that appear on the card. Signature debit card transactions are authenticated by the consumer signing the transaction receipt, allowing the cashier to compare the signature on the receipt to the signature on the debit card. Signature debit transactions are routed over the Visa or MasterCard credit card payment networks, and thus almost all merchants that accept their credit cards also accept their Signature debit products.⁷ Accordingly, U.S. consumers can use a Signature debit card virtually "everywhere [they] want to be." In contrast, PIN debit transactions are authenticated through the consumer typing a Personal Identification Number into a merchant terminal. In order to accept a PIN debit card, a merchant must install a PIN pad terminal that allows customers to enter their PIN number. Although PIN acceptance has grown, it has not achieved anywhere near the same level of acceptance as Visa's and MasterCard's Signature debit products.

There are a number of parties and fees involved in each payment card transaction. To analyze the relative costs/benefits of various means of payment, we can focus on three parties: the cardholder, the issuing bank, and the merchant.⁸ Most payment card networks charge both the merchant acquirer and the issuing bank a "switch" fee for the network switching services provided by the network and set an "interchange" fee.⁹ For a PIN debit transaction, the interchange fee is typically at least four to five times as large as the switch fee, and the Signature interchange fee can be significantly larger than the PIN interchange fee.¹⁰ The disparity is even larger between PIN debit and general purpose card interchange fees.

From the cardholder's perspective, there is virtually no difference in cost between the three main payment card options. An exception to this general rule, however, is that some banks charge their customers a fee for each PIN debit point of sale transaction. Cardholders may also derive significant

⁶ BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON THE DISCLOSURE OF POINT-OF-SALE DEBIT FEES (2004) [hereinafter FED REPORT], *available at* <http://www.federalreserve.gov/boarddocs/rptcongress/posdebit2004.pdf>. *See also* Michael Jalili, *Debit Use May Top Cash and Checks This Year*, AMERICAN BANKER, May 25, 2006, at 5 (MasterCard executive indicating debit volume may exceed cash and check volume in 2006).

⁷ Since the settlement of the *Wal-Mart* class action litigation, merchants that accept Visa and MasterCard credit cards are no longer required to accept their Signature debit cards, but nearly all have chosen to accept both.

⁸ Merchant acquiring banks are also involved in transactions conducted over the bank card associations' payment card networks. Merchant acquiring banks are members of the associations; they sign up merchants to accept bank cards as payment.

⁹ Merchants pay their merchant acquiring bank a "merchant discount fee" which is comprised, *inter alia*, of an interchange fee, a switch fee, and a fee paid to the merchant acquiring bank. For debit transactions, the associations assert the interchange fee is payment for access to the cardholder's demand deposit account. For credit card transactions, the associations have asserted that the interchange fee reimburses issuers their costs, including significant costs related to fraud. Some of the economic literature indicates the credit card interchange fee is necessary to strike a balance in the two-sided market between issuing and acquiring to provide an incentive for issuers to issue the cards.

¹⁰ Plaintiffs' Pretrial Brief at 4, *United States et al. v. First Data Corp. and Concord EFS, Inc.*, 2003 WL 23194271 (D.D.C. Dec. 10, 2003) (No. 1:03CV02169), *available at* <http://www.usdoj.gov/atr/cases/f201800/201804.htm>.

benefits, such as airline miles or other rewards points, if they choose to conduct a transaction using their credit card or, in some instances, their Signature debit card.

From the issuing bank's perspective, as a general matter, the amount of revenue generated by a cardholder's choice of payment card for a transaction, from most to least, is: credit, Signature debit, and PIN debit. Credit card transactions generate the most revenue for issuers for two reasons. First, the interchange fee is higher for credit than it is for debit. Second, the cardholder frequently chooses to pay less than the full amount due, leading the cardholder to pay the issuer interest payments at relatively high rates. Signature debit transactions generally generate the next highest level of revenue for issuers because they typically have higher interchange fees than PIN debit transactions.¹¹

From the merchants' perspective, as one might expect, the relative costs to merchants run in the opposite direction, with credit being the most costly and PIN debit the least expensive payment card.¹² Credit is most expensive because the interchange fees merchants pay for credit transactions are higher than the interchange fees for Signature debit or PIN debit. Merchants, however, are unable to directly charge their customers the payment network transactional costs, and thus encourage consumers to use the least costly payment cards, because the payment card networks have enacted "no surcharge rules" prohibiting them from doing so.¹³ Merchants have taken some steps to encourage users to enter a PIN rather than using the Signature debit function, but the effectiveness of these steering efforts is debatable. Nonetheless, merchants feel compelled to accept all means of payment, because: (1) there is a relatively low marginal cost to merchants to accept additional payment cards; and (2) U.S. retail markets in the are generally competitive and merchants do not want to potentially lose a sale because they do not accept the customer's preferred means of payment – especially when the merchant's local competitors accept the cardholder's preferred payment card.

As payment cards have increased in popularity among consumers, the card payment networks' structure and conduct have come under increasing scrutiny. Not surprisingly, market participants have sought to garner a greater share of the industry's profits through lawsuits. Most notable among the lawsuits filed in the 1980s was *National Bankcard Corp. v. Visa USA, Inc.*, 779 F.2d 592 (11th Cir. 1986) ("*NaBanco*") and *SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 36 F.3d 958 (10th Cir. 1994) ("*MountainWest*"). In *NaBanco*, a merchant processor claimed the interchange fee was essentially a price fixing agreement among Visa's issuing members. The court rejected this contention for various reasons, including factual findings that: (1) credit cards were not a relevant product market, but rather were among a group of

¹¹ Plaintiffs' Pretrial Brief at 6, *United States et al. v. First Data Corp. and Concord EFS, Inc.*, 2003 WL 23194271 (D.D.C. Dec. 10, 2003) (No. 1:03CV02169), available at <http://www.usdoj.gov/atr/cases/f201800/201804.htm> ("In 2003, PIN debit was typically 35%-60% less expensive to the merchant than Signature debit."); See generally FED REPORT, *supra* note 5, at 12-13 (fees paid by a merchant on the same transaction, by payment card type).

¹² FED REPORT, *supra* note 5, at 15. Merchants pay a "merchant discount fee" for payment card network services. The merchant discount fee is primarily comprised of the interchange fee, the network switch fee, and the merchant acquiring/processing fee. The overwhelming majority of the merchant discount fee is the interchange fee. The net relative costs to merchants identified in the text will vary to some degree by, *inter alia*, merchant category, payment card type, and whether the merchant has entered a special agreement with the payment network.

¹³ The no surcharge rules prohibit merchants from surcharging consumers any additional fee based on use of the payment card. These rules do, however, permit merchants to discount if their consumers use cash or a cash equivalent, such as PIN debit or checks. The U.S. Congress has on several occasions also prohibited merchant surcharging over brief time periods, while allowing merchants to discount for cash payment. Currently, numerous states prohibit merchant surcharging.

payment methods that included cash, checks, and debit cards, and thus, Visa did not have market power;¹⁴ and (2) issuers and acquirers were able to (and did) bypass the Visa network by entering into bilateral agreements for the interchange of credit card receivables (“interchange bypass arrangements”).¹⁵ After evaluating all of the evidence, the court held that the default interchange fee was an ancillary restraint to the association’s joint venture that was necessary for Visa’s universality of acceptance; and thus was, on balance, procompetitive.¹⁶

In *MountainWest*, Discover claimed that Visa’s refusal to allow Discover to issue Visa cards was essentially an agreement among competing issuing banks to restrain a strong competitor. Discover had entered the U.S. payment card market in the early 1980s by creating its own, separate payment card network. Although difficult and slow, the Discover card network slowly gained acceptance, but had not achieved a level of success comparable to Visa and MasterCard. The *MountainWest* court ruled for Visa, finding that Visa’s refusal to allow Discover to issue Visa cards preserved network-level competition, i.e., the competition between the Visa payment card network and the Discover payment card network, by preventing Discover from gaining a governing role and significant influence within the Visa joint venture.

Visa’s victories in these cases are likely at least partially responsible for the relative period of calm through the mid-1990s.

2. General Purpose Card Networks: *United States v. Visa U.S.A., Inc.*

In 1998, the Justice Department filed an antitrust case against the Visa and MasterCard joint ventures alleging two interrelated, anticompetitive agreements among Visa’s and MasterCard’s member banks.¹⁷ The associations’ bank members (many of which governed both networks through the associations’ boards and committees) adopted policies and by-laws to: (1) permit the election or appointment of governors of their associations that had material portions of their card portfolios on both the Visa and MasterCard networks, thereby reducing or eliminating incentives for the two jointly owned systems to compete vigorously against one another (the “dual governance” claim); and (2) prohibit all member banks from issuing American Express or Discover cards, while expressly permitting each member bank to issue cards on the largest two networks -- Visa and MasterCard (the “exclusionary rule” claim).

The Justice Department alleged, and the trial court found, there were two relevant product markets: (1) a general purpose card market, and (2) a general purpose payment card network services market. The general purpose card market consists of all credit and charge cards used by consumers to purchase goods at unrelated retail merchants. The Government proved the general purpose card market through the defendants’ and their members’ documents, economic testimony, and merchant testimony that they would continue to accept general purpose cards even if the cost to accept those cards were to rise significantly. In contrast to the card market, the general purpose card *network services* market is the bundle of goods and services that allow banks to issue general purpose cards to consumers and that allow merchants to accept general purpose cards as a method of payment by consumers. The court found that Visa USA and MasterCard International had market power in the U.S. general purpose card network services market.

The Government alleged that the dual governance agreements restrained competition by reducing the level of competition between the two leading networks, Visa and MasterCard, which jointly controlled

¹⁴ *Nat’l Bankcard Corp. v. Visa U.S.A., Inc.*, 596 F. Supp. 1231, 1258 (S.D. Fla. 1984).

¹⁵ *Id.* at 1264.

¹⁶ *NaBanco*, 779 F.2d at 605

¹⁷ *United States v. Visa U.S.A., Inc.*, 163 F. Supp.2d 322 (S.D.N.Y. 2001), *aff’d*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 543 U.S. 811 (2004).

over 75% of the general purpose payment card network services market. The overlapping governance of the two associations allowed member banks to restrain Visa's and MasterCard's proposed advertising and "share-stealing" innovations. The Government introduced evidence at trial that Visa and MasterCard each considered attacking the other in their advertising, but were prevented from doing so by their governing member banks. The Government also submitted evidence that Visa and MasterCard each refrained from introducing innovative products (for example, a chip "smart" card, and a premium card targeted at an affluent demographic) because of member-governors' concerns that the innovation might adversely affect the other association.

In its second count, the Justice Department alleged that the exclusionary rules restrained competition among general purpose card networks by limiting the areas of competition among the defendants' members through an agreement that they would not compete with respect to the issuance of cards on the American Express and/or Discover networks. The inevitable result had been the weakening of the American Express and Discover networks by denying them access to the assistance of card issuing banks, thereby: (1) limiting output of cards on those competitive networks; (2) restraining output of products that combine the unique features of the Amex and/or Discover networks with the particular skills of the numerous issuers; and (3) preventing those networks from issuing a competitive debit product (since the member banks have exclusive access to most Americans' checking accounts). The Government also introduced evidence demonstrating that, in regions of the world where the exclusionary rules did not exist, Visa and MasterCard responded to American Express' competitive overtures to member banks by enhancing their network products and services.

Visa and MasterCard argued that dual governance did not have any significant anticompetitive effect, that any such effect was the result of dual issuance, and that any effects would be ameliorated by Visa's recently-enacted by-laws mandating that the portfolio of all banks sitting on Visa USA's Board of Directors consist of at least 75% Visa cards. The card associations' primary defense to the Government's exclusionary rule claim was that their chosen organizational structure entitled their "loyalty/cohesion" rules to special deference as ancillary to the joint venture. Because the exclusionary rules were ancillary to the joint venture, the trial court examined the conduct under a rule of reason analysis. Based, in part, on each association's respective exclusionary rule exception for its largest network competitor (the other association), the trial court rejected the defendants' loyalty/cohesion rationale for the rules.

The trial court held that the exclusionary rules were unreasonably anticompetitive, but that the Government failed to demonstrate that dual governance (as opposed to dual issuance of credit cards by member banks) was the continuing cause of any restraint on competition.

3. Debit Card Networks

Electronic funds transfer ("EFT") networks were widely introduced in the United States during the late 1970s, when bank consortiums formed numerous regional networks to enable their customers to withdraw money at Automated Teller Machines ("ATMs") owned by other banks within a geographic region of the country. EFT networks began routing point of sale PIN debit transactions on a small scale in the early 1980s.¹⁸ To accept PIN debit cards, merchants need to install PIN pad terminals that allow customers to enter their PIN number. Consequently, it was not until the 1990s that EFT networks were widely used for point of sale PIN debit transactions in the United States. As the use of PIN debit grew, networks began to consolidate, resulting in fewer networks with wider geographic coverage. By 2003, there were three nationwide PIN debit networks (Interlink, owned by Visa; Maestro, owned by

¹⁸

Some EFT networks, such as the STAR network, switch/route both ATM transactions and PIN point of sale debit transactions; others, such as Visa's Interlink, only switch point of sale PIN debit transactions.

MasterCard; and STAR, owned by Concord), two large regional networks (NYCE and PULSE), and a few smaller, regional networks.¹⁹

Generally, a transaction can be carried over a particular PIN debit network only if the debit card issued by the customer's bank participates in that network.²⁰ To provide customers with seamless access to a wide array of merchants, many banks have historically placed the "bug" of more than one PIN debit network on their debit cards. Cards that can access more than one PIN debit network are often referred to as "double-bugged" or "multi-bugged." Some networks have "priority routing" rules that specify which network carries a transaction when a customer uses a multi-bugged card at a merchant that accepts more than one of the networks. For example, as recently as 2003, the NYCE PIN-debit network routing rule allowed the issuing bank to designate the network that carries the transaction, while STAR's network routing rule required most transactions on cards bearing the STAR bug to be routed over the STAR network, regardless of whether there are other bugs on the card.²¹

The PIN debit networks' routing rules substantially limit merchants' ability to engage in "least-cost routing," whereby the transaction is routed to the least expensive network whose bug is on the card. There are instances, however, when two networks' routing rules conflict. For example, an issuer of cards double-bugged with STAR and NYCE may designate NYCE as its priority network, while at the same time the STAR rule requires that STAR be designated as the priority network. When routing rules conflict, some merchants (through their merchant processors) route the transaction to the least expensive network.

4. United States v. First Data Corp and Concord EFS

First Data (the 65% owner of the NYCE network) and Concord (the owner of the STAR network) executed a merger agreement on April 1, 2003. Under that agreement, First Data would acquire Concord through an all-stock transaction valued at approximately \$7 billion. Approximately seven months later, the United States filed a complaint seeking to block the merger. The parties settled on the eve of trial, when First Data agreed to divest the NYCE network in conjunction with the merger. Shortly thereafter, First Data divested NYCE to Metavante Corporation.

The Justice Department's complaint alleged that PIN debit network services were a relevant antitrust product market because merchants would continue to purchase PIN debit network services even if the price of those services were to significantly increase.²² Generally, PIN debit was significantly less expensive for merchants than any other card payment method. Moreover, the issuing banks would not cause card holders to use other payment methods if the PIN merchant discount fee were substantially increased. Even if there were a 10% increase in the interchange fee paid to PIN debit issuers, issuing banks would not encourage their customers to switch to other payment methods because each PIN debit transaction would still

¹⁹ Although the transaction volume on MasterCard's Maestro is relatively insignificant, it has a nationwide infrastructure. In 1990, several state enforcement agencies blocked Visa and MasterCard from jointly creating a PIN debit network. *The State of New York et al v. Visa U.S.A., Inc.*, 1990-1 Trade Cas. (CCH) ¶ 69016 (S.D.N.Y. 1990). Approximately three years after the decree was entered, on October 24, 1993, Visa purchased the Interlink PIN-debit network.

²⁰ Some PIN networks have gateway agreements with each other that allow a card "bugged" on one network to function on another.

²¹ Plaintiffs' Pretrial Brief at 4-5, *United States et al. v. First Data Corp. and Concord EFS, Inc.*, No. 1:03CV02169, (D.C. Cir. Dec. 10, 2003).

²² Because the network switch fee is a relatively minor component of the merchant discount fee, if a hypothetical PIN debit network monopolist were to raise the switch fee 10% and leave the interchange fee unchanged, the merchant discount fee would rise significantly less than 10%.

generate less revenue than a Signature debit or credit transaction. Moreover, PIN debit cards have enhanced functionality relative to Signature debit that made cardholder and merchant switching to Signature products unlikely. For example, PIN debit cards offered greater security (and thus less fraud), faster transaction speed at cashiers, and the ability for consumers to get cash back from the cashier.²³

As evidence of the likelihood of anticompetitive effects the Justice Department noted the highly concentrated nature of the PIN debit network industry. At the time, the three largest PIN debit networks were STAR, NYCE, and Interlink. STAR routed 56 percent of all PIN debit transactions, while Interlink and NYCE accounted for approximately 15% and 10% of the PIN debit market, respectively.²⁴ Even accounting for contract losses that might have reduced STAR's share, if the transaction were consummated, the combined STAR/NYCE would have been the largest network with at least a 45 percent market share. Together, the combined STAR/NYCE network and Interlink would have formed a near duopoly, accounting for approximately 80 percent of all PIN debit transactions.

The Government alleged the merger would result in higher prices for PIN debit network services to merchants and that merchants, in turn, would pass these higher prices on to consumers by raising the price on all of their goods and services. First, the merger would reduce the merchants' ability to credibly threaten not to accept PIN debit cards on the merged firm's network, thus reducing opportunities for merchants to negotiate lower merchant discount fees.²⁵ Second, combining STAR and NYCE would eliminate a substantial number of routing conflicts that had existed between them, reducing opportunities for merchants to lower their costs through least-cost routing.

5. In Re: Visa Check/MasterMoney Antitrust Litigation ("Wal-Mart Class Action")

The *Wal-Mart* class action suit involved a challenge by merchants to the "honour all cards" rules imposed by Visa and MasterCard that required merchants to accept Visa and MasterCard Signature debit products if they wanted to accept Visa and MasterCard credit cards. The plaintiffs argued that debit cards were a separate relevant product from credit cards and that the associations' rules constituted unlawful tying.²⁶ Because Signature debit card acceptance was tied to credit card acceptance, the *Wal-Mart* plaintiffs alleged that Signature debit interchange fees were artificially high and immune from price pressures they would face if merchants could credibly threaten not to accept Signature debit cards.

The defendants settled the suit on the eve of trial by agreeing to: (1) pay the merchant class approximately \$3 billion and attorneys' fees and costs in excess of \$300 million; (2) abolish the "honour all cards" rule (as applied to debit and credit card products bearing the Visa or MasterCard "flag"); (3)

²³ Plaintiffs' Pretrial Brief at 7, *United States et al. v. First Data Corp. and Concord EFS, Inc.*, 2003 WL 23194271 (D.D.C. Dec. 10, 2003) (No. 1:03CV02169), available at <http://www.usdoj.gov/atr/cases/f201800/201804.htm>. See also FED REPORT, *supra* note 5, at 5-6.

²⁴ At the time, the fourth-largest network was PULSE, which had an overall market share just slightly below that of NYCE. But PULSE had difficulty competing effectively for large, nationwide bank contracts due to its regional focus and operational structure. Consequently, Pulse's market share had remained essentially flat.

²⁵ Plaintiffs' Pretrial Brief at 11, *United States et al. v. First Data Corp. and Concord EFS, Inc.*, 2003 WL 23194271 (D.D.C. Dec. 10, 2003) (No. 1:03CV02169), available at <http://www.usdoj.gov/atr/cases/f201800/201804.htm>.

²⁶ The *Wal-Mart* plaintiffs used the decision in *United States v. Visa* as support for their contention that credit and charge cards were a separate relevant product from debit cards and that Visa and MasterCard, together and separately, had market power in the general purpose card network product market.

require their issuing members to clearly label their debit cards as “debit;”²⁷ and (4) lower their Signature debit rates by approximately 30% from August 1, 2003 to December 31, 2003.²⁸ The settlement did not prescribe Signature debit rates after January 1, 2004.

5.1 *Recent Legal And Industry Developments*

The payment card industry continues to evolve. As a result of the remedy in *United States v. Visa*, issuing banks can and do issue cards on the American Express and Discover networks. Merchants and a prominent merchant processor are, separately, asserting new legal challenges to the card associations’ practices. And, perhaps in response to these challenges, the Visa and MasterCard associations are reorganizing.

5.1.1 *First Data And Visa Lawsuit*

First Data, a large processor for issuers and merchant acquirers, and Visa are preparing to go to trial in a case where First Data alleges that Visa’s recently enacted prohibition on interchange bypass arrangements is unlawful.²⁹ According to First Data, Visa recently enacted rules that require member banks to route all Visa card transactions over the Visa network. Previously, if the same bank issued the card to the cardholder and acquired the transactions for the merchant, the bank could circumvent the Visa network and route the transaction within its own network in what is typically called an “on us” transaction. Similarly, if a single processor processed transactions for both the issuing bank and the acquiring bank, it could essentially act as an alternative network for a Visa transaction and bypass Visa altogether. Moreover, the processor could offer its “on us” network services on different terms, such as a lower interchange fee. Soon after First Data developed the capability to offer this service to banks on a wide scale basis, Visa U.S.A. filed a complaint against First Data alleging, *inter alia*, trademark infringement and dilution claims. First Data’s counterclaim alleges that Visa is: (1) orchestrating a concerted refusal to deal with First Data; (2) has monopolized or is attempting to monopolize credit and debit card processing markets; and (3) tied debit and credit network services with processing services.³⁰ The court recently dismissed Visa’s claims and denied Visa’s motion for partial summary judgment.

5.1.2 *Merchant Class Action Litigation*

A number of merchants and other industry participants have also filed antitrust claims against Visa and MasterCard. These merchant class actions challenge: (1) the interchange fees on credit and debit cards as a price fixing agreement; (2) various network rules, including the “honor all cards” rule’s requirement that merchants accept more costly premium credit cards if they want to accept ordinary credit cards; and (3) the tying of network processing services and fraud guarantee services to card acceptance. Many of these lawsuits were recently consolidated for pretrial proceedings and transferred to the judge who

²⁷ Previously, a bank issuing ATM/debit cards typically had numerous regional PIN debit network “bugs” on the back of the card and the bank’s name and the Visa “flag” on the front of the card. Thus, the card closely resembled typical Visa/MasterCard credit cards, and there was no indication the card was a “debit” card, as opposed to a credit card.

²⁸ See Memorandum and Order, *In Re: VisaCheck/MasterMoney Antitrust Litigation*, 297 F. Supp.2d 503 (E.D.N.Y. Dec. 19, 2003), available at http://www.nyed.uscourts.gov/Decisions_of_Interest/96cv5238mo122303.pdf; see also, The Garden City Group, *History of the Action*, at <http://www.inrevisacheckmastermoneyantitrustlitigation.com/history.php3> (last visited on May 26, 2006) (description of a history of the litigation).

²⁹ Complaint, *Visa U.S.A., Inc. v. First Data Corp.*, No. C 02-011786 (N.D. Cal. filed April 15, 2002).

³⁰ Complaint and Defendant’s First Amended Counterclaim, *Visa U.S.A., Inc. v. First Data Corp.*, No. C 02-011786 (N.D. Cal. filed April 15, 2002).

presided over the Wal-Mart class action.³¹ One of the plaintiffs' most significant legal hurdles will be the Eleventh Circuit's holding in the *NaBanco* case that the joint setting of interchange fees by Visa's board of directors did not violate the antitrust laws. There have been a number of changes in the industry since the *NaBanco* decision that the merchant plaintiffs cite as support for their arguments that *NaBanco* is no longer persuasive authority, including Visa's prohibition of interchange bypass arrangements, the Second Circuit's relevant market and market power holdings in *United States v. Visa*, and the fact that Visa's and MasterCard's boards of directors have recently been comprised primarily of issuing bank competitors with fewer representatives of the card acquiring banks.³² At this early stage of the litigation, plaintiffs have not publicly articulated the "but for" world that would avoid the allegedly unlawful price fixing agreements and still allow for the creation/existence of the general purpose credit card product.

5.2 The Bank Card Associations

Meanwhile, the Visa and MasterCard associations are responding by fundamentally changing their organizational structures to more closely resemble American Express and Discover. The exact contours of their reorganizations are unclear at this point. Visa's board recently approved the immediate appointment of independent directors and a transition plan to ensure that a majority of voting board members are independent directors.³³ But the fiduciary duties that should guide the voting behavior of these board members is unclear. Meanwhile, MasterCard apparently intends to create a structure whereby 49% of the shares are held by the public and 10% of the shares are owned by a charitable foundation.³⁴ Presumably, the card associations believe their respective reorganizations will help them avoid the antitrust pitfalls inherent in an association of horizontal competitors.

Visa has also made significant inroads in PIN debit by signing "preferred debit network" issuing agreements with a significant number of banks. These agreements provide bank issuers with incentives to issue debit cards to their account holders that have only one PIN debit network "bug" on the card: Visa's Interlink. The strategy has been successful. In 2003, at the time the First Data/Concord case was filed, Visa's Interlink network had a 15.5% market share among PIN debit networks. Since then, Interlink has garnered about a 35.3% market share.³⁵ And most of that volume is dedicated to Interlink because the debit card issuers have eliminated other bugs on the cards.³⁶ Consequently, many merchants feel they must accept the card (because many of their customers' debit cards function *only* on the Interlink network) and they are unable to route the transaction to a less expensive PIN debit network.

As a result of the remedy ordered in *United States v. Visa*, there have been some fundamental changes in the payments card industry. The remedy allows banks issuing cards on the Visa and MasterCard

³¹ *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 398 F. Supp.2d 1356 (Jud. Pan. Mult. Lit. 2005).

³² At the time of *NaBanco*, merchant acquirers were well represented on Visa's board of directors. *NaBanco*, 779 F.2d at 603 ("The board can be, and actually has been, composed of members that handle more merchant accounts than cardholder business, and who therefore represent the solely merchant-signing members' interests because that interest coincides with their own.").

³³ David Breitkopf & H. Michael Jalili, *Visa Plan Advances, But...A Lawsuit Looms; Small Issuers Gain a Seat*, AM. BANKER, May 1, 2006, at 1.

³⁴ MASTERCARD, INC., 2005 ANNUAL REPORT (FORM 10-K) 4-5 (2006), available at <http://www.sec.gov/Archives/edgar/data/1141391/000119312506056300/d10k.htm>; Wendy Atkins, *Sudden Philanthropy*, THE BANKER, Feb. 6 2006, at 80.

³⁵ ATM & DEBIT NEWS, September 1, 2005.

³⁶ *Id.*

networks to also issue cards on a competing network. Since the decision became final in 2005, American Express has entered distribution/issuing agreements with several banks in the United States, including Bank of America, MBNA, and Citigroup.³⁷ In addition, Discover recently acquired the PULSE PIN debit network and announced that banks would be able to offer a Signature debit product on the Discover network.³⁸ Discover also announced that, in contrast to the other payment networks, it would allow merchants to surcharge transactions conducted with a Discover card.³⁹

6. Conclusion

Although payment cards have become ubiquitous in the United States, there is no significant U.S. regulation of the interchange fee charged by the card networks. The Federal Reserve recently indicated that its regulatory authority in this area is limited,⁴⁰ and recent Congressional hearings suggest that Congress will not enact legislation regulating interchange in the near future.⁴¹ The Justice Department neither regulates nor legislates. Rather, the DOJ investigates potential violations of the U.S. antitrust laws and brings enforcement actions when the investigation indicates the law has been broken and a remedy will rectify the resulting harm.

The only certainty in this industry is that it will continue to evolve and grow. If there is one message that permeates the Federal Reserve's recent Report to Congress and the various domestic and international challenges to the card associations it is that careful study and consideration should precede any government intervention in this complex and evolving industry.

³⁷ American Express Co., HOOVERS IN-DEPTH COMPANY RECORDS, May 10, 2006, *available at* 2006 WLNR 8000168

³⁸ Press Release, Discover Card, Merger of Discover Financial Services and Pulse EFT Association Closes, Following Pulse Member Approval (Jan. 12, 2005) (*available at* <http://pressroom.discovercard.com/data/articles/2005/01/12/200501141303580.shtml>).

³⁹ *Discover to Allow Surcharges; Adds Debit*, 19 CREDIT CARD MGMT. 10 (2006). Given that Discover's merchant discount fee is generally lower than the other general purpose card networks, merchants are unlikely to steer their customers to other, more expensive general purpose credit/charge cards by only surcharging consumers for using their Discover cards.

⁴⁰ *Market To Decide; Fed Won't Intercede In Interchange Fee Battle*, CREDIT UNION JOURNAL, No. 10-16, April 24, 2006, at 1.

⁴¹ *Law and Economics of Credit Card Interchange Fees: Hearings Before the Subcomm. of Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce*, 109th Cong. (2006) (Statement of Timothy J. Muris, of counsel, O'Melveny & Myers LLP), *available at* <http://energycommerce.house.gov/108/Hearings/02152006hearing1774/hearing.htm>.

EUROPEAN COMMISSION

1. Commission's sector inquiries into financial services

Competitive and efficient financial services markets are vital for the success of the European economy, in serving businesses and consumers efficiently to help deliver strong economic growth and sustain high levels of employment. The drive to deliver an efficient and competitive financial services industry in Europe can therefore make an important contribution to achieving the Lisbon goals.

The European Commission Financial Services Action Plan (FSAP) has made a significant contribution to developing the framework to support financial services integration in Europe. Following the FSAP, in its recent White Paper *Financial services policy 2005-2010*¹, the Commission set out its future strategy. The strategy has five priorities:

1. to dynamically consolidate progress and ensure sound implementation and enforcement of existing rules;
2. to drive through better regulation principles in all policy making;
3. to enhance supervisory convergence;
4. to create more competition between service providers, especially those active in retail markets; and
5. to expand the EU's external influence in globalising capital markets.

In June 2005, the European Commission launched inquiries into competition in financial services². The financial services sector enquiry focuses on three areas: payments cards, core retail banking and business insurance. The Commission's sector inquiries into financial services — specifically into retail banking and business insurance — are a central part of the post-FSAP agenda. The retail banking inquiry will make a significant contribution here, particularly to the second and fourth priorities.

The aims of the sector inquiry into retail banking are to:

- improve the Commission's market knowledge of retail banking, notably to provide an empirical basis for implementing the post-FSAP strategy for retail financial services;
- give all stakeholders concrete information about potential market failures, enabling them to resolve these problems where possible;
- identify issues that require investigation and possibly remedy under the European competition rules (Articles 81 and 82); and

¹ Available at http://europa.eu.int/comm/internal_market/finances/docs/white_paper/white_paper_en.pdf.

² Pursuant to Article 17 of Regulation (EC) No 1/2003 on implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

- provide a framework for National Competition Authorities (NCAs) and the Commission, to ensure that the many ongoing competition procedures are coherent.

In its inquiry into retail banking, the Commission is looking at the markets for core retail banking services, particularly (1) current accounts and related services, and (2) payment cards.

On 12 April 2006, the Commission published an interim report on the sector inquiry into payment cards³. This interim report into competition in payment cards is complementary to the work on current accounts and related services⁴. The findings from both aspects of the inquiry will be considered together, allowing the Commission to broaden and deepen its understanding of competition in EU retail banking. The final report on the sector inquiry into retail banking, covering current accounts (and related services) and payment cards, will be published by the end of 2006.

Legislation has been proposed to create a Single Euro Payment Area (SEPA) in the EU, to make cross-border payments in euros in the EU as easy and affordable as domestic payments. This alone could save the EU economy between €50 and €100 billion per year.⁵

The European payment cards industry is large and handles a significant part of retail sales in Europe. Total sales volumes with point-of-sale card transactions in the EU in 2005 were more than €1350 billion. It is estimated that businesses in the EU paid more than €25 billion in fees in 2005.⁶ It is estimated that cards alone account for up to 25% of retail banking profits. However, the payment cards industry shows evidence of continuing fragmentation and the inquiry has found striking differences in the levels of prices and profitability across Member States.

The findings of the inquiry into core retail banking, and in particular payment card systems, will provide valuable evidence to shape the future development of the Single Euro Payment Area (SEPA) project. In particular, the inquiry aims to show how differing forms of organisation, structure and governance of payment systems in the EU can produce differing competitive outcomes. The evidence gathered for the inquiry suggests that the characteristics of some payment systems lead to significantly higher prices for firms and consumers in some Member States. As work continues to develop the appropriate principles and structures to support SEPA and its Payment Cards Framework (PCF), significant consideration should be given to the findings of the Commission's retail banking inquiry.

1.1 The interim report into payment cards

The interim report into payment cards is a summary of the Commission's findings on competition in payment cards. The analysis is based on an extensive market survey conducted by the Commission throughout the second half of 2005. Thus, the Commission's inquiry has been able to draw on a rich and detailed evidence base. It is hoped that this evidence base will enable the Commission, together with market participants and authorities, to reach clear and robust conclusions about competition in payment cards in the EU.

³ The interim report and further information on the sector inquiry are available on the European Commission internet pages on competition policy:

http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/financial_services/

⁴ The Commission is planning to publish a report on this second part of the inquiry in July 2006.

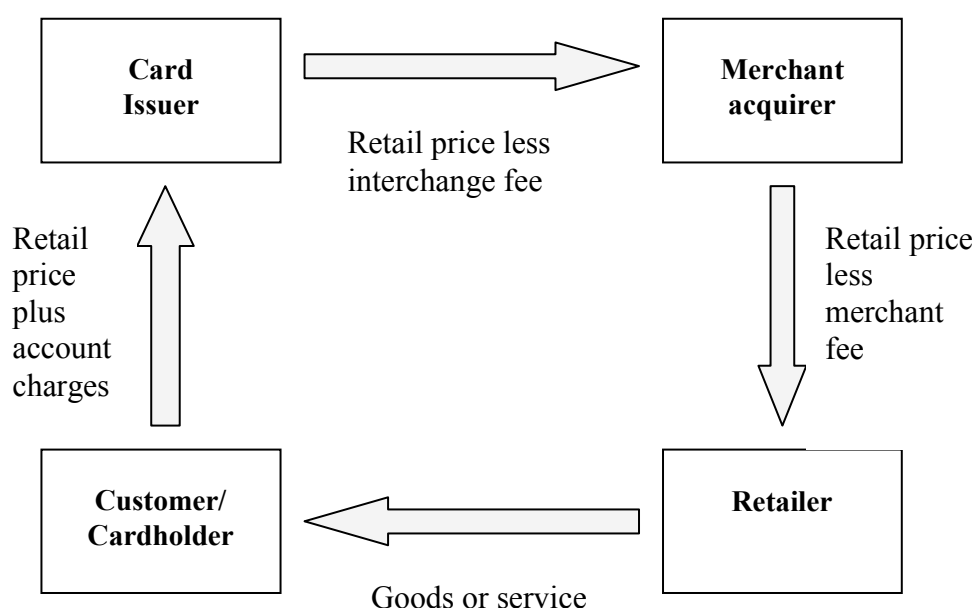
⁵ See "Time to Move Up A Gear" - The European Commission's 2006 Annual Progress Report on Growth and Jobs. Available at: http://europa.eu.int/growthandjobs/pdf/2006_annual_report_full_en.pdf.

⁶ Estimate derived from Payment Cards Report, RBR, 2005, London.

However, the interim report is only the first stage in the process. The Commission is keen to engage in a dialogue with market participants and authorities about the report's findings and appropriate ways forward. Therefore, the Commission highlights five sets of issues for consultation and welcomes the views and perspectives of all stakeholders on the interim report. In the following, key findings that are set out in the interim report are presented. The full interim report is annexed to this note.

2. Interim findings on competition in payment cards

Card payment systems enable consumers to use and businesses (merchants) to accept plastic cards as a method of payment. When a cardholder uses a card to purchase a good or service, the bank that issued the card, the issuer, debits the retail price from the cardholder's account. The issuer then pays the bank that acts for the merchant, the acquirer, the retail price less an interchange fee. Finally, the acquirer pays the merchant the retail price less a merchant fee.



2.1 Overall findings

The preliminary results of the inquiry show a picture of market fragmentation. While consumers clearly reap benefits from card payment networks in the EU, businesses do less so and largely foot the bill, particularly in the case of credit cards. Some — but not all — networks offer consumers a means for easy and convenient cross-border payments. This is clearly positive. But businesses, in particular small firms, largely do not benefit from market integration in card payments. This means that in a sector which is key for the European economy, the retail sector, potentially great opportunities for more economic efficiency are foregone for the time being. The inquiry suggests that building a true Single Euro Payments Area (SEPA), one that offers tangible benefits to business and consumers and contributes significantly to growth and competitiveness in this sector, still requires considerable work to be done.

It must be recognised that fragmentation in payment markets and in card payment markets in particular, is partly the result of historical evolution. Fragmentation is due to the way in which payment systems were created and built up in the EU Member States — through coordination and cooperation between banks at national level. While bearing this in mind, however, change appears necessary to move forward towards a SEPA.

Lessons for building SEPA could also be learnt by looking at efficient payment services provided by existing domestic card networks. Such networks offer in some respects a good value proposition to customers and often charge lower fees to cardholders and business than the large international networks (MasterCard and Visa). A challenge remains in creating efficient cross-border functionalities as a prerequisite for SEPA. The future choice of SEPA payment schemes by banks is a key issue for the further debate on SEPA.

The interim findings of the payment cards inquiry are divided into two parts:

- financial analysis of the industry; and
- potential barriers to competition

2.2 *Financial analysis of the industry*

2.2.1 *Profitability*

On the issue of **profitability** the main findings of the inquiry are:

- **Profitability in card issuing is high and has been sustained over time.** The credit card business is particularly profitable, with a weighted average profit-to-cost ratio of 65% for issuing. The average profit-to-cost ratio for debit card issuing is also high at 47%. High profitability is often correlated with high fees charged to merchants and cardholders. The evidence also suggests that even in the absence of an interchange fee, other revenues alone would in many cases generate a healthy profit for issuers.
- **Profitability is higher for credit cards than for debit cards.** In both issuing and acquiring activity, credit cards are more profitable than debit cards.
- Even without interchange fees, card issuing remains profitable. The evidence suggests that card issuing would generate positive profits in 20 out of 25 countries even without interchange fee income.
- Profitability in card acquiring varies, though is quite satisfactory overall. Credit card acquirers across the EU have a 15% profit-to-cost ratio as a weighted average, while debit card acquirers average around 5%.
- Profitability is far higher for card issuers than for acquirers. For both debit and credit cards, issuing is significantly more profitable than acquiring. Although this general finding was to be anticipated, the difference in relative profitability is striking. A range of explanations are possible, including the supposition that card issuers may have market power relative to acquirers.

2.2.2 *Acquiring banks' revenues: fees paid by businesses*

The merchant fee is the price per transaction that a business (or 'merchant') pays to the acquirer for accepting cards as a method of payment. The results of the inquiry show that **merchant fees vary considerably across the European Union**. These differences remain significant when several factors that may affect merchant fees (such as different risk levels) are controlled for. This may indicate that the market for card payment services is not working effectively in many Member States, to the detriment of businesses and consumers. There is evidence of price dispersion at five levels:

- **Businesses in *some countries* pay a far higher merchant fee on average than others.** This pattern is particularly pronounced. Merchants in Hungary, the Czech Republic and Portugal have to pay an average fee of between 2.5% and 3.1% of the total transaction value to accept a MasterCard/Visa credit card. This is 3 to 4 times higher than in Sweden, Finland and Italy.
- Businesses pay a far higher merchant fee on average to accept credit than debit cards. For example, a merchant in the UK pays almost five times as high a fee on average for accepting a MasterCard credit card as compared to a MasterCard debit card.
- **Businesses pay a far higher merchant fee on average to accept cards issued in the *international networks* than cards issued in the *domestic networks*.** Typically, businesses pay 30-40% lower fees on average for domestic debit card usage than for MasterCard (Maestro)/Visa debit.
- International payment systems make smaller businesses pay more than larger ones. This does not seem justified solely by transaction volumes. Smaller firms typically pay between 60% and 70% higher fees on average for MasterCard and Visa credit and debit card transactions than larger businesses. In domestic card payment systems, however, the price difference between smaller and larger merchants is only 7% on average.
- **Businesses in *some sectors* pay much higher merchant fees on average than in others:** For instance, florists, restaurants and car rental firms pay a merchant fee twice that of fuel companies and wholesale trade firms.

The acquiring banks' practice of charging businesses the same level of merchant fee for accepting cards issued by different networks is known as 'blending'. Acquirers often apply blending to competing products, such as MasterCard and Visa, in both domestic and international card payment systems. The inquiry has found that the **blending of prices may weaken inter-network price competition, which in turn may lead to businesses paying higher acquirer fees. Blending appears to be widespread across the EU25.**

2.2.3 *Issuers' revenues: financial transfers from acquiring banks and fees paid by cardholders*

The interchange fee is the fee that an acquiring bank pays per transaction to the issuing bank. It is used as a mechanism to transfer revenues from the acquiring bank to the card issuing bank. The results of the inquiry show that **interchange fees vary considerably across the EU**. This may indicate that the market for card payment services is not working effectively in some Member States. The levels of price dispersion are similar to those for the merchant fee:

- **Acquirers in *some Member States* pay far higher interchange fees on average than in others.** This is true for international credit and debit and domestic card transactions. For instance, acquiring banks in Poland pay 8 times as much for a Visa debit card transaction than in the UK. Similarly, the interchange fee for a €50 domestic debit card transaction varies from no fee or less than 10 euro cents in Finland, Denmark, Luxembourg, the Netherlands, Ireland and Belgium to more than 60 euro cents in one particular country.
- **Acquirers pay higher interchange fees on average for *international credit and debit card transactions* than for *domestic debit card transactions*.** For a 50 euro transaction, for example, an acquiring bank in one EU country would pay on average 39 euro cents on a MasterCard credit card, 27 euro cents on a Visa debit card and zero on a domestic debit card.

- Many acquirers pay a higher interchange fee on average for domestic MasterCard/Visa transactions than for corresponding cross-border transactions. A transaction is considered to be cross-border when the merchant is located in a different country to the cardholder. In about half of the EU-25, acquiring banks pay considerably more for a domestic MasterCard and/or Visa credit card transaction than for a cross-border one; in some cases up to twice the cross-border fee. In these countries, the MasterCard and/or Visa cross-border rates appear to be used as a minimum benchmark when setting the domestic interchange fee.

Cardholder fees are the fees a cardholder pays to the issuing bank for a payment card. The results of the inquiry show that there is no significant negative relationship between the fee per card and the credit card interchange fee at country and network level. The empirical evidence shows that if the interchange fee increases by 1 Euro only 25 cents are passed on to consumers in lower fees. This result challenges the hypothesis advanced by some industry participants and the economic literature that an increase in interchange fees exactly equals a decrease in cardholder fees.

Overall, the inquiry has not confirmed the possible justifications for interchange fees which rely on economic efficiency arguments.

2.3 *Potential barriers to competition*

The investigation has identified **a number of potential barriers to competition** in the market for card payment services. These barriers are of a structural, technical or behavioural nature:

2.3.1 *Structural barriers*

- The vertical integration of card payment systems may impede new entrants, in particular non-banks, from competing with the incumbent in one segment of the market. In some instances vendors of terminals have to compete with an incumbent that not only owns the domestic card payment system but also provides the technical and financial services. Systems in Spain and in Portugal, for example, are highly integrated. In Austria and in the Netherlands, however, the market for processing and acquiring services, respectively, has been opened up after the de-integration of the systems. This has led to lower merchant fees in the Netherlands.
- Joint ventures between local banks to acquire merchants may remove the competitive pressure on merchant fee levels because merchants only have one offer for the network concerned. Such joint ventures exist for instance in many EU countries for acquiring MasterCard and Visa.

2.3.2 *Technical barriers*

- Diverging technical standards across the EU may hinder acquirers, processors and terminal vendors from operating efficiently on a pan-European scale. There appears to be significant scope for efficient convergence of technical standards in the payment cards industry.

2.3.3 *Behavioural barriers*

- Agreement on preferential interchange fees between local banks and high fallback fees for foreign banks may raise the costs for foreign banks wishing to enter the market. This seems to be the situation in at least Portugal and Austria.
- Bilateral clearing arrangements between local banks could make market entry more difficult. New entrants depend on sponsoring banks, who have little incentive to sponsor potential

competitors. This seems to have been the situation in the UK. Similar structures are found in Ireland and Finland.

- Some governance arrangements within card payment systems risk distorting conditions for competition between members, in particular between new entrants and the incumbent banks. For instance, in some networks associate members have to communicate business-sensitive information to the principal members without reciprocal information sharing. In other systems, decision-making on issues affecting intra-system competition, such as fees, membership rules and technical specifications, is reserved to the principal members.
- Some payment system membership requirements may hinder non-banks from domestic acquiring and new entrants from cross-border acquiring. Rules which may constitute barriers include requirements to be a financial institution and to have a local establishment. About half of the domestic card payment systems in the EU require issuers and acquirers to be financial institutions. Some systems also require banks to establish a physical presence. In other systems, however, processors may act as acquirers in the domestic debit card system. Similarly, other systems do not require banks to have a local presence to join them.
- High joining fees for card payment systems and their structure may discourage new entry and expanded card issuing. The high variation of joining fees across the EU for similar card payment systems may also indicate that the level of fees is not objectively justified. For instance, the joining fee varies from zero in some systems to a fee of over €6 million in one country. Joining fees are particularly high in some, but not all, small countries, so the size of the country by itself does not seem to justify the high level.
- Other network rules may also prevent or make entry more difficult. For instance, the prohibition on cooperative agreements with competing networks or non-banks, co-branding, may hinder domestic debit card payment systems from entering into competition with MasterCard and Visa or retailers or other operators from entering into competition with the incumbent card issuer. Similarly, the prohibition on merchants charging customers for paying by card, surcharging, may hinder the development of alternative non-cash payment instruments, as the true costs are hidden from consumers via cross-subsidisation.

3. Possible remedies

On the basis of the interim findings, the table below sets out possible remedies. The remedies may be advocacy, antitrust measures and/or regulation.

Issue	Possible remedy	Details
High cardholder fees	Advocacy	Making information on price differentials transparent could help strengthen the demand side.
High merchant fees	Advocacy	Making information on price differentials transparent could significantly strengthen the demand side.
High interchange fees	(1) Advocacy (2) Antitrust (3) Regulatory	(1) Making information on fee differentials transparent may create some limited pressure on networks to lower fees. (2) But effective remedies might require appropriate antitrust or regulatory actions.
“On us” interchange fees	Antitrust	Could be examined under competition rules.
Vertical integration	(1) Advocacy (2) Regulatory	A differentiated and careful approach is needed to remove distortions but preserve efficiencies. Advocacy and discussion with networks should be the preferred approach to address existing situations. For a future SEPA, separation of scheme ownership and other activities could be considered.
Joint ventures (JVs) between acquirers	(1) Advocacy (2) Antitrust (3) Regulatory	The case for separating such JVs could be considered.
Financial institution requirements	Regulatory	Is addressed in the newly proposed payments directive. Issue for SEPA.
Local establishment requirements	Regulatory	Could be removed. Issue for SEPA.
Excessive joining fees	(1) Antitrust (2) Regulatory	Could be examined under competition rules or could be an issue for regulation.
Prohibition of co-branding with non-banks	Antitrust	Could be examined under competition rules.
Bilateral clearing arrangements	Advocacy	Creation of multi-lateral clearing facilities is difficult to obtain through competition or regulatory remedies.
Governance issues	(1) Self-Regulatory (2) Regulatory	Could be addressed through regulation or self-regulation by setting some basic requirements for scheme governance and member/stakeholder participation.
Technical barriers (standards)	(1) Self-regulatory (2) Regulatory	It may be worthwhile giving self-regulation bodies some limited time to set interoperable standards, but regulation should be considered if this approach does not work. Basic requirement for SEPA.
Blending of merchant fees	Advocacy	No apparent antitrust remedy. Making information on blending practices transparent could strengthen the demand side.
Prohibition of co-branding	Antitrust	Could be examined under competition rules.
Imperfect price signals on payment instruments	Regulatory	Need to explore how to incentivise banks to introduce transaction pricing that leads consumers to choose the most efficient payment instrument. Issue for SEPA.

CHINESE TAIPEI

This submission outlines the development of Chinese Taipei's payment card scheme and a related competition law case involving the payment card business.

1. Development of the Payment Card

The domestic payment card issuing business of Chinese Taipei originated with two local privately-owned investment banks separately issuing cards to certain customers with high income or strong economic power from 1974 onwards. The first domestic payment card was linked to the customer's account and the customer's payment would immediately be deducted from that account. In order to prevent the expansion of credit on the part of individuals, the Ministry of Finance (hereinafter "the MOF") ordered these two banks to cease issuing cards in 1978.

In the 1980s, in line with the needs of rapid economic growth, the relaxation of restrictions on citizens travelling abroad, and to increase the convenience of market transactions through paperless payment tools, the MOF implemented a policy to encourage consumer-banking business. It recommended that the Bankers' Association of Taipei establish a non-profit organization that would be invested in by local and foreign banks and named the "United Charge Card Center" with a view to developing fundamental facilities to process card transactions that would include designing and producing cards and handling the acquisition business. The business of issuing cards opened to banks was to be approved by the MOF under the adoption of a "one person can only have one card" policy. The united charge card was linked to the savings account and allowed only insignificant excess consumption; delayed payment with an interest rate was not acceptable to the issuing bank.

Along with the development of the economy and the increase in national consumption, the MOF approved the issuance of international credit cards at the beginning of the liberalization of the financial market of Chinese Taipei in order to diversify and to expedite the use of paperless payment instruments. The restrictions on credit card-related business were lifted and the market was opened to local and foreign banks, in addition to related financial institutions such as credit card companies on a fair competition basis starting in 1990. In spite of the MOF's requirement that specialized credit card companies have a minimum paid-in capital or related operating funds of 200 million New Taiwan Dollars for the establishment of such business before their application would be approved, banks, credit co-operatives and other institutions were able to apply to the MOF for approval to engage in credit card business. There were no explicit barriers preventing financial institutions from entering the paperless payment market.

According to statistics compiled by the Financial Supervisory Commission, the current financial competent authority, there are 50 card-issuing financial institutions including 44 banks and 6 specialized credit card companies in Chinese Taipei; 43 million credit cards were in circulation in Chinese Taipei as of March 2006 and each adult had 2.8 cards on average. In addition, the percentage of credit card transactions to national disposable income was 19.5% in 2004, and there were some 130,000 contracting merchants in both urban and rural areas, thereby enhancing the accessibility of using credit cards.

2. Structure of the Credit Card Market

The inter-connected infrastructure of the credit card market of Chinese Taipei is mainly based on a "four-party system". The four parties that make up this four-party system are as follows:

1. the consumer, who applies to the credit card-issuing bank for the credit card and where delayed payment for the consumption of the good or service provided by the contracting

merchant based on an interest rate is allowed by the card-issuing bank;

2. the card-issuing bank;
3. the merchant bank (the acquiring bank), which is responsible for signing the contract with the merchant, providing the contracting merchant with the card processing machine and assorted manuals of credit card consumption to unify the service process of accepting the cards, paying or collecting bills through credit cards on behalf of merchants and handling related acquisition business. The interchange fee is paid by the acquiring bank to the card-issuing banks or institutions;
4. the merchant, who is obliged to accept the credit card payments from the cardholder. The merchant charge fee is paid by the merchant to the acquiring bank for accepting and receiving payments from a credit card.

In Chinese Taipei, the above four parties coordinate their activities to complete the credit card transactions. In certain cases, the consumer-issuing bank and the merchant bank together integrate their activities to process the transaction so that there are three parties (e.g., American Express, Diners Club). In accordance with the Regulations Governing Institutions Engaging in Credit Card Business and the related policies of the MOF, the merchants are obliged to accept the credit card payments of the cardholder; furthermore, a merchant shall not pass on the merchant charge fee to the cardholder.

The “National Credit Card Center” of Chinese Taipei (hereinafter “the NCCC”) developed out of the United Charge Card Center and was reorganized based on the investments of 7 local banks. It was originally designated by the MOF as the exclusive organization for handling the domestic acquisition business related to local bank credit card transactions and as the centralized clearing house that processed foreign credit card transactions until 1996. The deregulation has caused the domestic acquisition market to become more competitive. However, the excessive competition in the acquisition business has resulted in a reduction in the marginal benefits and has discouraged new entrants. The NCCC currently enjoys a dominant position in its specific market in Chinese Taipei.

3. Enforcement of the competition law in the credit card market

The Fair Trade Act of Chinese Taipei (hereinafter “the Law”) was first promulgated in 1992. In the meantime, the restrictions on credit card-related business have been lifted and the credit card market opened to local and foreign banks. The liberalization and deregulation of the financial market have resulted in the credit card market becoming increasingly competitive.

In 1994, the NCCC and its member banks applied for approval of a concerted action exemption from the Law on matters that were related to a plan to establish a recruitment standard for merchants, to encourage merchants to accept card payments, to determine merchant charge fee standards for different types of merchants, and to set the interchange fee paid to card-issuing banks at 1.55% of the transaction.

The Fair Trade Commission of Chinese Taipei (hereinafter “the Commission”) deemed that the above plan in so far as it related to determining the merchant charge fees and interchange fees would result in price-fixing effects among acquiring banks and would exclude the competitors of the incumbent member banks from the acquisition business market. Since the NCCC was the centralized clearing house and a financial institution handling acquisition business, it needed to adopt a neutral stance and not set the standards for related fees to avoid conduct that could be regarded as an abuse of dominance. Thus, the Commission rejected the application and ordered the applicant to justify the plan.

In response to the opposition of the Commission, the NCCC decided not to invite member banks and regional clearinghouses to jointly determine the said fees. However, in order to increase the efficiency of the credit card clearing operations by establishing the said fee standards, the NCCC suggested that the MOF appoint the Bankers' Association, a non-profit and neutral organization, to determine the fees. The MOF, as the sector regulator, indicated that the said fees were based on an operating mechanism that involved the card-issuing institutions and acquiring institutions in the clearing of their creditors' rights and credit card transaction debts. The fees were not directly related to the rights and interests of cardholders or the contracting merchants. A prohibition of uniform clearing fees would have resulted in substantial increases in time and cost for clearing, would have reduced the efficiency of clearing, and might even have caused confusion in the credit card market. However, in regarding any formulation, drafting, announcement or alteration of agreements on prices or fees for services provided either by financial institutions, banks or trade associations as being a breach of the Law, the Commission thus issued a letter requesting that the Bankers' Association put off the meeting to be attended by the NCCC and its member banks.

At present, the interchange fee that the acquiring institutions pay to the card-issuing institutions is 1.55% of the value of the credit card transactions in Chinese Taipei.

4. Impact of the selected case

In the case selected above, the Commission rejected the NCCC's application and further ordered the Bankers' Association that had been appointed by the MOF to put off the meeting that was to discuss the scheme involving the said fees because the prohibition of hard-core cartels should be a bright-line rule. On the other hand, the MOF as the sector regulator put forward a different viewpoint for enhancing the operational efficiency of the acquisition market by lowering the costs of negotiating the related fees and charges. Thus, in order to have an in-depth understanding of the needs of uniform interchange fees and merchant charges, the Commission embarked on a research project with representatives of academia to determine the best-fit measures.

The study concluded that referring to the uniform standards of interchange fees and merchant charges could effectively lower the negotiation costs between card-issuing institutions, the acquisition institutions, and the merchants. As a result, the operational efficiency of credit card organizations, the scale of credit card transactions and the circulation of credit cards would be stabilized. Different interchange fees paid by the acquiring institutions to card-issuing institutions would result in the card-issuing institutions discouraging cardholders from engaging in consumption with the merchant, so that the acquiring institutions would lower interchange fees, thereby hampering the circulation of such credit cards.

Even though the unified determination of the relevant fees for credit cards might be necessary from the MOF's point of view, an appropriate fee standard is difficult to measure. An excessively high interchange fee will reduce the profits of the acquiring institutions and increase the charges the merchants are required to pay, whereas an excessively low interchange fee will result in the card-issuing institutions being unable to cover their costs and they will thus withdraw from the market. None of these outcomes is beneficial to consumers or in the interests of society as a whole.

In addition to the difficulty of the determination of an appropriate rate standard, from the Commission's point of view, Article 14 of the Law has been a general rule for regulating horizontal agreements, which prohibits enterprises from partaking in concerted actions. The special exemption of the concerted action related to the price issue arises in order to improve operational efficiency or strengthen the competitiveness of small and medium-sized enterprises on the condition that these actions are beneficial to the economy as a whole, are in the public interest and have had prior approval. Moreover, a strict procedure has been established for the review of applications for exemptions for joint price fixing by

small and medium-sized enterprises. In the selected case above, the NCCC failed to prove that a joint pricing plan in regard to the fees related to credit card payments could strengthen the efficiency of the market, and neither the NCCC nor its member banks are small and medium-sized enterprises.

Furthermore, the prohibition of concerted action is applied to trade associations in addition to enterprises because of the extreme ease with which the former can engage in restricting the activities of enterprises either through their charter, a resolution of a general meeting of members, a board meeting of directors or supervisors or other means. Thus, even the Bankers' Association should put off the meeting to be attended by the NCCC and its member banks.

In consequence, considering that price fixing is not typically needed to support the efficiency of the operation of the credit card business, the Commission tends to not accept the further application related to the determination of the said fees from the NCCC.

INDONESIA

Payment instruments in Indonesia have changed greatly in the last few years. The use of cash and check as a dominant medium of payments for goods and services transactions in the last decade has gradually shifted to the use of paperless payment or cards transactions. While this shift occurred in the last thirty years in developed countries, in Indonesia, this shift was just started in the last few years.

Indonesia Central Bank, Bank Indonesia, stipulated decree No. 7/52/PBI/2005 on the use of cards as an instrument for effecting transaction payments. This decree allows four types of non-cash medium of payment for transactions, namely ATM card, credit card, debit card, and prepaid card.

Bank Indonesia in 2005 recorded that the value of ATM transactions reached US\$ 77 billion (25.38% of GDP). This value increased more than three times compared to 2001 data, which was US\$ 23 billion (12.29% of GDP). Debit card payments were the second largest in volume of transactions made, reached up to US\$ 20.09 billion (6.62% of GDP). The credit card transactions value was still far below the ATM card and debit card, that is US\$ 6.14 billion (2.02% of GDP). Yet, the credit card transactions increase consistently every year.

1. Structural Condition

Both banks and non bank institutions may deal in cards based transactions. On the other hand, Bank Indonesia and the Ministry of Finance are the authorities with vital roles pertaining to the entry and exit of those institutions deal with cards based transactions. Any banks that intend to conduct cards based transactions, must obtain an approval from Bank Indonesia, and non-bank financial institutions must obtain it from the Ministry of Finance, prior to an operational permit from Bank Indonesia. Further discussion on issues covered in Bank Indonesia decree No. 7/52/PBI/2005 presented hereunder.

1.1 *Entry Requirement*

1.1.1 *For a Principal*

Role as a “General Principal”—that means a Principal whose rights of the brands can also be used by other issuer based on written agreement -- can be obtained by Non-Bank Institution, while role as a “Special Principal” – whose right can only be used by itself and act as an issuer and/or acquirer-- can be done by both banks and Non -Bank institutions. To act as a Principal, both banks and Non-Bank institutions are obliged to submit written reports to Bank Indonesia, on their planned activities to work as Principals

1.1.2 *For an Issuer*

Both bank and Non-Bank institutions can be an issuer of credit card, ATM card, debit card, and/or prepaid card. However, Bank Indonesia circular No. 7/59/DASP requires Non-Bank institutions to have an approval from the Ministry of Finance in advance.

Furthermore, a limitation also applies to Non-Bank institutions, as not every Non-Bank institution may issue ATM cards and/or debit cards. It is only for those authorized to mobilize public savings based on Laws on Non-Bank Institutions. Prior to obtaining operational permission from Bank Indonesia, banks and Non-Bank institutions have to submit a written request on their planned activities as card issuers.

1.1.3 For an Acquirer

Every bank and Non-Bank institution can be a Financial Acquirer for credit card, ATM card, debit card, and/or prepaid card. Non-Bank institutions permitted to act as an acquirer are those authorized to channelling credits or to conduct payments, based on Laws on Non-Bank institutions. Both Banks and Non-Bank Institutions wishing to serve as acquirer are obliged to obtain prior permission from Bank Indonesia.

1.2 Exit Condition

Bank Indonesia has an authority to suspend or to cancel the approval for both Banks and Non-Bank institutions, based on some considerations such as:

- Worsened financial condition of Bank (for banking institution).
- Recommendation from supervisory authority for Non-Banking institutions to postpone or to cancel approval given to the Non-Banking institutions to act as an issuer.
- The shortfalls in risk management of the Banks or Non-Bank institutions, which perceived can harm financially for related parties dealing with this card based transaction or in a larger scale, to national economy.

Bank Indonesia as a regulator has taken several strides to improve regulations on card based transactions payments. Decree No. 7/52/PBI/2005, for example, aims to improve the quality of card holders as well as better protection of card users, with regards to transparency rights and obligations.

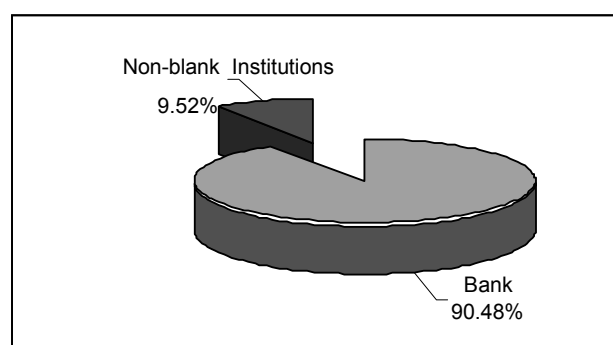
2. Competition in Card Based Transactions Payments Industry

The competition in card based transactions payments (or business using ATM, debit card, and credit card) becomes tighter. There are four parties involved in the card based transactions payments business, namely, the principal, the card issuer, the acquirer, and the switching companies. In general, the concentration ratio 4 (CR4) is used as an indicator of degree of market power wielded by leading companies. It is clearly depicted that the structure of card based transactions payments industry, especially for credit card and debit card, are dominated by few companies. The concentrated market can be measured using two main indicators (1) number of cards issued, and (2) the value of card based transactions payments made by the four leading companies.

3. The Market Concentration in the Credit Card Industry

Bank Indonesia latest data (2006) recorded 21 institutions issuing credit cards, 10 out of it are acquirers.

4. Instructions in Credit Card Business



Source: Bank Indonesia

The chart above illustrates that banking institutions play a dominant role in the use of credit card. 19 out of 21 institutions (90.48%) cards issuer are Banks and only 2 institutions (9.52%) are Non-Bank institutions. Non-bank institutions in this credit card industry in are GE Finance and Dinners Club. Overall, in credit card business, 9 banks are both card issuers and acquirers, while the remaining 10 has operational license as card issuers only.

Indicators of Competition in the Credit Card and Debit Card Industries

Description	Institution	Share (%)
Market share of four leading credit card Principal in Indonesia in terms of the number of cards issued	Visa	52.7
	“B”	44.9
	Diners	0.14
	JCB	0.14
Market share of four leading credit card Principal in Indonesia in terms of transaction value	Visa	58.5
	“B”	41.2
	Diners	0.18
	JCB	0.05
Market share of four leading Banks and Non-Banks Institutions credit card Issuers in Indonesia in terms of number of cards issued	Citibank	18.3
	GE Finance	14.8
	BNI	11.8
	HSBC	9.6
Market share of four leading—idem-- bank and non-bank credit card Issuers in Indonesia in terms of transaction value	Citibank	28.8
	HSBC	13.3
	BNI	9.9
	BII	7.5
Market share of four leading of –idem--bank and non-bank debit card Issuers in Indonesia in terms of number of cards issued	BCA	28.8
	Mandiri	22.5
	Lippo	10.7
	Niaga	8.2
Market share of four leading of Banks and Non-Bank Institutions as debit card Issuer in Indonesia in terms of transaction value	BCA	82.8
	Mandiri	6.9
	Niaga	4.6
	Lippo	1.4
Market share of four leading of Bank and Non-Banks financial acquirer in Indonesia in terms of transaction value	BCA	33.8
	BII	18.1
	Mandiri	10.7
	Citibank	9.9

Description	Institution	Share (%)
Market share of the largest three leading debit card switching companies in Indonesia in terms of number of card issued (million)	Prima Network	49.6
	Alto Network	29.3
	ATM Bersama	21.1
	Link Network	-
Market share of the largest three leading debit card switching companies in Indonesia in terms of transaction value (billion rupiah)	Prima Network	54.3
	Alto Network	33.1
	ATM Bersama	12.6
	Link	-

Source: Bank Indonesia

Several companies dominate the provision of credit card principal services. Using CR4 parameters, four leading credit card principals have 97.88 percent share, while the rest has merely 2.12 percent market share. Nonetheless, the structure of the credit card industry in the principal category, attests to the dominance of just a single company. This company issues 52.70 percent of all credit cards in circulated in Indonesia. The same applies to the market share in terms of transaction value. Four companies have 99.93 percent of the total value of transactions received by the principal for their brand use. However, it is found that 58.50 percent of the cumulative 99.93 percent is attributed to a single company.

The market structure for credit card issuers is also dominated by company. Regarding the number of credit cards issued, the CR4 ratio was 54.50%. The number of cards issued has a linear influence on the transaction value. CR4 ratio on the value of credit card transactions shows that 59.50% of the total transaction values were attributed to the four largest credit card issuers.

Market structure in debit card and credit card, reveals the similar pattern. CR4 on the number of debit cards issued shown that 70.20% market shares belong to the four largest debit card issuing institutions. Based on transaction value, the four largest debit card issuers had CR4 95.70%. Nevertheless, one company contributed 82.80%. This indicates a dominant position of a single company in the debit card industry, which in some extents may lead to a monopoly position.

A concentrated market in Indonesian credit card industry on financial acquirer perspective shows the dominance of several companies. The CR 4 for four leading acquirer shows that the total value of credit card transaction was 72.50% and 33.80% of which contributed by one Acquirer Company. In accordance with the numbers of transactions involving switching companies, 7.7 million transactions with nominal value of US\$ 355.55 million was contributed by the largest three switching companies.

5. New Technology

In this highly competitive industry technology is one of the important factors to invite customers. Technology applicability increases number of customers and improve Banks' efficiency and its services. The following is a matrix of innovation on technology for several Indonesian banks.

Technology used by Several Banks in Indonesia

No	Bank	Technology
1.	Mandiri	<i>Core banking system (eMAS Program)</i>
2.	BCA	<i>Electronic delivery channel (EDC), such as ATM, internet banking, mobile banking</i>
3.	BNI	The communication system and technology based on VSAT technology that could be used as means of money transfer, SWIFT transaction and Point of Sale (POS).
4.	BII	BII was the only bank in Indonesia that offered credit card with smart chip and all forms of important facilities in chip as well as Personal Identification Number (PIN)

Source: website each bank

For technology adoption, several banks in Indonesia have made strides in banking technological innovation such as internet banking and mobile banking. Both companies and customers benefited by such innovations. For the company/Banks, the technological innovation improves cost efficiency (cost of communication, human resources, and infrastructure) and improves customer's perception of bank products. For the customer, technology makes all transactions much easier, safer, more comfortable, and greatly saves time.

6. Fees and Charges

Issuers in Indonesia gain income from some sources, such as for debit card issuing: administrative, book replacement, closing accounts, and card replacement charges, and joint/plus ATM network fees. For credit card issuing, incomes generated from monthly or annual subscription, interchange fee, merchant charges, interest income, ATM installment payment fees and penalty charges.

Bank Indonesia noted that the annual fee charges depend on the type of credit cards. For the regular card, the annual fee ranges from US\$ 8.33 to US\$ 18, gold cards are about US\$ 13.89 to US\$ 36.67; platinum card range between US\$ 55.56 and US\$ 111.11 and infinite card is approximately US\$ 555.56 each year. The annual interest rate also depends on the type of card. For regular and gold cards, interest rate ranges from 21% to 48%, and for platinum and infinite cards, between 39 % and 48 %. In fact there is no rule from the authority on annual fees and annual interest amount should be charged to credit card holders.

Besides the subscription fee, credit card issuers also generate income in form of interest charged on credit arising from the use of the credit card. Interest rate differs from one bank to another and the recent trend shows that the interest rate is about 3.25% per month. The administrative cost charged for cash withdrawal varies among issuers. Some issuers charge fixed costs, while others charge by the percentage of withdrawal made. For credit card payment through ATM, the card holder should also pay administration cost approximately US\$ 1.11 for each transaction.

Fines and costs are another source of income for issuers. The following table shows the credit card charges as applied by several issuers in Indonesia

The Transaction Cost of Credit Card that was worn to Customer in Several Bank

No	Bank	Parameter	
		Monthly or Annual	Fees and Charge (at transaction time)
1.	Mandiri	Mandiri Visa Gold : US\$ 3.06/month Mandiri Visa Silver Rp US\$ 1.5/month	
2.	BCA	Free charge	<ul style="list-style-type: none"> • Credit card payment to BCA ATM, Bank Lippo ATM, and <i>Electronic Channels Niaga</i> worn cost US\$ 0.56 per transaction. • Credit card payment to BII ATM worn cost US\$ 0.44 per transaction.
3.	BNI	Fluctuating based on bank regulation	Interest on retail transaction: 2,25 % per month Interest on cash withdrawal:: 3,25 % per month Over-limit cost: US\$ 3.33 Proportion cost on cash withdrawal:: 4 % of the debit nominal
4.	BRI	Monthly administration cost: Classic : US\$ 0.22 Gold : US\$ 0.44 Platinum : US\$ 0.78	Cash debit via : link & joint ATM: US\$ 0.33 Cirrus ATM: US\$ 2.78 BCA ATM: US\$ 0.44
5.	Danamon	Main Card: FixnFast : US\$ 13.89 /year Classic : US\$ 16.67 /year Gold : Rp US\$ 27.78 /year Platinum : US\$ 55.56 / year Additional Card: Classic: US\$ 8.33 /year Gold : US\$ 13.89 / year	<ul style="list-style-type: none"> • Interest 3,25 %. • Electronic shopping worn administration cost 3 % that come from <i>merchant</i> • The fine late paid US\$ 5.56 /month
6.	BII	Gold: US\$ 33.33 Regular: US \$ 13.33	
7.	Niaga	Main Card : - Classic : US\$ 13.89 /year - Gold : US\$ 27.78 / year - Niaga credit mini card : US\$ 16.67 / year Additional Card - Classic: US\$ 8.33 / year - Gold : US\$ 16.67 / year - Niaga credit mini card: US\$ 11.11 / year - Niaga through teller US\$ 1.11, atm free - other Bank if withdrawal: US\$ 2.22, cash US\$ 3.33 - ATM Niaga: Niaga,ABN, HSBC,Stancart card, Citibank	<ul style="list-style-type: none"> • The fine late paid: 6% from minimum of total payment (min US\$ 4.44) • Cost of over limit credit: <ul style="list-style-type: none"> - Classic: 5% from overload (US 3.33-US\$ 8.89) - Gold: 6% from overload (US\$ 5.56-US\$ 11.11) - Credit mini card: 5% from overload (US\$ 3.33-US\$ 8.89) • Cost of cash withdrawal: 4,5% from withdrawal (min: US\$ 5.56) • Cost of retail interest: 3,25% ; cash advance interest: 3,75% • Cost from <i>merchant</i> : 2,5 % from transaction value
8.	Citibank		Several ATM from other bank with the cost specification that worn by card holder, i.e.: <ul style="list-style-type: none"> • Bank Permata: US\$ 0.33 • Bank Niaga : US\$ 0.39 • BII : US\$ 0.44 • Lippo Bank : US\$ 0.44 • Bank Danamon : US\$ 0.44 • BCA : US\$ 0.56 • BNI : US\$ 0.56 • Bank Panin : US\$ 0.56 • Post office : US\$ 0.22

Source: website each bank

The cost structure of credit card differs from what applies to debit card, due to its characteristics and functions. The table below list down the administrative cost and other costs imposed on debit card users by several issuers.

The Transaction Cost of Debit Card charged to Customers in Several Banks

No	Bank	Parameter	
		Administration Cost	Fees and Charge (at transaction time)
1.	Mandiri	<ul style="list-style-type: none"> • US\$ 1.11/month if balance less than US\$ 33.33. • US\$ 0.56 /month if balance more than US\$ 33.33. 	-
2.	BCA	US\$ 0.83 /month	<ul style="list-style-type: none"> • Transfer cost for account among branches US\$ 0.83 /transaction. • Transfer through ATM is free of charge.
3.	BNI	US\$ 0.56 /month	<ul style="list-style-type: none"> • Cash debit at ATM Maestro free of charge. • Cash withdrawal: at ATM without Maestro logo, cost depends on each bank.
4.	BRI	US\$ 0.22 /month	
5.	Danamon	US\$ 1.09 /month	<ul style="list-style-type: none"> • Balance more than US\$ 277.78 free of charge. • Balance less than US\$ 222.22: Alto ATM costed US\$ 0.56 and joint ATM US\$ 0.33 • Average balance US\$ 666.67 /month, free of charge withdrawal cost in all ATM • Average balance less than US\$ 666.67 /month, charged US\$ 2.22 /transaction. • The card using for shopping in merchant free of charge. • There are certain merchants if shopping with debit card worn cost 3 % from transaction value. This is not bank request but from its merchant.
6.	BII	Free of administrative charges, except for transfer and payments.	
7.	Niaga	<ul style="list-style-type: none"> • Balance above US\$111.1 is free of charge Balance below US\$111.1 faces a charge of US\$ 0.67/month 	<ul style="list-style-type: none"> • Joint ATM: <ul style="list-style-type: none"> - Balance Information = US\$ 0.17 - Cash transaction =US\$ 0.5 - If through counter < US\$ 1,111.11 cost US\$0.56 • VISA Plus: <ul style="list-style-type: none"> - Balance Information = USD 0.5 - Cash Debit = USD 2.50
8.	Permata	US\$ 0.56 /month for administrative cost US\$ 0.17 /month card maintenance	

Source: website each bank

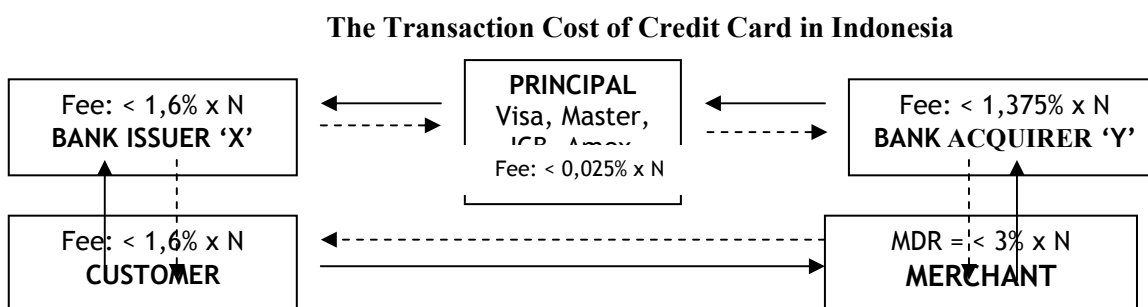
The table shows that generally, the administrative cost charged to debit card customers is still below US\$ 1.11 per month, except for Bank International Indonesia that doesn't charge administrative costs to its customers. Bank Mandiri charged the highest monthly administrative costs to its customers, which was US\$ 1.11, and Bank Rakyat Indonesia imposed the lowest administration cost, US\$ 0.22 per month. Usually, administrative cost charged by each bank includes the card maintenance fee, making it unnecessary for banks to impose other card maintenance related charges. However, this does not apply to Bank Permata that charge administrative cost of US\$ 0.55 per month, and also imposes card maintenance cost of US\$ 0.16 per month.

In addition to the administrative costs, banks also impose other costs such as for accounts closing, book replacements, and other costs. The fees vary among banks depending on policy applicable.

Banks do not set additional cost to card holders for using ATM services such as cash withdrawal, balance information, and other transactions for transactions carried out at the ATM of the relevant bank and jointly operated ATMs (like joint ATM, Alto, Maestro and others). Additional charges charged to card holders for using ATM services of other banks vary from one bank to another.

6.1 Merchant Charges

Merchants who use credit cards as a medium of payment, are charged less than 3% of the transaction value. This cost reduces profits for merchants, but by permitting the consumers to pay using credit cards, which is easier and safer, increases the volume of transactions, and in such a way allows the merchant to earn a higher profit margin. Currently, in Indonesia, no regulations on merchant charges applied.



Source: Directorate Accounting and Payment System, Indonesian Central Bank 2006

6.2 Interchange fees

Interchange fee is the fee that banks must pay to other banks, which provide interchange services for credit card, debit card, and transactions carried out using ATM by customers. There is suspicion that Interchange fee in credit card and ATM network is based on dubious internal cost judgment. In the USA interchange fee for credit card and debit cards is 1.3% of the transaction value. In Indonesia the interchange fee is less than 1.375 %.

6.3 Regulation fees

Until now Bank Indonesia as an authority for card payment system in Indonesia, does not determine the fee and the cost of each transaction made using cards. The fee and cost of each card transaction is based on the market mechanism. However, Bank Indonesia decree determines the policy that obliges card issuers, especially credit card issuers, to pay a minimum of 10% of the total card bill. This decree aims to

encourage card issuers to be more selective in attracting their new credit card customers, and to put the credit in position as a non-cash payment that facilitates transactions, rather than as a debt instrument.

6.4 *No-surcharge rule*

Transactions using cards, especially credit cards, often face various charges imposed by the credit card issuer. The card holder sometimes also has to pay charges imposed by merchants. In other words, the cost of transactions made using credit card, is more expensive than cash transactions.

Merchant charge an additional fee of between 2.5% and 3% for each transaction made depends on the kind of goods/services bought by the card holder. Merchants often impose such costs for payments on electronics, jewels, and other products. No rules ban these practices in Indonesia.

6.5 *Cost-based fees*

The determination of charges in the payment system using credit card, wholly based on the cost incurred in providing the payment Instrument service. This also indirectly reflects the efficiency level. However, in reality there is a suspicion that the determination of transaction fees on cards in Indonesia are not based on cost of credit card, rather on the agreement made by the related parties.

7. *Tying*

7.1 *Honor all cards rule*

The factor lead to credit card growth is the increasing number of merchants who co-operate with acquirer, making it possible for the customer using the credit card to be able to conduct transactions with merchants within the entire network operator. In Indonesia, there are several credit cards network operators such as VISA, MasterCard, American Express, JCB, Diners and BCA Card.

It is because of using the same network operator, makes the credit card acceptable to several merchants. This is what underlies the honour all cards rule, which in essence implies that the credit card with the same network operator is acceptable to all merchants although the cards issuers are different. However in some cases, there are merchants with preference to a single credit card from certain principal or issuer. Under such circumstances, the acquirer has made some special arrangements with merchants to give priority to credit card from certain principal /issuer than other principals/ issuers, benefiting both parties mutually.

7.2 *Distributional effects of merchant fees on non cardholders*

The non-existence of differences in selling prices between cash payment and using card, presupposes that cash users subsidize card users. The existence of merchant fees encourages merchants to set a higher selling price for credit card payment than cash payment. In some cases, some merchants impose additional fees to consumers who use credit to pay for transactions, but for cash transaction payment, consumers are given discount by merchants. This creates the impression to consumers that transactions done using credit card is more costly than using cash.

7.3 *Duality*

The problem that can emerge when the bank issuer issues more than one card, although the card user is registered for one card, he/she is automatically registered in more than one principal for example Visa and MasterCard. The emergence of this case, has led most card users to concentrate on a certain principal. This has resulted into a less competitive business climate. In other words, this problem has the potential

to create anti-competitive climate. Left unhandled, this problem is likely to stifle the card market and undermine innovation. In Indonesia, there are yet no regulations, which specifically attack the problem in the card industry.

The duality practice has not been found in Indonesia, as yet. However, Indonesian banks can co-operate with two principals in issuing credit cards. Banks that made co-operation arrangements with two principal are Bank Central Asia, BNI, Danamon, BII, and Bank Permata. Meanwhile, bank that cooperate with only one principal are Bank Mandiri, Bank Niaga, and Bank Panin. The table below shows banks and credit card principal used.

Bank and Credit Card Principal that Was Used

No	Bank	Visa	MasterCard	Other
1.	Mandiri	V		
2.	BCA	V	V	JCB
3.	BNI	V	V	
4.	Danamon	V	V	
5.	BII	V	V	JCB
6.	Niaga	V		
7.	Permata	V	V	
8.	Panin		V	

Source: website each bank

7.4 Exclusivity

There is no regulation framework in Indonesia on the issue of exclusive agreement between card issuer and principal. Nevertheless, market dynamics shows that credit card issuers can issues more than one credit card. There are even cases of card issuers for example BCA and BII issue three credit cards which are Visa, MasterCard, and JCB.

8. Conclusion and Recommendation

- The structure of paperless payment instruments in Indonesia such as credit and debit card is relatively concentrated. It seems to be caused by entry and exit requirement and advancement in technology development of infrastructure support.
- Some business strategies such as tying, exclusivity and honor all cards rule, tends to become anticompetitive conducts, although none were identified during the preparation of this paper. Nevertheless, based on the estimation of transaction cost, especially fee and interest charges that have to be paid by consumer, there is a strong indication of abusive pricing or price fixing between card issuing companies.
- Technology plays a significant role in this industry. The industry that characterized by relatively concentrated market with a small number of player, regulations of interchange fees are essential. Regulations are needed to ensure that the basic principles of fairness, openness and non discriminatory access to essential infrastructure, are applied.

ISRAEL

Israel's Antitrust Authority (IAA) has been working intensively on issues related to the credit card industry, in two major directions: Achieving a Cross Clearing Agreement between the three Credit Card Companies, and the determination of an interchange fee which does not harm competition. The object of this presentation is to provide an insight into the work of the IAA aimed to achieve these goals.

1. Background

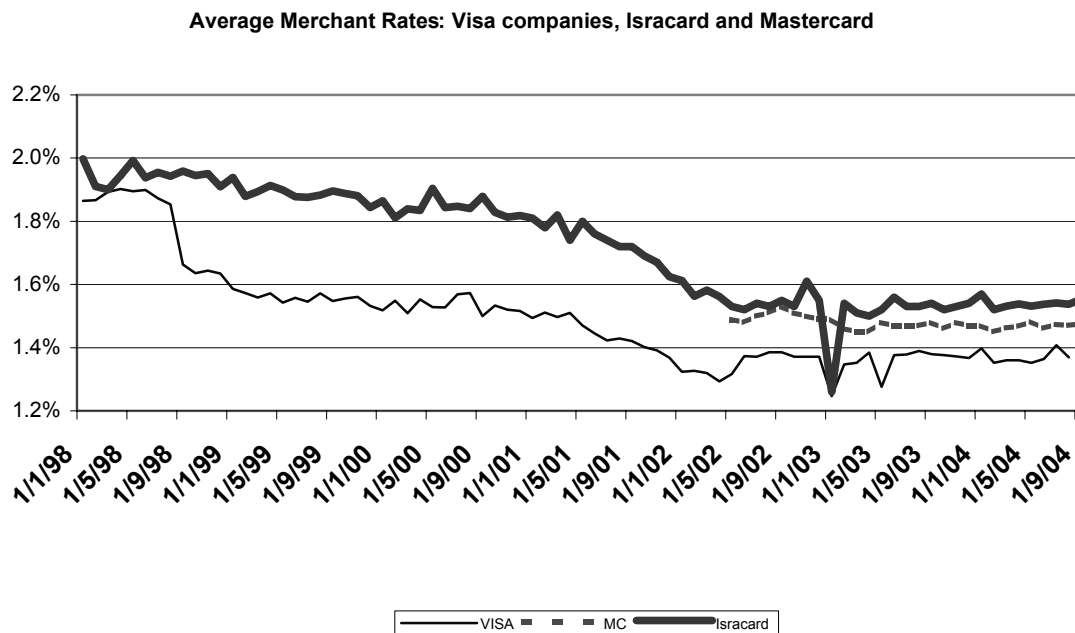
The Israeli credit card industry is comprised of three major companies:

- Isracard Ltd., Visa Leumi and Visa I.C.C. The Owner of Isracard is Hapoalim bank, Israel's largest bank. Isracard issues two credit card brands: Isracard and MasterCard. Visa Leumi is owned by Leumi bank, which is the second largest bank in Israel. And the third, Visa I.C.C is jointly owned by Discount Bank and Beinleumi Bank, which are ranked third and fourth among the banks of Israel.
- A market structure in which most of the issuing is conducted by the large banks, lessens the competition in the issuing sector, due to the fact that the competitive abilities are dependent on the existing customer base of each bank.
- The structure of the Israeli credit card industry has experienced notable changes in recent years. Until 1996 there were only two credit card companies: Isracard and Visa I.C.C which at the time was co-owned by Leumi Bank and Discount Bank. Each of these companies cleared only the cards it issued.

In 1996 a new entrant, the Beinleumi Bank, became a third player in the credit card industry by establishing the "Alpha Card" company, which received a license from Visa Int. to issue and clear Visa credit cards. The new entry to the Visa credit card sector by "Alpha"¹ and its successor "Leumi Card", required the companies to create a cross clearing system which enhanced competition in the Visa credit card sector. Businesses benefited from the rising competition, enabling them to work with the Visa Company of their choice, and consequently the merchant fee has eroded.

The rising competition in the Visa sector reduced the Visa rates at the end of 1998, thus creating a significant gap between the rates of Visa Leumi and Visa I.C.C, compared to the rates of Isracard and MasterCard.. **The Israeli experience demonstrates that cross clearing agreements can bring a substantial reduction in the merchant fees.**

¹ This entry proved unsuccessful and by the year 2000 the company ceased to exist. Due to the intervention of the Israel Antitrust, Leumi's and Discount's joint venture in Visa I.C.C was dismantled by a BMBY buy out mechanism, that left Discount Bank the sole owner of Visa Cal. Leumi established instead a new credit company based on Visa: "Leumi Card", which used the operative infrastructure of the former "Alpha" company.



2. Reaching an Interchange Fee which does not harm the competition

In order to establish a cross clearing system in the Visa sector, the two licensed Visa companies had to agree on the rate of the interchange fee that would be charged.

The IAA found that interchange fee agreements among credit card issuers and acquirers are a **restrictive arrangement** under the Antitrust Law². An interchange fee can serve as a coordinating mechanism concerning merchant commissions: as interchange fees are a substantial component in establishing the merchant commission, they generate a minimal price threshold beneath which processors will not be willing to go.

After previous exemptions granted to the interchange fee agreements between VISA companies in Israel expired, they applied to the Antitrust Tribunal for authorization of their interchange fee agreement; the court approved a temporary arrangement, which was supported by the IAA, setting up provisions which included: A gradual reduction of merchant commissions, a reduction of the magnitude of the discrimination in interchange fees charged for processing different categories of businesses, and the prohibition of the practice of tying banking services to the clearance or issuance of the banks' credit cards. Businesses which use both VISA companies processing services and VISA International requested the

²

A "**restrictive arrangement**" is defined as an arrangement made between two or more persons conducting business that limits at least one party to the arrangement in a manner that may prevent or reduce competition. In addition, the Antitrust Law provides for a number of specific restraints, the existence of which constitute an irrefutable presumption that damage to competition exists.

Entry into a restrictive arrangement without the authorization of the Antitrust Tribunal (or without a temporary authorization) is forbidden, unless the arrangement was exempted specifically by the General Director

Antitrust Tribunal to join the proceedings and present their perspectives on the proposed interchange arrangement.

Since the Visa companies in Israel were reluctant to expose their costs data, it was agreed to bifurcate the proceeding: The first step was to decide upon the required methodology to set the interchange fee and in the second step to apply the methodology on the given costs data and thus set the interchange fee.

The main dispute which exists between the IAA and the Visa companies relates to the methodology that should be applied in setting the rate of the interchange fee. The IAA's position is that the rate should be derived from the visa company's cost of clearance which is composed of: cost of direct damage caused by fraud and bankruptcy, cost of cross-cleared transactions processing and cost of risk management. In contrast, the Visa companies position is that the rate should be based on the **total** issuing costs minus the revenues from card holders' membership fees.

3. The Isracard - MasterCard Monopolies in the Isracard and Mastercard Clearing Markets

The Isracard-MasterCard sector is controlled and exclusively cleared by a single company, as apposed to the Visa sector. Therefore Isracard has market power, exposed through the merchant fee, which is substantially higher than the other companies. According to our findings, businesses feel obligated to accept Isracard and MasterCard, due to the fact that Isracard claims a substantial share of the total credit card transactions. Isracard's market power is due to the low substitution rate between Isracard, Mastercard and Visa, which is a result of the low percentage of dual card holders. The low substitution rate between Isracard and Visa is also reflected by the high percentage of businesses which accept both Isracard and Visa.

An example of Isracard's market power and the low substitution rate of credit cards and alternative means of payment can be demonstrated by the effect of the temporary exemptions that were given to the Visa companies. As a condition for the exemption, the Visa companies were required to limit the discrimination between the price categories of different businesses and merchants. The limiting of discrimination between businesses has caused a significant price increase in the merchant fee for some of the businesses, especially in the supermarket chains.

The existence of alternative means of payment, such as checks and cash, did not prevent the supermarkets from accepting the significant price increase. A thorough examination of the economic department of the IAA has not found a single supermarket that chose not to respect all three credit cards, or to divert payments to cash or checks. The above example of the supermarket chains proves the low substitution rate between credit cards and cash.

In 2005, The IAA declared Isracard a monopoly in the Isracard and Mastercard clearing markets, in order to impose instructions regulating the Isracard clearing and facilitate the opening of the Isracard and Mastercard clearing to competition³.

Isracard is now appealing against the declaration of Isracard as a monopoly and contests the definition of Isracard and MasterCard as separate Markets, which is the basis of the declaration.

³ The Visa companies are able to cross single-payment transactions of Mastercard. Their crossing ability isn't significant, because it is only a "handicapped" crossing. The same is true about the crossing of Visa by Isracard.

4. The main objective of the General Director: A Cross Clearing Agreement Between the Three Credit Card Companies

The vision of the IAA is a credit card industry which is subject to competition on all levels. The IAA aims to reach a total set of agreements concerning credit card cross clearing which will encompass all companies in the credit card industry. Fundamentally the agreement would include opening the Isracard and MasterCard clearing to competition. The Declaration of Isracard as a monopoly is an important step in reaching this goal.

In the meantime, there is an attempt to solve competitive problems in the credit card industry through legislation. The proposed legislation, if passed, will require all credit card issuers to enable other credit card companies to clear their card. Due to the mounting pressures of the IAA and the legislation in process, the credit card companies themselves are realizing that a fundamental change in the market structure is under-way, and are proposing to introduce changes which they expect the IAA would find satisfactory.

The process of opening the credit card industry for competition is high on the IAA agenda, and substantial progress has been made. Even though there is much more to be done in order to enhance competition in the credit card industry, it seems that the process of opening the credit card industry to increased competition is in motion.

LITHUANIA

1. Social costs and benefits of the payment systems

The payment system in Lithuania is based mainly on cash and payment card settlements. Check payments are used very rarely. Till now no domestic estimates have been produced of the relative costs of cash and payment cards.

2. Payment card system: exit and entry conditions

There are 2 international payment card systems operating in Lithuania – VISA and MasterCard. Also there are some domestic payment card systems that operate only on a very limited scale. It should be noted that only 2 out of 8 banks provide domestic cards¹. Domestic cards are being receded from the market. In order to join an international payment card system or to start producing new payment product, the bank must become a licensed member of the said international card payment system. The licence fee differs depending on the system and type of the licence. The fee for the joining of the MasterCard system is EUR 50,000-150,000, and that for the VISA – up to EUR 545,000. In addition banks pay fees for licenses to issue the relevant individual products. Such admission fee policy has played a role in the decision making of smaller banks many of which have chosen to join only one payment card system.

During the 3 years' period under review 2 new smaller banks entered the market. That did not have any more tangible impact to the situation in the market, because each of them have joined only 1 system, besides having a very limited number of customers.

3. Merchant charges

The scale of the card usage has expanded considerably in the course of the 3 years' period under consideration. This conclusion is confirmed by the data supplied by the banks participants of the survey (table 1).

Table 1.

	2003	2004	2005
Credit cards (units)	2,414,879	2,826,000	3,163,356
Growth		17%	12%

The number of credit cards in the Table 1 represents the total number of VISA, MasterCard and domestic payment cards. The increasing number of transactions, made by banks as issuers or acquirers also demonstrates the expansion of the payment cards market.

¹ The data included in this contribution were collected by having sent a questionnaire to 8 commercial banks operating in the Lithuanian payment card market, to the Bank of Lithuania and to some trading community entities. The inquiry covers a 3 years' period (2003-2005).

Table 2.

	2003	2004	2005
Transactions, 000	26,993.48	38,783.75	57,850.29
Growth		43%	49%
Value, m LTL	2,395.58	3,538.05	6,700.07
Growth of value		47%	89%

Table 2 presents the data on the number of transactions performed by the banks as issuers (the number of transactions performed in the role as acquirers being very similar). All banks taking part in the survey act as issuers.

The comparison of the growth of the market with merchant charges can contribute to drawing the conclusions about the existing (or absent) market power in this specific field.

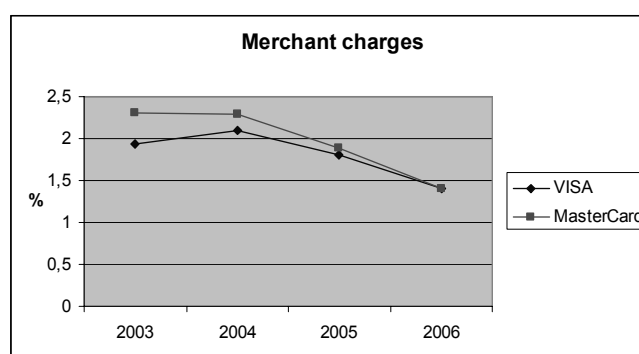
There is an observable increase in the number of the payment cards which is a normal phenomenon in emerging markets. Merchant charges have been gradually decreasing which is clearly illustrated by the data presented in the Table below:

Table 3.

		2003	2004	2005	2006
VISA	merchant charge cards (units)	1,93%	2.09%	1.81%	1.4%
MC	merchant charge cards (units)	1,387,249	1,703,010	2,052,705	
		2.3%	2.29%	1.88%	1.4%
		704,746	785,265	825,793	

Obviously the increase in the merchant charge of VISA payment cards in 2004 was just negligible, although any conclusions on the reasons for such an increase are difficult to arrive at since exhaustive data of 2003 have been collected.

The data show the existence of the inverse relation of payment card number and merchant charges. It could be treated as an indication of no evident market power of acquirers which facilitates competition between banks over the merchants exists. Five commercial banks acting as acquirers operate in the Lithuanian market.



The increasing number of the card holders means the cardholders' demand for the POS services. Thus the increasing demand of POS services stimulates the growth in the number of transactions at acquiring banks. The examination of the merchant charge trend could possibly testify to the increasing competition between the acquirers for the merchants. This situation could hardly lead to the emergence of any disproportional development of the merchant charges.

This assumption could be confirmed (or denied) by further analysis of the interchange fee. Competition between acquiring banks for the merchants is possible when the merchant charge is higher

than interchange fees (i.e. banks have a possibility to earn through maintaining merchants). The analysis of interchange fees is presented below.

4. Interchange fee

As has been indicated by the banks participating in the survey the interchange fee is determined by the payment card systems (VISA, MasterCard) and does not differ to any more significant extent from bank to bank. It means that in the interchange payments' level the banks have only very limited possibilities (or virtually none) to negotiate with each other in terms of the interchange payments rates and other terms. The margins of interchange fees in Table 4 cover both domestic and international interchange fees (domestic fees are slightly lower than the international charges).

Table 4.

	VISA		MC		domestic card systems	
	debit	Credit	debit	credit	debit	credit
Margins of Interchange fee, %	1-1.5	1-1.5	1-1.5	1-1.5	0.6-1	0.6-1

The data presented in Table 3 (merchant charges) and Table 4 (interchange fees) shows, that merchant charges are higher than the interchange fees. It means, that by paying merchant charges merchants redeem interchange costs, paid by acquirer to issuer. The positive difference between merchant charge and interchange fee allows the acquirer to earn some profit. On the one hand, issuer can gain increasing market share of cardholders due a considerable number of interchange transactions. On the other hand, for a bank it is a reasonable choice to hold a larger number of merchants as their transactions cover the interchange fees.

In the merchants' opinion the merchant charge is still excessive and should be reduced below 1%. On the other hand, merchants recognise that merchant charges are partly determined by the stable interchange fee (1-1.5%) that limits acquirers' possibility to compete in service prices.

5. Regulation of fees

Under the Lithuanian legal system Central Bank of Lithuania acts in due to all functions set by Law on Lithuanian Central Bank², including supervision over payment systems. The operations of credit institutions and payment systems are regulated by the Law on Payments of the Republic of Lithuania³. The Law also regulates the usage of the electronic payment instruments. The relationship between banks and the institutions are based on contractual terms in the same manner as joining the international payment cards networks. The Law does not contain any provisions authorising the Bank of Lithuania to influence the payment card system, based on contractual basis. The relations between banks and the banks' strategy regarding the cardholders and merchants are based on competition and partly influenced by international payment card systems (VISA, MasterCard). Payment card systems determine interchange fee of participants, licensing and other conditions of membership.

² Law on Lithuanian Bank, 1994.12.23, No. 99 (VŽ, 2001, No.: 890)

³ Law on Payment, 1999.10.08, No. VIII 1370 (VŽ, 1999, No.: 97).

6. No-surcharge and no-discount rule

The merchants that provided responses to the questionnaires noted, that merchant charges are not transferred to buyers (this is restricted by the terms of the agreements with the acquirer). It means, that merchant cannot charge neither customers using a card nor customers using cash.

7. Cost-based fees

To the opinion of the Bank of Lithuania the interchange fee should be computed following the principles of cost-basing and transparency. The Bank of Lithuania, however, noted that it has no authority to intervene into payment card market.

Costs of issuing and acquiring activity are difficult to identify and to estimate. For instance, the costs structure of acquiring activity differs from bank to bank. Interchange fee consist a major part of total acquiring business costs, i.e. 54-87% of total acquiring costs, while the other two indicated other costs (for example, transaction processing costs, terminal renting costs): 50-77% of total costs. Very similar situation occurs calculating the issuing business costs. No evident cost-scheme can be identified – issuing cost (or revenue) structure differs from bank to bank. This could be possibly treated as an indication of an undetermined cost account system of this service.

8. Distribution effects

As mentioned before, merchant charges are not transferred to buyers (this is restricted by the agreement with acquirer). That means, merchant fees did not lead merchants to set higher prices for their goods in order to redeem merchant charge. Therefore, non-card users do not pay for their goods more than cardholders.

9. Competition law application and joint activity by merchants

Lithuanian retail banking market remains a very new area for Lithuanian Competition Council. Up until now the Competition Council of Lithuania has not had a case of any legal proceedings related to any infringement of the regulations related to the payment card system.

Joint venture of the merchants for developing of a new retail payment should not directly or indirectly fix purchase or selling prices, limit production markets and technical development, effect the prevention, distortion or restriction of competition. The joint venture activity would be assessed whether it contributes to improving the production or distribution of services or to promote technical or economic progress.

10. Other comments

Survey shows, that most of the issuers only recently (since 2005) started operating on a profitable basis while many, from the activities in question, incur losses. The major part of the income naturally is generated from the cardholders' payments and interchange fee. The issuers having the largest number of cardholders' numbers gain mostly from cardholder fees, while others – from interchange fees.

The banks compete also in the cardholders' market side. The rates of cardholders' fees are different in all banks, subject to the payment system operated, type and the term of validity of the payment card. Nevertheless, certain trends are becoming clearly discernable. A group of smaller banks indicated that the payment card purchasing fee has been decreasing (up to 250% of decrease), while the major banks maintain prices almost stable although offering for the same charge a much wider range of services. The latter now includes is the free travel insurance when leaving abroad, modern chip technologies, etc. The

fact indicates that the emerging market and the increase of payment cards demand leads to reduction of payment card purchasing price.

The growing income from the cardholder fees clearly demonstrates the attractiveness of the issuing activity. Most of the banks that participated in the survey indicated that cardholder fees constitute the main share of all card issuing revenue. Besides, some banks indicated that income from cardholder fees during a three year period has increased more than 4 times. The fact that the number of the issued payment cards grows slower than the rate of the revenue from the issuance of the payment cards, could be treated as an indicator, that the high demand of payment cards makes it possible for the issuers to maintain high costs of cards for consumers and they are unlikely to decrease within the foreseeable period of time in proportion to the increase in the number of the issued payment cards.

RUSSIAN FEDERATION

1. Structural Conditions

1.1 *Social costs and benefits of different payment systems*

Detailed analysis was not made.

It should be noted that in Russia the capacity of banking services for business and citizens is rather small and the cash turnover is disproportionately larger than clearing. One of the main benefits from using of payment cards is increase of legalized part of trade turnover in the state. In this connection the state takes measures for stimulating the market development considering at the same time the difference between cash payment and payment by cards. The RF Ministry of Finance is very careful in introducing benefits and discounts for this or that kind of payments assuming that the tax system is uniform for everybody and that tax allowance can be introduced only for that group of products that are of social significance but not of economic significance.

The Federal Antimonopoly Service, having analyzed the agreements between legal persons and banks on the so-called “salary projects”, came to the conclusion that for the consumer the cost price of the payment cards is near “0”. At the same time in each particular case (issue of payment cards, instalment and maintenance of cash machines for lending agencies; servicing of payment cards for customers; printing of cash, collection of payment for the state) there are spending that are commensurable by their cost. Thus the question of using this or that way of payment is solved to the benefit of the most profitable way. For example, speaking about the so-called “salary projects”, we can state that an enterprise gets the following benefits:

- Funds saving on the administrative spending, connected with the work with cash;
- Secure and quick way of paying a salary

Transfer of money for a payment card gives the following advantages for an employee:

- Security and comfort of keeping and using money.
- Access to the network which includes a lot of sales outlets and cash machines.

1.2 *Exit/entry*

At present there are both Russian and international payment systems in the Russian market of payment cards. Most of these systems entered the market at the beginning of 90-ies. Stagnation is observed in this market during the last years. Number of the market participants is increasing mostly at the account of lending agencies.

The lending agencies record the following barriers for entry in the payment system:

- economic inexpediency;

- unavailability for the entry into the system;
- high original investments;
- difficulty in business-plans co-ordination;
- level of prices for entry and participation in the payment systems is too high;
- there is hard system of statuses which restricts the rights and possibilities of a bank in the system, depending on its share in the payment cards market, level of its business-plan fulfilment and so on, and makes unequal the conditions for metropolitan and regional banks;
- bad level of organization of relations between association of the payment system bank-members and associated members of the payment system.

Competition in the payment cards market is useful for all participants of the market. Great potential of the market growth is evident as at present in Russia only 8-10 consumers out of 100 use cards and 90% of all operations with cards are generated by 10% of all cards' owners. So the main aim of the payment systems and the banks included in these systems is to increase the volume of operations with the cards in shops, restaurants and other business and servicing centers. It is aimed not only at developing of the network of cards' reception and service but also at increasing the variety of types of cards introducing new advantages for the cards' consumers. The mentioned activities of the payment systems are beneficial both for consumers and for any trade and servicing center.

1.3 *New technologies*

The most crucial point in this sphere in Russia is the matter of use of new technologies. It is especially typical for the regions where the telecommunication structure which is necessary for clearing is less developed. Chip-card that does not need on-line connection with the bank for transaction has become one of the solutions. The Russian banks have achieved great success in transition to the "chip" technologies. New technologies which let manage the account through Internet and mobile telephone and get access to consolidated information on all bank accounts are being introduced.

There are difficulties connected with the usage of outdated software in some banks and sales outlets.

Besides, there are mistakes in transfer of information. In this connection the question of introducing requirements for the use of software providing for outdated versions withdraw if under investigation.

1.4 *Interchange fees*

From the point of view of the antimonopoly body these fees are necessary as they are aimed at reimbursement of issuer's costs.

Speaking about the amount of these fees it should be noted that in accordance with the antimonopoly legislation it is forbidden for a dominant company to establish unjustified high (low) price for a financial service as well as to conclude agreements restricting competition which are aimed at establishment (maintenance) of prices (tariffs), discounts, extra charges, additional mark-ups and interest rates.

Non-competitive method of establishment of such payments, including by the state, will have negative impact on the market, i.e. reducing of bank commission in the presence of competition between banks may lead to increase of the number of bankruptcies, loss of confidence in banking system and capital outflow.

Thus in Byelorussia the commission for sale outlets servicing had been lowered to such extent that the acquirers began to leave the market. In such a situation the banks can simultaneously increase the other commissions for payment cards in order to recover losses.

1.5 *No-surcharge and no-discount rule*

There are no corresponding legal rules in this country. Sale outlets can allow a discount to the owners of a particular card independently. This practice, for example, is widely spread in payment for fuel by cards (the owners of "Sbercard" get 3% discount at all filling stations of "Sibneft" in Tumen, where special terminals are installed).

But there is no practice when the price is higher for those using card and at the same time is low in cash. Mainly the price of a commodity is higher in the shops using POS terminals than in the shops where the POS terminals have not been installed.

1.6 *Cost-based fees*

In this country the conditions of provision of funds for operation with payment and credit cards the order of repayment as well as extra charges and interest payments are determined by the bank-issuer in its agreement with the customer. Emission of banking cards, payment cards' acquiring and distribution is implemented by lending agencies on the basis of the rules and regulations established within the payment system and banks elaborated by the lending agency in accordance with the RF legislation and normative acts of the RF Central Bank.

So the types and volume of payments and expenses are established by the lending agencies independently under the influence of the market situation. At the same time the legislation forbids for a dominant company to establish unjustified high (low) price for a financial service as well as to conclude agreements restricting competition which are aimed at establishment (maintenance) of prices (tariffs), discounts, extra charges, additional mark-ups and interest rates. The antimonopoly body is authorized to exercise regulation in this sphere.

2. *Tying*

2.1 *Honour-all-cards rule*

At present such technologies are not used in Russia.

2.2 *Distributional effects of merchant fees on non-cardholders*

Recently more and more sale outlets have joined to the cards payment system despite the fact that they have to pay for it. Undoubtedly, it is profitable for the sale outlets as it let attract more customers. At the same time the payment for this service is included by the sale outlet in the price of the commodity, i.e. the price of the commodities in these sale outlets is higher than in that one where this type of services is not rendered.

There are, however, sale outlets (supermarkets of economy class, for example) that work for lowering the commodities' price as much as possible and therefore the extra costs connected with the entry into the cards payment system are of no advantage to them and they do not use the system.

Thus there is subsidizing of the cards' owners by the non-owners, but the customer can always choose the sale outlet according to his means.

3. Information Limits

The customers' possibility to get information about the cost of the services and cards availability from the cards payment systems, issuers and acquirers is extremely low in Russia. Banking charges are not duly exposed, only attractive perspectives of using payment cards are provided and that leads to increase of risks and cost of services in the payment cards market. As a result the citizens regard with distrust such rather new product as banking card. Position of the antimonopoly body is the following: the present practice misleads the customers and can yield losses to the competitors and this is a form of unfair competition. The optimal decision is the disclosure of the information by the market participants in accordance with the standards that must be established by professional community or by the state

4. Membership in Joint Ventures: Exclusivity and Duality

4.1 Exclusivity

Such agreement was concluded in 1994 between Visa International and Credo Bank. At that time there was no antimonopoly legislation regulating relations in the financial market in Russia and the problem could not be solved by issuing direction to stop violation or by initiating a case in accordance with the legal procedures. The problem was solved with the help of negotiations between Visa and the Russian antimonopoly body.

4.2 Duality

Similar duality exists in Russia. From the point of view of the antimonopoly body granting the customer with the maximum possibility of choice will contribute to the market development forcing the payment systems to introduce new products. Lack of duality agreement between payment systems, Visa and Mastercard in particular, is indispensable condition, however.

5. Competition Law

5.1 Competition law application

In 2005 on the basis of a bank's application the RF FAS started legal proceeding against Visa International Service Association for the antimonopoly law violation in the part concerning abuse of the dominant position and concerted practices that restricted competition in the banking cards market (articles 5, 6 of the Federal Law "On protection of competition in the financial services market" N117-FZ of 23.06.99).

The violation was in the following form: for the entrance in the system Visa established such conditions that impede assessment of the risks of operating in the system for the banks. The fact was confirmed by the RF FAS after selective interrogation of lending agencies- participants of different payment systems was done.

The RF FAS made analysis of the RF market of payment cards for the period of 2001-2003 within the framework of the case investigation. The analysis confirmed Visa's dominant position in the market.

On 18.04.2005 when the case was examined by the RF FAS Commission, Visa had prepared and submitted into the FAS a standard letter for lending agencies. The letter contained a description of requirements and procedures for the entrance in the system Visa as associated member and gave a chance to preliminary assessment of the conditions of operating in the system. The letter is available in the Internet and displayed on the site www.visa.com.ru.

There Visa informs that any bank which is eager to become an associated member of Visa can before the entrance get acquainted with all the necessary of operating and requirements for the entry.

Banks business plan is of a formal character and the minimum requirements to the volume of cards' issue for a bank are not established.

A list of host suppliers, instalment of the software which was tested by Visa is given exclusively for information, is regularly renewed and new suppliers are included in it.

Having taken into consideration all stated above the RF FAS Commission withdrew the Visa case as the fact of the antimonopoly law violation had not been confirmed.

During a year the antimonopoly body got quarterly information about the banks which received the standard letter in the established order as well as about all changes and additions in this letter and it was done by Visa's initiative.

According to the information provided by Visa, 65 banks received the standard letter in the period of time from May till December of 2005.

5.2 *Joint activity by merchants*

In this context it means that we are talking about payment systems which are founded by sale outlets' associations and are used only by them. Within this system a consumer accumulates points with the aim of getting further discounts in the sale outlets, included in the association.

Such systems are not very developed in the RF and that is the reason why the antimonopoly body has not made detailed analysis of this market. Violation of the antimonopoly law by this payment system is possible; however, if there are indications of concerted practices or abuse of dominant position.

SOUTH AFRICA

Introduction

In April 2006 the South African Competition Commission announced that it would hold a public enquiry into bank charges and access to the payment system. This follows a research report to the Commission on the *National Payment System and Competition in the Banking Sector*.

The main competition concerns arising from the report relate to bank charges and access to the national payment system. The enquiry will probe the effect of both of these on the provision of competitive banking services for South African consumers (be they businesses or individuals).

The objects of this enquiry will be:

- To increase market transparency;
- To ascertain whether there are grounds upon which the Competition Commissioner should initiate, and the Commission consequently use its powers to investigate, any specific complaints of contraventions of the Competition Act;
- To enable the Commission to report to the Minister and make recommendations on any matter needing legislative or regulatory attention.

The subject matter of the enquiry will be:

- The level and structure of bank charges (both interbank and to customers), including the relation between the costs of providing bank services and the charges to the customers, the process by which bank charges are set and the level and scope of existing and potential competition in this regard;
- The feasibility of improving access by non-banks and would-be banks to the national payment system infrastructure, so that they can compete more effectively in providing payment services to consumers.

In dealing with the above subject matter, the enquiry will also examine competition issues in respect of a number of payment mechanisms, including payment cards.

This submission will focus on the issue of payment cards, and draws substantially from the abovementioned research report¹.

¹

The report, *National Payment System and Competition in the Banking Sector*, was prepared for the Competition Commission by Dr Penelope Hawkins of FEASibility. A copy of the final report is available on our website: www.compcom.co.za

2. Background on South Africa's Banking Sector

The Bank Supervision Department of the South African Reserve Bank has prudential and regulatory authority over the banking industry, in terms of the Banks Act no. 94 of 1990. There are currently 21 operating commercial banks. The five largest commercial banks, which account for some 86% of deposits, are ABSA, First National Bank, Nedcor, Standard Bank and Investec.

A report for the National Treasury and the South African Reserve Bank on *Competition in South African Banking*, released in April 2004, found that “the concentration levels of the South African banking industry are high, but not out of line with other emerging markets. However, it is in the market segments rather than at firm level that concentration is even more marked. For example, while the Big Four (ABSA, First Rand, Nedcor and Standard) accounted for 83% of the total deposits of the public in June 2003, they accounted for 92% of mortgage loans and 89% of bank financed instalment sales. Each of the Big Four has a scale monopoly (25% or more market share) in one or more of the retail market segments (credit cards, current accounts, mortgages or leasing and instalment sales).”

Although South Africa's national payment system is considered highly efficient by international standards, there is concern that it should develop into one that also caters for the previously unbanked sector of South Africa. The Competition in SA Banking report noted that ‘around half of South African adults have no or only marginal access to financial services’.

There is also concern that a lack of competition in banking impacts negatively on access to finance and the quality and cost of service that small business receives from banks. This of course impacts on their profitability and prosperity, and ultimately that of the economy.

3. Payment Cards in South Africa

The Commission's research found that, apart from the South African Multiple Option Settlement System (“SAMOS”)², the pricing arrangements for each payment mechanism within the National Payment System (“NPS”) fall outside the remit of regulation and in the past have been negotiated between participants on a multilateral basis.

It was noted that there might well be aspects of the NPS where uniform pricing could give way to competitive pricing without compromising the soundness or efficiency of the system. However, it was recommended that there should be further enquiry regarding pricing arrangements in respect of each of the payment mechanisms.

We begin with a broad overview of payment cards in South Africa, and then address a couple of areas, drawing from the South African experience, which we consider relevant to a discussion of competition among payment cards:

- Overview;
- Pricing and fees; and
- Multilateral vs. bilateral negotiations.

² SAMOS is the real-time settlement system of the South African Reserve Bank (SARB). It came into operation in March 1998 and enables banks to electronically make payments to and receive payments from the Reserve Bank, through their settlement accounts held in the books of the Reserve Bank. Daily settlements of interbank exposures are effected through the SAMOS system.

4. Overview

There has been a major growth in electronic funds transfer point-of-sale (EFTPOS) terminals, which provide a sophisticated network for electronic-card presentation to clearing banks. In excess of 90% of credit-card payments have been converted to EFTPOS payments. Banks mainly own these networks. Card-based payments can be effected by means of credit as well as debit cards. Withdrawals and deposits can also be made at automated teller machines (ATMs) of the major retail banks. When withdrawals are made and the drawer transacts at a different bank from his/her own bank, these ATM transactions are switched through SASWITCH. SASWITCH refers to the infrastructure underlying the banks real-time switching services and is part of Bankserv, a systems operator jointly owned by the Big Four banks.

Preliminary estimates show that there are approximately 24 million cards in circulation in South Africa of which 5 million are credit cards and the rest account-linked (debit) cards.

Credit cards: Credit cards are affiliated to either VISA or MasterCard and are issued with a pre-set credit limit. American Express and Diners Club are also represented. The card account is normally separate from the bank account. Real-time credit card authorisations are also conducted via SASWITCH.

Debit cards: Real-time debit card payments are also facilitated. The debit card provides the same purchasing capability as a credit card but purchases are made from funds held by the customer at the bank. Debit card payments for fuel sales are being introduced via point-of-sale devices at petrol stations. Fleet Card, Petrol and Garage card products bear domestic labels of the individual banks.

A company called EasyPay controls the largest bank-independent financial switch in Southern Africa, processing more than 260 million transactions last year. Its infrastructure connects into all major South African banks and switches debit, credit and fleet card transactions for the country's leading retailers and petroleum companies.

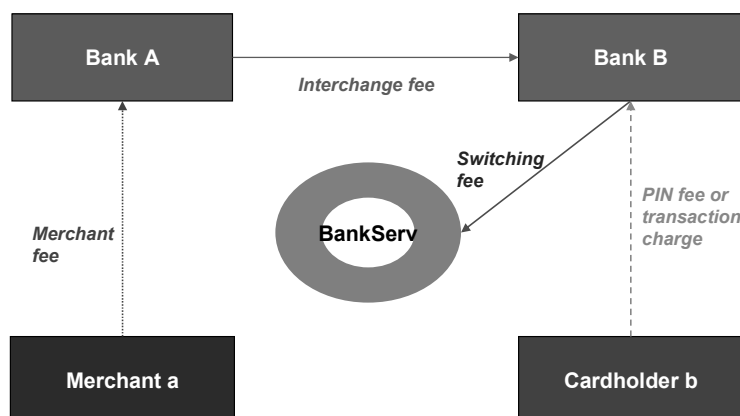
The company has enjoyed substantial growth over the last five years. EasyPay currently processes a considerable number of South Africa's point of sale-originated debit and credit transactions, in addition to processing over 1 million bill payments and over 3 million prepaid transactions per month.

Data from the Commission's research shows a dramatic increase in debit card usage since 2002 with an average annual growth rate of 194%, although by 2005 the annual rate of growth of debit transaction appears to be slowing down. In June 2005, debit card transactions represented 10% of the volume of EFT transactions, up from 0.6% in 2002. Credit cards grew at an average annual rate of 22% over this period and EFTs 10%. By comparison, ATM growth was roughly in line with real economic growth of GDP over this time (at 4%), while cheque usage fell on average by 17% per year during this period.

5. Pricing and Fees

The pricing of payment instruments differs, but in general, one rule applies: where more than one bank is involved an interchange fee applies: the acquiring bank will pay the issuer. Hence using the ATM of another bank, using a credit or debit card at a merchant that banks with another bank, etc, all result in interchange fees.

Figure 1: Transaction cost & revenue



	Fee / Cost	From	To	Value (based on R100)
	Customer or Pin fee / transaction charge	Consumer	Bank B	R3.68 ³
	Interchange	Bank A	Bank B	R0.55
	Bankserv/Operator	Bank B	Bankserv	R0.09
	Merchant Fee	Merchant	Bank A	R2.50
	Total revenue from transaction			R6.18

Institution	Amount earned from transaction	Share of revenue
Bank A (Acquirer)	R1.95	32%
Bank B (Issuer)	R4.14	67%
Bankserv/Operator	R0.09	1%
Total value of transaction	R6.18	100%

Figure 1 illustrates a typical “on them” debit card transaction and serves to show the exchange of fees between participating banks, merchant and customer. Here, the merchant A banks with bank A, while the customer B banks with bank B. A purchase by customer B and merchant A involves a customer fee, a merchant discount (fee), and interchange fee and a switch fee through Bankserv. The amounts shown are illustrative values for a R100 debit card purchase. The Commission’s research shows that there is little apparent link between the switching cost and the fees customers pay. In this example, Bankserv earns only 1% of the revenue generated by the transaction.

There are a number of Payment Clearing Houses (PCHs) in South Africa, which offer distinct payment mechanisms. PCH means an arrangement between two or more system participants governing the

³ = Average charge by big banks

clearing of payment instructions between such system participants. In the case of payment cards, South Africa has one payment clearing house participant group known as the Card PCH. Historically, PCH participants have set interchange multilaterally. The available data in respect of interchange fees is that determined four years ago on a multilateral basis by Edgar Dunn and Company. These were calculated using the weighted average of combined cost and risk of all players in the credit and debit PCH to determine a standard card inter-change rate. There are:

- Credit card: 1.99% of transaction value, subsequently reduced to 1.71%
- Offline debit card: 0.55% of transaction value
- Online (pin-based) debit card: 0.75%, subsequently reduced to 0.71%.

There are also card association costs relating to participation in either VISA or MasterCard for the issuing and acquiring of credit or debt cards.

In South Africa, while cash may appear to be a “free” payment instrument at the till, the distribution fees for both banks and merchants is considerable, and banks charge a withdrawal fee at both ATM and counter. Charges for the use of cheques accrue to the consumer, as do the costs for setting up debit orders. In the case of credit cards however, while a merchant discount (or fee) is levied, the customer may see the transaction as free, as typically no transaction fee, only an annual fee and interest, will be charged. A debit card transaction attracts a merchant discount and as well as a customer charge per transaction.

The South African consumer may have difficulties in making rational choices, since although transactions generally attract a fee, there may still be cross-subsidisation which obscures the relative costs of payment instruments. Debit cards, for example tend to attract a fee per purchase, whereas credit cards do not. This obscures the fact that the debit card is a more efficient payment stream. Improvement in disclosure will require not only better information on transaction fees, but also on the costs and interest rates associated with other banking services, on comparable terms.

6. Multilateral vs. Bilateral Determination of Interchange Fees.

In interviews conducted by the researchers, it emerged that the views on interchange negotiations appear to be polarised. It appears that the understanding in the industry is that section 4(1) of the Competition Act may preclude multi-lateral negotiations. Section 4(1) of the Competition Act prohibits *per se* direct and indirect price fixing by parties in a horizontal relationship. The banks have not sought an exemption.

Those who are for the continuation of the multilateral negotiations, point out that this is the most practical option to implement. The multilateral solution is that all banks would pay the same fee for certain transactions, irrespective of investment in legacy infrastructure or volume or value of transactions, such as currently occurs in the case of debit and credit card transactions.

Bilateral negotiations would allow for the agreement of interbank pricing principles, cost components and fees on a bilateral basis, between issuers and acquirers. Those who argue against this approach point out that it is not practical to implement as too many negotiations will be required⁴. In particular, this is likely to discriminate smaller players – both banks and non-bank - as they will have to devote resources to the many negotiations required which would take –up the time of key resources. The burden would fall

⁴ One bank official estimated that some 8000 negotiations would be required - on an annual basis- within the industry

disproportionately on smaller players as they typically have one payment system official, not a fully staffed department.

In general, smaller players indicated support for the multilateral approach, especially if it could be based on some fair evaluation of costs. The big banks also favoured this approach for practical reasons. The large non-bank players called for bilateral negotiations however, keen to flex their respective muscle.

7. Conclusion

The research to date indicates that although South Africa has a very sound and efficient payment system it may nevertheless lack features which would make it also fair to consumers.

The banking sector is highly concentrated. While a number of operators exist, typically these serve only a single payment stream. The core NPS payment process in respect of EFT and card transactions are dominated by Bankserv which is owned by the large banks who constitute the major users of its infrastructure. While concentration has resulted in a high degree of interoperability and likely economies of scale, it nevertheless inhibits the extent of competition and entry in this vital competitive space.

In terms of the National Payment System Act, 1990 (Act No 78 of 1998) only banks are allowed to participate in the clearing house activities of the payments system and only banks may keep a settlement account with the Reserve Bank. There is concern that mechanisms in the payment-processing procedures favour the account-holding banks, and may thus undermine competition and create disincentives for both bank and non-bank competitors to compete with account-holding banks.

Advances in technology allow for non-bank players to offer competitive payment services. However, their ability to do so is enabled or hindered by the rules for participation and the general approach of regulators. The enquiry will also probe the extent of regulatory gaps in terms of the rules of participation for non-bank players. Depending on the findings of the enquiry, the Commission may use its advocacy powers to recommend legislative or policy changes that may be necessary in this regard.

Insofar as collaborative infrastructure and uniform pricing is necessary for sustaining sound and efficient payment mechanisms, the enquiry will probe the extent to which more competition may feasibly be introduced - bearing in mind that joint ventures may have pro-competitive and anticompetitive outcomes and that it is often not a simple matter to distinguish the 'good' from the 'bad'.

The South African Competition Commission is very much at the formative stages of its enquiry into competition in payment card activities, and banking generally. At this stage, the Commission has not initiated any specific complaint and will accordingly not invoke in connection with the enquiry its formal powers to compel the production of information and answers to questions.

Having regard to its responsibilities and powers, the Commission has thus decided to conduct a public enquiry in order to obtain further information and input about the competition concerns highlighted in the research report.

We thank you for the opportunity to make this submission and look forward to any insights and contributions, arising from this roundtable discussion, which will assist as with our enquiry.

BIAC

“INCREASING COMPETITION IN PAPERLESS PAYMENT INSTRUMENTS”*

1. Introduction

The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to comment to the Working Party on Competition and Regulation for discussion at the June 6, 2006 Roundtable on Increasing Competition between Payment Cards.

Competition is now broadly viewed as the best available mechanism for maximizing consumer welfare.¹ It is widely accepted that market-driven outcomes and competition should form the foundation of economic and regulatory policies.²

Deregulation and regulatory reform in numerous OECD countries have reduced consumer prices and significantly improved quality and service.³ For example, U.S. deregulation over the past few decades in several industries, including airlines, telecommunications, railroads, trucking, financial services, natural

* This paper has been prepared principally by Christine C. Wilson, partner, and Kathleen M. Pessolano, associate, O’Melveny & Myers LLP. Ms. Wilson serves on BIAC’s Competition Committee and on the Competition Law and Policy Committee of the U.S. Council for International Business. The drafters gratefully acknowledge the input of James F. Rill, Chair, Competition Committee, BIAC and Vice Chair, Competition Law and Policy Committee, USCIB; Calvin S. Goldman, Vice Chair, Competition Committee, BIAC; Rufus Ogilvie Smals, Vice Chair, Competition Committee, BIAC; Nicola Northway, Senior Competition Legal Counsel, Barclays; Timothy J. Muris, Of Counsel, O’Melveny & Myers LLP; Thomas P. Brown, Vice President, Senior Counsel, Visa U.S.A. Inc.; and Lacey L. Plache, Ph.D., Principal, LECG, LLC. The drafters also acknowledge with appreciation the invaluable research assistance of Jane Antonio, Research Analyst, Howrey LLP.

¹ See Paul Crampton, *Competition and Efficiency as Organizing Principles for All Economic and Regulatory Policymaking*, First Meeting of the Latin American Competition Forum, Paris, at 3 (Apr. 7-8, 2003) (“Competition and efficiency ought to provide policy coherence to all economic and regulatory policy decisions.”).

² See *id.*; see also Timothy J. Muris, Chairman, Fed. Trade Comm’n, *Creating a Culture of Competition: The Essential Role of Competition Advocacy*, Address before the International Competition Network (Sept. 28, 2002), available at <http://www.ftc.gov/speeches/muris/020928naples.htm> (“Competition advocates have won many victories over the last few decades. We have largely won the intellectual debate: Economists and legal scholars around the globe now recognize the benefits of competition to consumers and to the economy as a whole. We are winning the legal debate: Courts now recognize the importance of efficiency and robust price competition in evaluating mergers and business conduct. Lastly, and perhaps most critically, we are starting to win the policy debate: From airlines to electricity to telecommunications, industry after industry has been privatized or liberalized. Legislators more frequently are turning to competition policy, rather than to more burdensome forms of regulation, to create a well functioning marketplace.”).

³ See Crampton, *supra* n.1, at 3 (citing OECD, *Report on Regulatory Reform*, Volume II, at 252 (Paris: 1997)).

gas, and electricity, has significantly improved consumer welfare.⁴ Similar results have been obtained in Europe within sectors such as energy, postal, airlines, and telecommunications.⁵

Experiences with deregulation confirm that competition should be stimulated and maximized except in cases of market failure or where other overriding public interest objectives give rise to a need for regulation.⁶ Consequently, BIAC has advocated that competition authorities and sectoral regulators should exercise caution when considering intervention.⁷ Before authorities intervene, moreover, BIAC has advocated the need to be certain that the conduct in question is anticompetitive, that enforcement action is necessary to protect consumers, and that the remedy imposed will, on net, benefit consumers.⁸ BIAC also has urged authorities to proceed with particular care when considering whether to intervene in high-technology industries undergoing rapid transition.⁹ Intervening too quickly and perhaps too aggressively can inhibit innovation and future market growth.¹⁰

One industry where the propriety of regulation is currently debated involves payment cards. Courts and regulators in several countries have considered or are considering the competitive and societal

⁴ See Robert Crandall & Jerry Ellig, *Economic Deregulation and Customer Choice: Lessons for the Electric Industry* (Center for Market Processes 1997) (reporting that real prices for natural gas, long distance telecommunications, airlines, trucking, and railroads dropped at least 25% and often close to 50% within ten years of deregulation), available at <https://www.mercatus.org/pdf/materials/839.pdf>; see also Anne K. Bingaman, Asst. Atty. Gen., U.S. Dep't of Justice, Address before the Commonwealth Club of California (July 29, 1994) ("The salutary effect of competition on innovation has been demonstrated repeatedly in this country when a variety of previously regulated industries have been deregulated, either in whole or in part.").

⁵ The relevant provisions in Europe are: (1) the Airspace Regulation Nr. 551/2004 (on the organisation and use of airspace in the single European sky), the Service Provision Regulation Nr. 550/2004 (on the provision of air navigation services in the single European sky), and Regulation 793/2004 (on common rules for allocation of slots at Community airports); (2) Council Directive 1996/92, EC (concerning common rules for the international market in electricity); (3) Directive 97/67/EC (on common rules for the development of the internal market of Community postal services and improvement of quality service), and Postal Directive 2002/39/EC (defining further steps in the process of gradual and controlled market opening and further limiting the service sectors that can be reserved); and (4) Regulation Nr. 2887/2000 (on unbundled access to the local loop).

⁶ See Crampton, *supra* n.1, at 2.

⁷ See, e.g., BIAC, Summary of Discussion Points, Presented at the OECD Competition Committee Roundtable on Competition on the Merits (June 1, 2005); see also BIAC, Session 1: Bringing Competition into Regulated Sectors, Presentation to the OECD Global Forum on Competition (Feb. 17, 2005); BIAC, *The Roles and Tools of Competition Authorities: Fundamental Considerations*, Presentation to the OECD Global Forum on Competition (Oct. 17, 2001).

⁸ See BIAC, *The Roles and Tools of Competition Authorities: Fundamental Considerations*, Presentation to the OECD Global Forum on Competition (Oct. 17, 2001).

⁹ See *id.*

¹⁰ See Joel I. Klein, Asst. Atty. Gen., U.S. Dep't of Justice, *Rethinking Antitrust Policies for the New Economy*, Address at the Haas/Berkeley New Economy Forum, Portola Valley, California (May 9, 2000) ("[S]ince we believe that free and competitive markets maximize innovation and consumer welfare, we tend to disfavor regulation generally and certainly as a way to remedy abuses of market power. Ongoing regulation is invariably inefficient, both because it under-deters competitive behavior and because it can be exploited by opportunistic rivals to hamper procompetitive conduct. Thus, where possible, we seek structural, market-based solutions to serious competitive problems, because these solutions mean that consumers, not government agencies or existing monopolists, will get to choose when longstanding monopolies yield to innovative technologies and innovative business models.").

implications of various payment card system practices. In some countries, these investigations have resulted in regulation or other agreements adjusting payment card rules and pricing. This submission provides an overview of the payment cards industry, including the unique economics affecting the industry, and discusses the various practices that are under debate. We also provide an overview of innovation in this dynamic and rapidly evolving industry. We conclude by advocating that, as with other industries, competition authorities and sectoral regulators should exercise caution when considering intervention. Before intervening, authorities should be sure that the targeted behaviour is anticompetitive, that intervention is necessary to protect consumers, and that the measures imposed will, on balance, benefit consumers.

Regulators also should consider the impact that intervention may have on the global economy. In particular, imposing jurisdiction-specific technical and functional requirements to achieve competition, fraud protection, and financial security may chill innovation and impact the ability of consumers to use cards for international transactions. Thus, BIAC advocates that authorities should proceed with special care in this high-technology and rapidly evolving industry, given concerns about the potential for hampering innovation and future competitive growth.¹¹

2. Overview of the Payment Cards Industry

It has been observed that, “[i]n the last half of the twentieth century, payment cards—credit, debit, and charge cards—have quietly revolutionized how we pay for goods and services.”¹² Frank McNamara introduced the first general purpose charge card, the Diners Club card, to U.S. consumers in 1950. Bank of America followed with the first general purpose credit card in 1958. French banks introduced the first general purpose debit cards in the 1960s. Globally, purchasers used 1.8 billion general purpose payment cards to pay for \$2.7 trillion worth of goods and services in 2002.¹³ In 2005, payment cards accounted for 17% of personal consumption expenditures in Europe and 26% in the United States.¹⁴

As the use of payment cards has increased, volume on more traditional payment instruments has declined. In the U.S., for example, cash and checks accounted for more than 90% of personal consumption expenditures in 1970,¹⁵ but for only 61% of those expenditures in 2004.¹⁶ Between 2000 and 2003, check volume in the U.S. fell for the first time ever. During that period, the number of checks paid fell by 12.4%, while the number of non-cash payments grew by 3.8%.¹⁷ Europe has seen a similar trend, with check usage declining from 2000 to 2004 at a rate of 12% per year and card payments growing 5.5% per year

¹¹ See *id.*; see also Debra A. Valentine, Gen. Counsel, Fed. Trade Comm’n, *Antitrust in a Global High-Tech Economy*, 8th National Forum for Women Corporate Counsel, Washington, D.C. (Apr. 30, 1999) (“The benefits of correct antitrust enforcement are huge, because proper enforcement will positively affect the possibilities for innovation today and the quality and prices of products tomorrow. But because the path of innovation is fraught with uncertainty and technology is changing with lightning speed, the potential costs of enforcement errors can loom large.”).

¹² DAVID S. EVANS & RICHARD SCHMALANSEE, *PAYING WITH PLASTIC* xi (2d ed. MIT Press 2005).

¹³ *Id.*

¹⁴ Point of Sale (POS) for Visa and MasterCard (September 2005). Visa Business Research and Reporting.

¹⁵ *Id.* at 85.

¹⁶ See Tom Brown & Lacey Plache, *Paying with Plastic: Maybe Not So Crazy*, 73 U. CHI. L. REV. 63, 70 (2006) (citing data from Visa Business Research and Reporting).

¹⁷ See Dove Consulting, *Payments Migration: The Turning of the Tide 2* (2005), available at http://www.doveconsulting.com/article_download/Payments_Migration_2.pdf.

during this same period.¹⁸ In Canada, roughly 80% of all consumer transactions by dollar volume in 1993 were completed using cash or check. By 2003, this number had fallen to 50%.¹⁹

The rise in payment cards use has been made possible by cooperation, as well as competition, among various market participants. So-called “co-opetition,”²⁰ the combination of competition and cooperation, is an important element in the payment industry as in other markets.²¹ Market participants cooperate in key areas to generate efficiencies for consumers, such as investing in technological innovation, product development, and sharing networks to minimize transaction costs. Participants compete in every other dimension—interest rates, fees, service, and innovative offerings.

Despite the popularity of payment cards, the business, academic, and regulatory communities have debated the economics that underlie the industry. Payment cards are an example of what many economists describe as a “two-sided” or “platform” product. A market is two-sided “if the platform can affect the volume of transaction by charging more to one side of the market and reducing the price paid by the other by an equal amount; in other words, the price structure matters and platforms must design it so as to bring both sides on board.”²² Two-sided markets have three distinguishing characteristics: (1) they appeal to at least two distinct groups of customers; (2) the value obtained by each group increases with the size of the other; and (3) an intermediary must connect the two.²³ Payment cards display each of these attributes:

- Two distinct groups of consumers demand payment cards: cardholders (who use the cards for purchases) and merchants (who accept the cards as payment).
- A cardholder obtains more value from his card as the number of locations at which he can use it increases. Conversely, a merchant obtains more value as the number of cardholders increases. Thus, for a payment card system to work, cardholders must hold and use cards, and merchants must accept them. Cardholder and merchant demand is interdependent.
- To coordinate the two sides of the market, the card companies create a platform through which cardholders and merchants interact. Card companies must maintain a critical mass of customers on each side of the market.

Firms competing in platform industries often employ strategies that appear to defy traditional economics when only one group of customers is considered.²⁴ Newspapers are a classic example of a two-sided product, connecting readers and advertisers. Readers may appear to pay too low a price because the

¹⁸ European Central Bank Blue Book (March 2006) (quoted figures do not take cash payments into account).

¹⁹ See *The Benefit of Electronic Payments in the Canadian Economy*, Global Insight and Visa Canada Association (2004).

²⁰ See ADAM M. BRANDENBURGER & BARRY J. NALEBUFF, CO-OPETITION (1997).

²¹ See David S. Evans, *More than Money: The Development of a Competitive Electronic Payments Industry in the United States*, PAYMENT CARDS ECON. REV. 1, 3 (2004).

²² J.-C. Rochet and J. Tirole, *Two Sided Markets: An Overview*, IDEI Working Paper (2005).

²³ See Timothy J. Muris, *Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets*, 2005 COLUM. BUS. L. REV. 515, 516 (2005); see also Richard A. Epstein, *The Regulation of Interchange Fees: Australian Fine-Tuning Gone Awry*, 2005 COLUM. BUS. L. REV. 551 (2005) (“two-sided markets are those in which the value attributed to the goods and services received by parties on one side of an exchange depends not only on the intrinsic properties of those items, but also on the number of parties located on the other side”).

²⁴ See *id.* at 517.

total price paid by all subscribers does not cover the newspaper's production costs. It is efficient for the newspaper to "subsidize" readers, though, because increased circulation increases the demand for, and the price of, newspaper advertising. Advertisers benefit from this "subsidy," because this increased readership raises the value of advertising in the newspaper.²⁵

Payment systems face much the same challenge as newspapers. Because they must attract both merchants and consumers, they must, *inter alia*, design a pricing strategy to attract the constituent group that has the most alternatives. With payment cards, that group appears to be cardholders, who, in deciding which payment cards to carry and use, can and do play competing card systems against one another.²⁶ Hence, card networks tend to use the funds collected from merchants to attract cardholders. American Express, Discover, and other three-party systems accomplish this goal by directly setting the rates that merchants and cardholders pay to participate in their systems. In four-party systems, the member issuers and acquirers, not the systems, set rates for cardholders and merchants, respectively. MasterCard, Visa, and other four-party systems balance cardholder and merchant demand indirectly through the rate at which their acquirers and issuers exchange transactions, the so-called interchange rate. The interchange rate influences the terms on which issuers market cards to consumers and acquirers sign merchants to accept those cards.

The essential interchange structure pre-dates the formation of the Visa and MasterCard systems. When Bank of America owned and managed the BankAmericard system, it franchised the operation to banks operating outside of California. For the system to work, Bank of America needed a mechanism to allow a card issued by one franchisee to be used at a merchant signed by another participant in the system. Bank of America solved the problem of interchange in a multi-party payment system with a rule that allocated all of the revenue on each transaction to the issuing bank. This solution was criticized, though, because acquirers asserted that they were not being rewarded for expanding the system, and issuers were convinced that acquirers structured their relationships with merchants to deprive issuers of revenue. When Bank of America spun off Visa in the early 1970s, Visa implemented the Interchange Reimbursement Fee, which sought to address the criticisms of the previous arrangement. Thus, proponents observe that the early emergence of the interchange fee and the continued presence in the payment cards industry testify to the inherent logic of interchange fees in equilibrating the two sides of the market.

Interchange systems have evolved differently in different jurisdictions. After a comprehensive review of interchange fee developments and issues in several jurisdictions, Stuart Weiner and Julian Wright concluded that a number of complex and interrelated factors, many country-specific, play a role in interchange developments.²⁷

²⁵ See *id.* (comparing the role of the subsidy in newspaper operations with that of the interchange fee in coordinating a credit card network).

²⁶ See Benjamin Klein, *et al.*, *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, at 5 (2006) (on file with authors). Competition among the member banks has resulted in a large variety of payment cards available to consumers. In addition, the Visa and MasterCard networks offer merchants an option of establishing their own proprietary cards—developing a co-branded card with member issuing banks. The presence of co-branded cards can increase both competition in the payment card market and the variety of card choices available to consumers.

²⁷ See Stuart E. Weiner & Julian Wright, *Interchange Fees in Various Countries: Developments and Determinants*, 4 REV. NETWORK. ECON. 290, 291 (2005) (concluding, after a comprehensive review of interchange fee developments and issues in several jurisdictions, including Australia, Canada, Denmark, Mexico, the Netherlands, Spain, Sweden, the UK, and the U.S., as well as EU cross-border, that a number of complex and interrelated factors, many country-specific, play a role in interchange developments).

Both the interrelated nature of the two sides of the payment cards market²⁸ and the heterogeneous factors that impact the payment cards market across countries²⁹ signal the need for great caution when considering the propriety of regulatory intervention.

3. Costs and Benefits of Payment Systems, Interchange Fees, and Merchant Charges

Significant dialogue is occurring globally regarding the interchange fee and, more broadly, the net social cost of card-based payments and the appropriate regulatory response to the increasing usage of payment cards and other forms of electronic transactions. During the past decade, central bankers, competition authorities, and courts in Australia, Europe, Mexico, Spain, the United Kingdom, and the U.S., to name just a few, have studied the issue. The results of these inquiries have varied. Authorities in Australia, Europe, and elsewhere have intervened to reduce the rates that merchants pay for access to electronic payments. Authorities and courts in the U.S., on the other hand, thus far have refrained from action. The business community is split on the issue, with merchants and retail groups on one side and financial institutions and payment systems on the other.

The relative cost of different forms of payment is a critical issue in deciding whether intervention in the payment card industry is justified. Merchants and some enforcement authorities have asserted that payment cards are relatively more costly than other forms of payment, including cash and check, and that payment cards are “overused” in a social welfare sense. For example, the Reserve Bank of Australia and the UK’s Office of Fair Trading (“OFT”) have asserted that credit card systems charge unjustifiably high fees to merchants, while card issuers provide cardholders with below-cost services and loyalty rewards. According to this view, higher-cost and less efficient forms of payment drive out less expensive ones because consumers are not charged the full marginal cost of using their cards.

3.1 *The Cost and Benefits of Payment Instruments*

Financial institutions and payment card systems argue that benefits, as well as costs, must be considered when comparing different payment methods. They note that electronic payment methods, such as payment cards, enable funds to be moved more quickly, more securely, and more reliably than traditional forms of payment and offer consumers more methods to pay for goods and services.

Relatively limited data exist to determine whether payment cards are, on balance, more efficient to society than other forms of payment. In an early article, Alan Frankel asserted that payment cards using interchange fees are less efficient than other forms of payment.³⁰ Specifically, Frankel concluded that so-called “price coherence” helps encourage payment card use rather than competing products, despite differences in relative operating costs.³¹ Frankel asserted that this price coherence shifted the cost of financial institutions’ exercise of market power onto consumers who use a competing payment system, at the expense of social welfare. According to Frankel, besides burdening consumers, price coherence across payment mechanisms also constrains merchants’ choices.

²⁸ See Epstein, *supra* n.21, at 551-54.

²⁹ See Weiner & Wright, *supra* n. 27 (concluding that “[t]o adequately test existing and future theories, richer data will be required”).

³⁰ See Alan S. Frankel, *Monopoly and Competition in the Supply and Exchange of Money*, 66 ANTITRUST L. J. 313 (1998) (defining “price coherence” as “the phenomenon in which the price paid by a consumer for a product does not vary with modest differences in the costs imposed on the merchant by the customer’s choice of brands or payment methods”).

³¹ *Id.* at 314.

More recently, in a paper on the social costs and benefits of various payment instruments in the U.S., authors Daniel Garcia Swartz, Robert Hahn, and Anne Layne-Farrar assert that previous empirical studies addressing these issues have been incomplete because they did not adequately consider the effects on all parties involved in payment transactions and did not include economic benefits in their calculations.³² After a detailed examination of both costs and benefits, the authors conclude that electronic payments are more efficient from the standpoint of society as a whole than other forms of payment, particularly cash and check. Ric Simes, Annette Lancy, and Ian Harper drew similar conclusions from their study on the social costs and benefits of various Australian payment instruments.³³ Specifically, the authors found that the net social costs associated with credit card transactions are at most marginally higher than those for PIN debit transactions, while the net social costs associated with using credit or debit cards are lower than those associated with cash or checks. Similarly, studies by national central banks in Europe, including the central banks of Norway and Sweden, have confirmed that cash and checks use more total resources from all participants than electronic payments.³⁴ The results of these studies, coupled with those of Simes, *et al.* and Garcia-Swartz, *et al.*, cast doubt on the propriety of intervening in such a complex, empirically difficult area.

Proponents of payment card systems also take a different view regarding whether payment cards are cross-subsidized and thus overused. They note that it is common for merchants to provide services that only some customers consume (*e.g.*, free beverage refills, free parking, knowledgeable sales staff, and fitting rooms). Throughout the economy, consumers who do not use these services cross-subsidize consumers who do. Depending on the service, the demographics of those consumers cross-subsidizing and being cross-subsidized will vary so that, for example, low income consumers at times cross-subsidize and at other times receive cross-subsidies from high income consumers. Such cross-subsidization may create “overconsumption” of, say, coffee refills. Given its ubiquity, proponents of payment card systems and some economists argue that such cross-subsidization is neither anticompetitive nor a basis for regulation.³⁵

Merchants claim that offering their customers the option to use a payment card is different than the provision of other services because the interchange fees set by the payment systems do not allow merchants to choose the size of the subsidy. In many countries, including the U.S., however, payment card system rules allow merchants to offer a discount to customers paying with cash, checks, or non-signature based debit cards. In several countries, such as the UK, the Netherlands, and Sweden, merchants also can surcharge customers paying with payment cards. Industry observers note that a discount for cash and checks is analytically equivalent to a surcharge for payment cards.³⁶ Most merchants do not offer discounts or surcharge (when allowed). The Interim Report concluded that this merchant behaviour may be due to factors such as the lack of merchant information or the prohibition of surcharging through means other than network rules.³⁷ Industry proponents, however, attribute infrequent merchant discounting and

³² See Daniel Garcia Swartz, Robert Hahn & Anne Layne-Farrar, *The Move Toward a Cashless Society: A Closer Look at Payment Instrument Economics*, AEI-Brookings Joint Center for Regulatory Studies, Working Paper 04-20 (2004).

³³ See Ric Simes, Annette Lancy & Ian Harper, *Costs and Benefits of Alternative Payments Instruments in Australia*, Paper Prepared for the Payments System Conference 2006, Center for Business and Public Policy, Melbourne Business School (2006).

³⁴ See Sveriges Riksbank, *Do Prices Reflect Costs? A Study of the Price and Cost Structure of Payment Services in the Swedish Banking Sector 2002* (Oct. 2004); see also Norges Bank, *Cost and Income in the Norwegian Payment System 2001* (Sept. 2003).

³⁵ For an economic analysis of this issue, see Klein, *et al.*, *supra* n.26.

³⁶ See *id.*

³⁷ European Commission Competition DG, Interim Report I Payment Cards: Sector Inquiry under Article 17 Regulation 1/2003 on retail banking, at 124 (Apr. 12, 2006).

surcharging to merchants' desire to retain credit card customers, who typically have more options for places to shop than cash or check customers and who are more likely to take advantage of merchant sales because they have access to credit.³⁸

Industry proponents also assert that merchants can avoid the cross-subsidization of payment cards by choosing not to accept payment cards. Some merchants assert that they have no choice but to accept these systems' cards for payment regardless of the price charged. Observers have noted, however, that retailers accept payment cards because their consumers demand to pay with these methods. Accepting payment cards so as not to lose sales to another retailer is an important aspect of competition among retailers. Acceptance of payment cards is thus arguably indistinguishable from other forms of competition such as hiring knowledgeable salespeople, providing a clean and well-designed environment, and offering "free" parking. Moreover, not all merchants accept all electronic payment methods. Price apparently plays an important role. Only about two-thirds of the U.S. merchants that accept Visa and MasterCard also accept the more expensive American Express cards.

3.2 Cost and Benefits to Merchants of Electronic Payments and Merchant Acceptance over Time

Although the participants in the debate may disagree about the total social costs of payment cards, there does appear to be consensus about the cost to merchants of accepting payment cards over time. For example, the total amount that U.S. merchants paid to accept payment cards roughly tripled between 1996 and 2004. These increases were largely fuelled by year over year double-digit increases in the number and volume of card payments for goods and services.

When measured in percentage terms, in contrast, the cost to merchants of accepting electronic payments has declined. In the U.S., American Express charged a system wide merchant discount rate of more than 4% when it was launched in the 1950s. Today, its average system wide discount is approximately 2.5%. Similarly, the percentage rates that merchants pay to accept Visa and MasterCard transactions in the U.S. are lower than those charged by their predecessor systems. When Bank of America launched its credit card system in the 1950s, it set a discount rate of 5%. Today, the average merchant discount on the Visa system is below 2.1%. Likewise, in the EU, weighted average merchant service charge rates on credit card transactions have fallen for all international payment card networks—MasterCard, Visa, Diners Club, American Express, and JCB.³⁹

As the volume of electronic payments has increased, so have the number of merchants accepting them. Payment card systems began as niche products, targeting particular groups of merchants and consumers. The Diners Club and American Express systems, for example, began as travel and entertainment cards for executives and international travellers. The MasterCard and Visa systems, on the other hand, originated to provide middle-class American families with access to credit at retailers that could not afford to offer their own credit programs.⁴⁰ Today, all of these systems, and many others, are accepted at a wide variety of merchants. This widespread merchant acceptance of payment cards has expanded consumer choice of payment methods at the point of sale.

³⁸ See Klein, *et al.*, *supra* n.26.

³⁹ Interim Report I Payment Cards, *supra* n.37, at 45.

⁴⁰ Credit card networks also have provided middle-class America with nationwide payment capability in the absence of nationwide banking. Paying for a hotel in New York with a check drawn on a California bank account was and probably still is not possible.

3.3 *The Interchange Debate*

Critics of interchange fees predominantly comprise the merchants who fund the interchange through merchant discount fees. Some urge regulators to eliminate the interchange fee altogether, while others recommend capping it.⁴¹ Most enforcement agencies who have intervened in this area have chosen the latter path:

- In 1997, a group of retailers complained about interchange before the European Commission's Competition Directorate. The retailers alleged that the interchange fees on both credit and debit cards amounted to a price-fixing cartel in violation of EU competition law. They also objected that acquirers were not permitted to disclose the actual interchange fees to merchants. In its decision, the Commission held that the interchange fee is an agreement among competitors that restricts the freedom of banks individually to decide their own pricing policies, and distorts the conditions of competition in the Visa issuing and acquiring markets. With respect to the acquiring market, the Commission held that the interchange fee, the primary component of the merchant service charge, likely constitutes a *de facto* floor for the merchant service charge, having the effect of distorting acquiring banks' behaviour vis-à-vis their customers at the resale level. After a lengthy investigation, the European Commission in July 2002 announced a settlement with Visa under which Visa agreed to set its interchange with reference to a cost-based cap, to increase transparency of interchange rates, and to reduce its credit card interchange fee on all cross-border transactions gradually during the subsequent five years. The modified interchange fee that the Commission imposed under the settlement accomplished the Commission's goals: it is (1) based on objective criteria (certain identified costs) and (2) transparent to merchants. The EU also has opened interchange proceedings against MasterCard.⁴²
- In August 2002, the RBA intervened regarding credit cards. The RBA capped interchange fees, but not merchant discounts. It also eliminated the so-called no-surcharge rule, effectively allowing merchants to impose a fee on consumers for using credit cards. The RBA's actions sought to remedy the perceived overconsumption of credit cards, in light of the RBA's determination that the effective per-transaction price that consumers paid to use payment cards was significantly lower than the operating costs involved in the payment cards system. In capping interchange fees and allowing merchants to charge customers for using payment cards, the RBA sought to promote price signals to users of payment services and thereby encourage efficient choices. The RBA is also publishing merchant service fees across all networks to

⁴¹ Some merchants, for example, object to the inclusion in the interchange fee of certain identifiable costs that they assert cover items that do not benefit merchants particularly. Merchants objected unsuccessfully to the inclusion of the costs of the payment guarantee, the cost of processing, and the cost of free funding, in Visa's interchange fee approved by the European Commission in July 2002, on the grounds that these costs are of benefit to cardholders and not merchants. See Commission Decision 2002/914, 2002 O.J. (L 318) 17 (EC).

⁴² The Commission sent MasterCard a statement of its preliminary view on its interchange fees in October 2003. See European Commission, *Statement on MasterCard*, MIDDAY EXPRESS (Oct. 30, 2003), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEX/03/1030&format=>. The Commission's preliminary view was that MasterCard should make its fee structure transparent to retailers. After discussions with the Commission, MasterCard informed the Commission that it would publish its multilateral interchange fee rates for European cross-border payments on its Web site. See European Commission, *Commission Welcomes Increased Transparency in Visa and MasterCard Cross-Border Fees* (May 7, 2004), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/616&forma>.

increase transparency. As discussed below, the RBA's intervention has been the subject of much controversy.

- In September 2005, the UK OFT issued a formal finding that MasterCard's system of setting interchange fees was anticompetitive, violating Article 81 of the EC Treaty as well as UK competition law. The OFT found that MasterCard's interchange fee was unduly high because it enabled issuers to recover more than the cost of transmitting and processing payments. The OFT concluded that unduly high interchange rates restrict competition among acquirers and issuers. The OFT also concluded that merchants passed on the fee to consumers by raising retail prices. On appeal, the OFT appear to have reconsidered its handling of the MasterCard case since last year's decision. Industry participants observed that there were "material divergences" between the OFT's Defence, lodged on February 28, 2006, and its Decision, adopted on September 6, 2005. The OFT will hear the appeal against the MasterCard Decision in the Fall of 2006.⁴³

The EU also is considering additional intervention. Last year, the European Commission launched a sector inquiry into certain financial services, including the payment cards industry. On April 12, 2006, it issued its Interim Report on Payment Cards ("Interim Report," or "EC Interim Report"), and anticipates publishing its final report later this year. In the Interim Report, the Commission expressed serious concern about the current scheme of interchange fees, concluding that interchange fees vary considerably across the EU; that its inquiry did not confirm the possible justifications for interchange fees that rely on economic efficiency arguments; and that the setting of interchange fees in some cases may have the object and/or effect of creating market entry barriers to competition between local and foreign member banks.⁴⁴ Pursuant to the Lisbon Agenda and the EU goal of instituting the Single Euro Payments Area ("SEPA") and the Internal Market for Payments, the Commission as well as the European Central Bank ("ECB") are tackling issues that they view as potential obstacles to SEPA and the Internal Market for Payments.

As noted previously, challenges to interchange fees have come not only from regulatory authorities, but also from private plaintiffs. In 2005, numerous merchant groups in the U.S. filed nearly 50 individual and class action lawsuits against the payment card associations. They allege, among other things, that setting interchange rates amounts to illegal price fixing. The cases have been consolidated for pre-trial proceedings before Judge Gleeson in the Eastern District of New York.⁴⁵

4. Honour-All-Cards and No-surcharge Rules

Other common industry practices have been challenged, as well. For example, both the Honour-All-Cards rule and the no-surcharge rule have been challenged as anticompetitive, although these challenges were unsuccessful in the EU. Honour-All-Cards rules, which require a merchant that agrees to accept one particular card on a system to accept all other cards issued on that system, have been challenged as tying arrangements that limit merchant choice. No-surcharge rules have been criticized for limiting the ability of merchants both to signal to consumers the relative costs of different forms of payment and to steer

⁴³ See Order, at 5-6, Cases 1054-56/1/1/05 (Competition Appeal Tribunal May 9, 2006) ("It was accepted by the OFT . . . that, in the Defence, the conclusion that the arrangements for setting the [interchange fee] infringed Article 81(1)/section 2, and did not satisfy Article 81(3)/section 9, had been reached by a different route from that in the Decision, and that the route taken in the Defence was in substitution for the route taken in the Decision.").

⁴⁴ See Interim Report I Payment Cards, *supra* n. 37.

⁴⁵ Other legal challenges at the network level in the U.S. have involved issues besides interchange, but still have targeted primarily the open networks (MasterCard and Visa). These challenges have focused on three main issues: (1) exclusivity, (2) the Honour-All-Cards rule, and (3) the scope of permissible activities of the cooperative networks.

consumers to their preferred payment type. Payment card systems have defended the rules as output-enhancing practices that protect the goodwill associated with the entire system from opportunistic behaviour that merchant participants otherwise could undertake.

Proponents of Honour-All-Cards rules assert that these rules offer substantial efficiency benefits. Every time a system introduces a new issuer or a new variant on previously issued cards, it does not have to negotiate with each merchant that previously agreed to accept its card or develop a new brand name for the new variant. In addition to avoiding significant transaction costs, the proponents of these rules assert that the presence of an Honour-All-Cards rule prevents individual merchants from blocking the introduction of new cards that would increase the utility of the system as a whole to all merchants and all consumers.⁴⁶

Similarly, proponents of no-surcharge rules assert that legitimate business justifications support their implementation. In the U.S., these rules typically have two elements. First, they require merchants to provide prior notice to consumers when there are fees that apply to the use of a particular payment system, so that undisclosed fees at the point of sale do not surprise consumers. Thus, no-surcharge rules leave merchants free to set different prices for different payment systems, but they require merchants to disclose both prices to consumers prior to purchase. Second, no-surcharge rules generally have a most-favoured-nations requirement. This aspect of the rule prevents merchants from selectively using differential prices at the point of sale to distinguish between comparable card systems. In the U.S., these provisions typically encompass Visa, MasterCard, American Express, and Discover. According to proponents, the no-surcharge rule prevents merchants from surcharging and thus imposing a negative externality on a payment card system and its brand name by not “accepting” the system’s card in the way that the cardholder expects.

In the EU, no-surcharge rules appear to be more restrictive. European no-surcharge rules do not allow merchants to charge customers more for using a payment card, effectively prohibiting merchants from offering discounts for cash or other forms of payment. The European Commission declined to challenge Visa’s no-surcharge rule in 2001 because it found that the policy had no appreciable effect on competition.⁴⁷ More recently, the EU Interim Report identified the no-surcharge rule as a possible entry barrier, stating that it may hinder development of non-cash payment instruments.⁴⁸ Nevertheless, even where surcharging and discounting are allowed, the practices are not widespread, leading the Commission to recommend further inquiry into the effects of this policy.⁴⁹

Notwithstanding the proffered justifications, both the Honour-All-Cards and no-surcharge rules have been abandoned or abrogated in a number of jurisdictions. In the U.S., the *Wal-Mart* litigation resulted in a settlement that ended Visa’s and MasterCard’s extensions of their Honour-All-Cards rules to off-line debit cards. The RBA recently announced its intention to strike down both the extension of the Honour-

⁴⁶ Even the merchant plaintiffs in the *Visa Check/MasterMoney Antitrust Litig.*, No. 96-CV-5238 (JG), 2003 WL 1712568 (E.D.N.Y. Apr. 1, 2003) (*Wal-Mart* litigation) agreed there were significant benefits to the Honour-All-Cards rule and did not challenge its necessity. Specifically, the *Wal-Mart* plaintiffs accepted the guaranteed acceptance benefits of the Honour-All-Cards rule, but challenged the claim that it was necessary to achieve these benefits by extending the rule from credit cards to debit cards. The European Commission has recognized the value of the Honour-All-Cards rule, upholding Visa International’s Honour-All-Cards rule in 2001 and concluding that abolishing the rule would not increase competition substantially. Council Decision 2001/782, 2001 O.J. (L 293) 24, 37-38 (EC).

⁴⁷ *See id.*

⁴⁸ *See* Interim Report I Payment Cards, *supra* n.37, at 124-25.

⁴⁹ *See id.*

All-Cards rule to off-line debit and the no-surcharge rule. Surcharging is permitted in Sweden, the Netherlands, and the UK.⁵⁰ In Denmark, Danish law prohibits merchants from surcharging for Dankort cards.⁵¹ UK MasterCard has announced the repeal of its no-surcharge rule throughout the EU. Variations throughout the world in applicability of the Honour-All-Cards and no-surcharge rules illustrate the empirical complexity and the lack of consensus on competition issues in the payment card industry.

5. Australia: A Case Study

As noted above, authorities in a number of jurisdictions have imposed regulatory constraints on interchange fees and have limited or eliminated the application of the Honour-All-Cards and no-surcharge rules. The most controversial and widely debated intervention is that of Australia.

The RBA began considering interchange fees and related acceptance practices in the late 1990s. In 2001, the RBA issued a report stating that allowing payment systems to capitalize on the strategic interest of merchants in maximizing foot traffic could create perverse incentives for choice among payment systems. The RBA was concerned that payment card systems such as Visa and MasterCard were more expensive than legacy payment systems such as cash and check, and that the role of interchange in subsidizing card issuance and use might lead to the overconsumption of payment cards relative to other forms of payment.

These concerns prompted the RBA to regulate Australia's payment card industry. In August 2002, the RBA required all major payment card systems to eliminate their no-surcharge rules. Later that year, the RBA announced an interchange rate formula for the bank-owned systems (Visa, MasterCard, and Bankcard), effective October 2003. The RBA did not regulate either American Express or Diners Club, three-party systems without an explicit interchange framework. The RBA recently announced plans to extend its regulatory regime to embrace debit systems as well, eliminating Honour-All-Cards rules that bundle debit and credit cards and bringing interchange rates on competing debit systems into close alignment.⁵²

⁵⁰ See *id.* at 123-24; see also Decision No. CA/98/05/05, at 14 (O.F.T. Sept. 6, 2005), *republished in* Competition Act 1998 Pub. Reg. (UK Office of Fair Trading Credit Cards (Price Discrimination) Order 1990 declared illegal MasterCard and Visa's no-surcharge/no-discrimination rules, as of March 7, 1991); Weiner & Wright, *supra* n.27, at 297-98 (plotting national variations in application of Honour-All-Cards and no-surcharge rules).

⁵¹ See Interim Report I Payment Cards, *supra* n.37, at 123.

⁵² In contrast to Australia, Mexico's Central Bank intervened in the payment card industry due not to perceived overconsumption, but underdevelopment of the credit card market and low usage of credit cards. The Central Bank's intervention was three-fold: (1) to improve transparency, the Central Bank required issuers to inform their clients of all fees charged to them, and to inform the Central Bank of such fees in advance; (2) to improve participation in the payment card industry, the Central Bank required all banks to allow payment of credit card balances through electronic transfers, which would allow procompetitive credit card balance transfer arrangements, and the Central Bank also modified the Honour-All-Cards rule so that merchants decide whether to accept only credit cards, only debit cards, or both; and (3) regarding interchange fees, which banks in Mexico set through the Association of Mexican Banks, and not Visa or MasterCard, the Central Bank reduced both debit and credit card interchange fee schedules, and introduced several categories of interchange fees specific to different types of businesses. Unlike the RBA's cost-based cap, the Mexican Central Bank's intervention was a value-based methodology. The Mexican Central Bank has stated that it is still too early to observe the effects of the intervention in Mexico on discount rates. However, it states that consumers have not experienced increases in annual or initial fees for credit cards due to the regulation. See Jose L. Negrin, *The Regulation of Payment Cards: The Mexican Experience*, 4 REV. OF NETWORK ECON. 243, 244, 260 (2005).

The results of the RBA's actions in the Australian credit cards industry may prove instructive for other jurisdictions contemplating similar actions.

- Perhaps the most intriguing aspect of the intervention in Australia is the impact on consumers, because that impact has policy implications elsewhere. The RBA has asserted that its intervention helps consumers through greater competition and lower merchant costs. Nevertheless, it appears that results among consumers vary considerably. While the RBA has stated that non-cardholding consumers are benefiting, cardholders have experienced increased costs and lower benefits. In a paper discussed at a recent New York Federal Reserve conference, economists Howard Chang and David Evans identified negative impacts on Australian consumers. They estimate that cardholders had seen their annual fees and finance charges increase by AU\$148 million since the imposition of the RBA rate caps. Chang and Evans also reported that rewards programs have been cut following the RBA regulation. According to the RBA, though, issuers have introduced more low-interest rate cards. In addition, the RBA reports that lower merchant costs are being passed through to consumers with lower prices, although it has acknowledged that “[i]t is, however, not possible to monitor the speed and extent to which [the reduction in retail prices] is occurring, as the effect is relatively small compared to changes in the overall price level of the economy.”⁵³ It further has stated that “the fact that it cannot be separately identified does not mean that it has not happened.”⁵⁴
- Merchants have benefited substantially from the RBA's intervention. Merchant discount rates for credit cards issued on the bank-owned systems have dropped from 1.45% to .97%. The discount rates on American Express and Diners Club have also declined, but by much less. American Express, for example, has reduced its discount rate from 2.58% to 2.38%. Weighted by volume, the average rate that merchants pay for credit card acceptance across all systems has declined from 1.61% to 1.17%.
- As noted above, one concern of the RBA was the perceived overconsumption of credit cards. It appears that the RBA's regulatory intervention has affected the use of credit cards. The rate of spending growth on credit cards has fallen from 2005 through February 2006 to 8%, the lowest rate of growth since the RBA began collecting data in the early 1990s.⁵⁵ The RBA's intervention has also shifted share from the now regulated networks to the unregulated networks, which remain unconstrained in their ability to offer attractive deals to issuers and benefits to cardholders. Thus, proprietary credit card systems operating in Australia have benefited from the rate advantage, as the American Express and Diners Club share of credit card transactions has increased by approximately 20%. From October 2003 through August 2005, dollar volume on the American Express and Diners Club systems increased at about twice the rate as on the bank-owned systems (18.8% versus 9.6%).

⁵³ Reserve Bank of Australia, Payments Systems Board Annual Report 2005, at 11.

⁵⁴ *Id.* Specifically, the Bank estimates that when fully passed on to consumers, the Consumer Price Index (CPI) will be 0.1 to 0.2 percentage points lower than it would have been without the RBA's intervention. The RBA stated: “There are no statistical techniques with fine enough calibration to separately identify this change against a background where the overall CPI increase is about 2.5 per cent.” *Id.*

⁵⁵ See Philip Lowe, Asst. Governor, Opening Statement to House of Representatives Standing Committee on Economics, Finance and Public Administration – The Australian Payments System (May 15, 2006), available at http://www.rba.gov.au/Speeches/2006/sp_ag_150506.html.

- Moreover, Simes, *et al.* have asserted that several methodological problems existed in the RBA's study assessing the costs of payment cards, casting doubt on the RBA's premise for intervention—the perceived greater social cost of credit cards.⁵⁶

The primary purpose of competition law and enforcement is to enhance consumer welfare by preserving competition on the merits.⁵⁷ If intervention were to prove harmful to consumers, on balance, the propriety of the intervention would have to be reconsidered. As BIAC has observed previously, a “primary consideration in preserving competition on the merits is ensuring that the enforcement process itself does not undermine benefits to consumers.”⁵⁸ Despite assertions from the RBA that consumers have benefited from the intervention in Australia, empirical data do not confirm net benefits for consumers. Rather, the data show that intervention benefited merchants and the unregulated card networks.⁵⁹ In the absence of empirical evidence pointing to net consumer benefits, and in the face of a general consensus that consumer welfare is the touchstone of competition law, BIAC urges authorities to proceed cautiously before pursuing similar interventions in other jurisdictions.

6. Competition and Innovation

Besides pricing and non-price rules, competition authorities typically address the degree to which the practices of industry participants allow for and result in innovation. As with many aspects of the payments industry, observers are divided over the question of innovation. Proponents of the industry emphasize a sophisticated payment card infrastructure, rapidly evolving technologies, and anticipated innovations that will bring enhanced convenience and security for consumers.

The U.S. Department of Justice (“DOJ”), in contrast, challenged the networks’ alleged failure to innovate in a lawsuit filed in 1999. The Department’s primary claim involved the overlap in membership, ownership, and governance. DOJ argued that this overlap, known in the industry as duality, suppressed competition between the associations and blunted their incentive to innovate. According to the complaint, duality dissuaded management from “proposing competitive initiatives likely to lead consumers to switch from one brand to the other.”⁶⁰

The U.S. district court rejected the claim that duality had suppressed the companies’ drive to innovate. The centrepiece of DOJ’s claim was the failure of the two companies to launch smart cards in the U.S. On this issue, the district court found that the lack of a business case, not duality, explained their absence in the U.S.⁶¹ The court similarly rejected DOJ’s other evidence of suppressed innovation—an alleged delay in developing a protocol to secure payment card transactions on the Internet, the absence of comparative advertising between Visa and MasterCard, and Visa’s failure to pursue a premium card product before MasterCard launched its own product.

The district court found, instead, that Visa and MasterCard had compiled an impressive record of independent innovations. The district court pointed to the companies’ respective successes “in mov[ing] from inefficient, labor-intensive, paper-based systems to sophisticated electronic systems.”⁶² The district

⁵⁶ See Simes, *et al.*, *supra* n.33.

⁵⁷ See Summary of Discussion Points, *supra* n.7, at 4.

⁵⁸ See *id.* at 1.

⁵⁹ See RBA Payments Systems Board Annual Report 2005, *supra* n.53, at 10-16.

⁶⁰ *United States v. Visa U.S.A. Inc.*, No. 98 Civ. 7076, Compl. ¶ 82 (S.D.N.Y. 1998).

⁶¹ *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322, 347 (S.D.N.Y. 2001).

⁶² *Id.* at 364.

court also highlighted Visa's record of innovation regarding fraud control, noting that Visa's successful efforts in these areas had "created a competitive advantage for Visa over MasterCard."⁶³ The district court noted that MasterCard, on the other hand, had a long string of product innovations. The district court observed that MasterCard had been the first to introduce a reward card with no pre-set spending limit for high-end business travellers as well as Fleet cards and Purchasing cards.⁶⁴

Despite the decisive ruling of the U.S. district court on this issue, concerns about innovation in the payment industry have resurfaced. The RBA, in building its case for regulatory intervention, asserted that Visa and MasterCard had inhibited the development of new payment technologies.⁶⁵

To rebut these assertions, Visa and MasterCard point to steady improvements in the reliability, security, and efficiency of payment cards. Average settlement time on Visa transactions in the U.S., for example, has dropped nearly 20% since 1999, falling from an average time of 2.2 days in 1999 to 1.8 days in 2004.⁶⁶ In the UK and France, Visa and MasterCard have successfully deployed an EMV Chip + PIN antifraud technology. In the U.S., Visa's fraud rates fell by an annual rate of 7% from 1999 to 2004 as volume grew by 14% per year over this same period.⁶⁷ The companies also observe that new technologies are constantly emerging to extend the reach of electronic payments.⁶⁸ They point to the development of "contactless" cards, cellular-based acceptance terminals and the steady expansion in the types of cards, *e.g.*, first credit cards, then debit cards, then stored-value cards, *etc.*⁶⁹

Other regulatory perspectives further complicate the debate about innovation. Concerns about national security, privacy, consumer protection, and the safety and soundness of the banking system often lead countries to impose requirements on payment systems and their participants. These legitimate concerns may limit the development of new technologies.⁷⁰ To the extent that non-competition considerations are relevant to regulatory intervention, they should be articulated in a transparent way and implemented so as to permit the maximum level of competition possible within that framework.

BIAC previously has observed that "[t]raditional competition law, particularly in its enforcement, cannot foreshadow the pace of invention. A focus on short-term allocative efficiency may result in enforcement activities that could adversely affect the incentives to innovate and the long term benefits to society that flow from dynamic efficiencies."⁷¹ Given our current state of knowledge, regulators should exercise extreme caution when considering intervention in the payment card industry; preserving the current dynamic environment of the payment card industry is preferable to premature intervention that may chill future innovation and hamper competition.

⁶³ *Id.*

⁶⁴ *Id.* at 365.

⁶⁵ *See, e.g.*, Philip Lowe, Asst. Governor, Address to Banktech.05 Conference, Sydney (September 2005).

⁶⁶ Visa Business Research and Reporting.

⁶⁷ *Id.*

⁶⁸ *See* McKinsey & Co., *Payments: Charting a Course to Profits* (2005).

⁶⁹ *See id.*; *see also* Brown & Plache, *supra* n.16, at 67-71.

⁷⁰ *Cf.* STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (Harvard 2006).

⁷¹ Summary of Discussion Points, *supra* n.7, at 7.

7. Conclusion

Numerous issues relating to competition in the payment cards industry are highly controversial and subject to conflicting viewpoints. The economics underlying the industry are complex and not yet well understood, given the two-sided nature of the product. Existing theory provides some insight into fee levels and changes, but a number of complex factors shape interchange developments. Many of these factors are unique to particular countries, and further empirical work is necessary to account adequately for these individualized factors.

For these reasons, BIAC recommends for the payment cards industry the same approach it has recommended generally. Namely, competition should be maximized except in clear cases of market failure or where other overriding public interest objectives justify regulation. Before intervening, regulators should be certain that the conduct in question is anticompetitive, that enforcement action is necessary to protect consumers, and that the proposed remedy will benefit consumers. Regulators should be cognizant, moreover, of the high-technology and rapidly evolving nature of the industry, as well as the interoperability that payment cards can provide for travel and commerce in this increasingly globalised world. Regulators should refrain from intervening in ways that would hinder innovation, stymie international transactions including travel and commerce, and impede competition.

**INTERCHANGE FEES.
IS THERE A COMPETITION PROBLEM AND, IF SO,
HOW DO WE APPROACH SOLVING IT?**

David S. Evans¹

Based on a presentation given at the OECD Meeting on Payment Cards,

Paris, 5 June 2006

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We're all aware of the vibrant debate over whether interchange fees, or the current levels of interchange fees, lead to market distortions. In this paper, I'd like to step back from that controversy and address two fundamental issues:

- Are the market distortions that are said to arise from collectively set interchange fees something that are within the proper provenance of competition authorities or should these distortions, if they exist, be dealt with by other governmental institutions?
- How should governmental authorities think about the regulation of interchange fees assuming that it is a sensible role for the government?

To answer either of these questions, I start with an understanding of what market distortion might arise from interchange fees. For this I think it is helpful to take a look at what several European competition authorities and the Reserve Bank of Australia have found after their investigations.² Based on my review, I believe they more or less agree on four points although of course there are nuances for each authority:

- First, card systems have entered into an interchange fee agreement that restricts competition.
- Second, the interchange fee agreements weren't indispensable for accomplishing a pro-competitive purpose. Nor did they meet any other conditions under which they might be exempt.
- Third, bilaterally set interchange fees are infeasible and may result in a barrier to entry to new competitors.
- Fourth, a centrally-set interchange fee agreement would be pro-competitive if it were based on costs incurred by the issuing banks on behalf of the acquiring banks.

To put all this in the language of EC competition law, the interchange fee agreements violate Article 81(1) but would be exempt under Article 81(3) if the interchange fee were based on certain costs. The investigations have therefore found that centrally set interchange fees are pro-competitive so long as they are set at the right level. Notably, no authority or court, as far as I have seen, has found that the right level is a zero interchange fee or what is sometimes call on-par exchange.

Competition law ordinarily condemns price fixing because it restricts output. In this instance at least some of the decisions claim that the problem with letting the associations set interchange fees without any restrictions is that it has led to too much output - too many card transactions³

Normally, competition law condemns price fixing and insists that it stop. Here, the decisions condone price fixing and insist on a different fix.

² European Commission, Interim Report I Payment Cards, Apr. 12, 2006. Reserve Bank of Australia, *Reform of credit card schemes in Australia: IV Final reforms and regulation impact statement*, Aug. 2002. Office of Fair Trading, *Investigation of the multilateral interchange fees provided for in the UK domestic rules of MasterCard UK Members Forum Limited (formerly known as MasterCard/Europay UK Limited)*, No. CA98/05/05, Sept. 6, 2005.

³ Reserve Bank of Australia, *Reform of credit card schemes in Australia: IV Final reforms and regulation impact statement*, Section 2, Aug. 2002.

Box 2. The "Australian" Theory of Market Failure in Payment Cards

Market Failure: Cards are used “too much” relative to other payment methods

- Because cardholders don’t incur cost of using them
- While merchant does incur cost of using them
- But merchants can’t discourage their use because of transactions costs or no-surcharge rules

Interchange fees: “High” interchange fees encourage issuers to subsidise cardholders

- Who then use cards too much

Consumption tax and subsidy: All consumers end up paying interchange fee tax because merchants pass this along

- Cash-paying customers indirectly subsidise card-using customers

SOURCE: Reserve Bank of Australia, *Reform of credit card schemes in Australia: IV Final reforms and regulation impact statement*, section 2, Aug. 2002. European Commission, Interim Report I Payment Cards, Section XVI.2.3 Apr. 12, 2006.

So what’s the problem with interchange fees? The Reserve Bank of Australia (RBA) provides the clearest explanation and the Office of Fair Trading’s (OFT) decision echoes this in paragraphs 381-382.

The interchange fee subsidises cardholders. It gives people an incentive to use credit cards over other means of payments. People therefore use credit cards too much and cash too little. That is inefficient from society’s standpoint. The Governor of the RBA says this is an example of Gresham’s Law.⁴ The bad money drives out the good.

This alleged market failure stems from two claimed features of the card business. The first is that cardholders make the decision concerning what payment instrument to use. And the second is that merchants can’t really alter that decision because, on the one hand, they can’t surcharge and because, on the other hand, they can’t afford to decline cards given that their competitors take them.

Is this the sort of problem that competition authorities should be devoting resources to? My answer is no for three reasons.

First, at least for now, I don’t believe that anyone has really identified a traditional competition policy issue. These associations provide a way for many competing banks to get into the card business as issuers and acquirers. To do that, they have to establish rules for operating the system. The interchange fee is one of those rules. And many of the decisions recognise that a centrally set interchange fee helps reduce transactions costs and helps reduce barriers to entry into the card business.

⁴ Ian Macfarlane, Governor of the Reserve Bank of Australia, “Gresham’s Law of Payments,” address to Australasian Institute of Banking and Finance Industry Forum 2005, Mar. 23, 2005.

If there is a basis for believing that the interchange restricts competition in a way that reduces overall output or raises overall price and thereby harms consumers, then by all means competition authorities should take it on. But without that basis I think analysing interchange fees under Article 81 is really like stuffing a square peg in a round hold. And to me that's how the decisions read. That becomes most apparent when having pilloried centrally set interchange fees under Article 81 the decisions have to explain why a centrally set interchange fee - just a different one - is necessary.

Second, I don't think competition authorities are the right institution for fixing - or thinking about fixing - a market failure involving the overproduction of card transactions. The claim is that the interchange fee distorts the choice of payment instruments. That claim can't seriously be addressed without considering the costs and benefits and possible market failures for other payment instruments. How could it be concluded that having cards drive out cash is bad without examining whether there are market imperfections that lead to too much cash? And it seems very odd - not impossible, but quite strange - that the future of the payments industry is more paper and fewer electrons. It would seem that a central bank, with responsibility over the monetary system, is in a better position to look into these questions than a competition authority. (That of course was the case in Australia).

And, third, it is a mistake for competition authorities to become the all-purpose fixers of market failures or becoming quasi-regulatory agencies for whole industries. The antitrust laws were not intended to ferret out market failures or fine-tune the operation of industries. Most antitrust authorities have wisely avoided filing excessive pricing cases because they know it will take them down the slippery slope of industrial regulation. The interchange fee cases are really excessive pricing cases dressed up in Article 81 clothing. They take competition authorities down the same slope.

Let me now turn to the second issue. Whoever takes the interchange fee issue on – whether it is a competition authority or a central bank – must ultimately decide whether there is a sensible role for the government.

That, of course, requires figuring out whether there is a problem to be fixed. The legalistic Article 81 analysis is not helpful here. So let's return to the market failure theory which was put forward by the Reserve Bank of Australia and that seems to lie behind many of the concerns expressed about interchange fees including those by the UK Office of Fair Trading⁵.

The market failure theory has some attractions that should appeal to economists or the practically minded. One can actually test it with data that one could actually get. Credit cards are used too much relative to cash if the net marginal social benefits of cash exceed those of cards. Unfortunately, thus far at least, we haven't seen any attempt to take the market failure theory seriously as a framework for investigating whether there is a problem. Rochet and Tirole (2006) explain why the simplistic approaches based on what they have called the "tourist test" yield invalid results⁶.

If there is a problem, though, then the next step is figuring out the most effective way to solve that problem. The analysis of remedies in these interchange fee decisions is quite unsatisfactory. None of them is based on an objective standard for what the right interchange fee is. Instead they start from the premise that the interchange fee is too high and that it must be lower. The older decisions that didn't have access to

⁵ Office of Fair Trading, *Investigation of the multilateral interchange fees provided for in the UK domestic rules of MasterCard UK Members Forum Limited (formerly) known as MasterCard/Europay UK Limited*, No. CA98/05/05, P.9 – 10, Sept. 6, 2005.

⁶ Jean-Charles Rochet and Jean Tirole (May 2006) *Must-Take Cards and the Tourist Test*, Section 2.2 (IDEI, GREMAQ Working Paper). Joseph Farrell (Mar. 2006) *Efficiency and Competition between Payment Instruments*, *Review of Network Economics* 5(1): 26 – 44.

the two-sided markets literature can be forgiven for concluding that interchange fees should be set at the incremental cost to the issuer.

The newer decisions don't have any excuse. They settle on cost-based regulation of interchange fees primarily because it is something they can calculate.⁷ That should remind you of the old joke about the economist looking for his lost keys on a darkened street. When asked whether he was looking for his lost keys under a street lamp, he replies that he's looking there because it is easier to see.

We are never going to be able to calculate the right interchange fee precisely. But any responsible regulator has to start by figuring out what the right interchange fee is and then approximating it as best as possible.

And lastly, there is now an extensive body of work on regulation which teaches us that we should compare the benefits of regulation against its cost. The economy is a complex organism. It is hard to anticipate all of the things that will happen when we intervene in it.

This brings me to my final point: What have we learned from the interchange fee cases so far? Well, the Australians have done us a favour by embarking on their great experiment in regulating interchange fees. While I have a paper that goes into more detail on this in the Review of Network Economics (Vol. 4, 2005) (See also Joseph Farrell's comment), here I will just observe that Australia cut the credit card interchange fee in half almost three years ago. That took almost half a billion Australian dollars out of the revenue that banks got from credit cards in 2004 alone. This is an absolutely massive intervention that intended to reduce the use of credit cards and increase the use of cash, check and debit cards.

But there's just no evidence that it has, or will, accomplish those objectives. Here's the data on the level and growth of credit cards in Australia.

⁷ Reserve Bank of Australia, *Reform of credit card schemes in Australia: IV Final reforms and regulation impact statement*, Section 7, Aug. 2002.

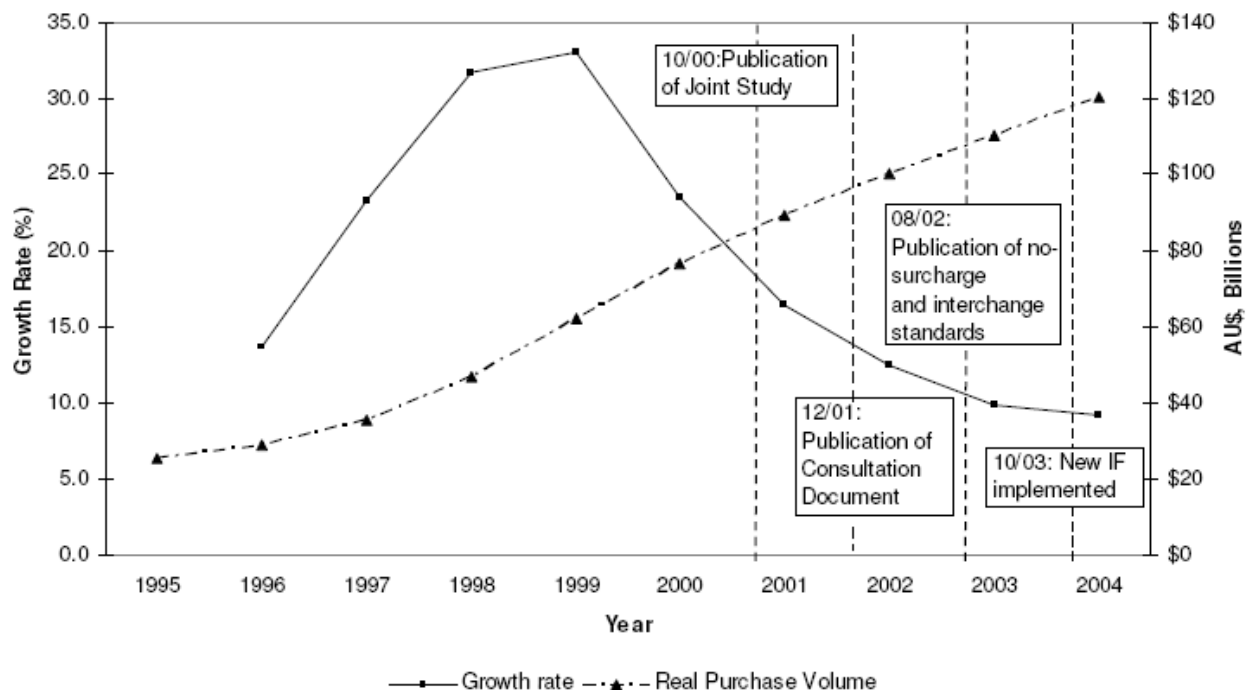


Figure 1. Real Purchase Volume on Credit Cards in Australia, 1995 - 2004⁸

What the reforms have done is to transfer a massive amount of wealth from issuing banks and cardholders to merchants. Issuing is pretty concentrated in Australia so it is not surprising that the banks absorbed some of the lost interchange revenue. But most retail categories in Australia are highly concentrated too. That and the fact that the cost decrease to the merchants was trivial as a percent of selling price suggest strongly that the merchants have gotten most of the benefits of the interchange fee reduction in the form of higher profits. Merchants received an exogenous decrease in costs of \$480 million annually, most of which they have probably retained thus far, while banks lost about AU\$328 million net revenues annually after accounting for increased cardholder fees.

Maybe this will work itself out of the system in the long run. But, as Keynes said, in the long run we are all dead.

In Australia, banks shifted volume to American Express which wasn't subject to the regulations. And the RBA is letting that continue perhaps because it has no logical basis for doing otherwise. MasterCard had a higher cost-based interchange fee – I guess because it was less efficient or had better accountants. Banks started switching volume to MasterCard. The RBA stopped that by making the interchange fees the same.

Around the world, card systems are trying to figure out how to convert themselves to unitary systems and thereby escape oppressive cartel laws. The second largest system in the world – Mastercard – has recently reorganised itself into a publicly owned for-profit corporation. It is widely understood that the threat of interchange fee litigation was one of the main reasons behind this. Bank of America, the largest

⁸ Howard Chang, David S. Evans, and Daniel D. Garcia Swartz, "The Effect of Regulatory Intervention in Two-Sided Markets: An Assessment of Interchange-Fee Capping in Australia," 4 Review of Network Economics 328-358 (Dec. 2005).

bank in the United States, is considering leaving the Visa system to start its own unitary system like American Express. My guess is other large banks are too. Then they can set the merchant discount at any level they want – just like American Express.

The open systems have allowed easy entry and exit by banks into card issuing and acquiring. Maybe these open systems are not as conducive to competition in some countries as in other countries. Perhaps structural reforms of the banking industry are needed. But competition authorities should give a lot of thought to these issues before they embark on policies that will give unitary systems an advantage in the marketplace and that will encourage open cooperative systems to collapse into unitary ones. Regulating interchange fees results in a massive government intervention into an industry that is vital for the smooth functioning of the economy.

SUMMARY OF DISCUSSION

The Chair, Alberto Heimler, opened the roundtable on card payment systems by noting that the session will discuss issues primarily related to debit cards and credit cards. There are three main competition policy options in this area: Firstly, that there is no market failure and therefore no intervention is necessary. Secondly, that arrangements in the credit card industry lead to artificial increases in market power that are not competed away and intervention is indeed necessary. And thirdly, that there is a market failure, but intervention is really too difficult so it is better to do nothing.

Interchange fees, no-surcharge rules and honour-all-card rules have all been the subject of debate and heated discussions in recent years. In order to help better understand the issues involved and the costs and benefits of alternative solutions, the Chair stated that a number of well-known economists or officials were invited to join the roundtable discussion including Wilko Bolt, David Evans, Joseph Farrell, Alan Frankel, Jean-Charles Rochet, Wiebe Ruttenberg and Jean Tirole. The Chair expressed his gratitude for their presence. He stated that the discussion would be organized around three themes: first, the market for payment instruments, second, interchange fees and restraints on merchants, and third, other enforcement actions, procedural issues and the role of government.

1. Market for payment instruments

The Chair noted that when a consumer arrives in front of a cashier, he or she can choose among a number of alternative payment instruments: cash, cheques, debit cards and credit cards. Efficiency will be assured when, given the characteristics of the chosen payment instrument, the one characterized by the lowest cost will be chosen. The problem with the market for payment instruments is that very often this is not the case. Payment systems are often claimed to constitute a two-sided market. The Chair asked Professor Tirole to speak about two-sided markets.

Professor Jean Tirole began by discussing multi-sided markets. These are markets in which a platform is trying to attract two or more 'sides' of a market who want to transact or interact with each other. For example a video game platform such as PlayStation, Nintendo or the X-Box must attract both game developers who want to sell games to gamers and gamers who want to buy consoles for which games have been written. Similarly the vendor of an operating system like Palm or Windows wants to attract both application developers and users. Portals, newspapers and TV stations want to attract both advertisers and 'eyeballs'. Credit card platforms want to attract merchants and cardholders. The point is that there is a chicken and egg problem: the platform must get both sides on board while not losing money.

To indicate the range of applications of two-sided market theory, platforms can include auctions, securities and matching platforms, telecommunication platforms such as the internet, academic journals and shopping malls. Platforms devote substantial thought and experimentation to the choice of their business model. They decide what they should charge according to what each side can bear, and according to 'cross-group externalities'. Of course, platforms account for externalities of demand on both sides, so the price structure should aim at getting both sides on board. 'Fair' cost allocation does not enter into this calculation, but the surplus generated on each side does. For example if a buyer creates a lot of value to a seller, then the platform can charge high prices to the seller; and that means that in exchange the platform will want to charge low prices to the buyer, because the platform wants to attract buyers who are going to create value to the seller. The most obvious examples are advertising-supported portals, TV networks and newspapers, for which 'eyeballs' may receive the service for free, or in any case far below cost. The price is below cost to the 'eyeballs' because the 'eyeballs' have a lot of value to the other side, the advertisers.

In a first business or economics course is typically taught a pricing rule that is applied every day by business executives. This rule is the standard formula for profit maximization and states that the price charged for any good or service, expressed in relative terms (price minus the marginal cost over the price) should be inversely related to the elasticity of demand. The elasticity of demand is the percentage increase in demand when the price is reduced by 1%. So if there is a high elasticity, the firm will charge close to marginal cost; if there is low elasticity, the price can be raised.

It turns out that, despite the complexity of two-sided markets, this formula still applies to two-sided markets. So for example, when computing the price that should be charged to a buyer, the cost should be thought of as being an opportunity cost, smaller than the cost incurred in serving this buyer. The reason for that is that attracting extra buyers generates revenue on the seller side either through user or per-transaction charges, or by being able to increase the seller's membership fee because they value the presence of buyers on the other side. So think of marginal cost as really an opportunity cost which includes how much money will be made on the other side from attracting some transaction or member on that side.

This is theory, but theory is actually very important because it predicts - and practice confirms - that for one side of the market, the price may be low, perhaps 0 and even sometimes negative as with credit cards, if the presence of a buyer generates substantial revenues on the seller side.

Consider how the theory applies in practice. It often results in skewed pricing patterns with pricing at or below cost to one side and high prices to the other side. It is a very common pattern in many industries. A pdf reader is given for free. But to create a pdf document, the user has to purchase the software. The price of the pdf writer software is relatively high relative to marginal cost (which is basically 0). Now presumably this skewness comes from the writer's willingness to pay. In contrast, users pay for movies or books, not the writer. Often operating system platforms such as Palm or Windows do not make money on developers but make money on the user side. Again that is a 0 price for one side and a high price for the other. For the platform that is the focus today (credit and debit) cards, there is a relatively high merchant discount and for the cardholder, a very low price, which is actually often negative because of frequent flyer miles or interest free periods. Again, this is a very standard pricing pattern.

Platforms - and this is true for many industries - tend to regulate interactions between end-users in that they perform the balancing act of trying to attract both sides through instruments other than just price, which are membership and usage fees. Platforms often protect consumers by allowing substantial competition inside the platform through an open architecture. When there is not enough competition they may also regulate prices. Everyone with an iPod will know that the price is currently regulated through a price cap of 99 cents. Similarly, there is in some countries a no-surcharge rule for payment with cards, although this rule may not be binding due to transaction costs. Platforms perform many other standard protection functions such as licensing, information provision and enforcement. The reason why they take these actions is that protecting the consumers allows the platform to make more (or lose less) money on the buyer side. Put differently, regulation is an additional strategy to get consumers on board.

Multi-sided platforms present complex business models and it is important to understand this in order to make judgments about these industries.

There are some interesting aspects to platforms' competitive strategies. Consider situations with no interconnection, such as cards and software, not telecom. The first point is that due to network externalities users want to be on the same platform as other users, and that may create a winner-take-all effect, which may yield a tendency to have a single platform. This however need not imply a long-term dominant position, due to dynamic contestability, as seen in the video game industry where dominant players have been replaced over time.

Two-sided platforms do not necessarily tip even at a given point of time. Multiple platforms survive in mobile phones, media players and cards. Differentiation may allow smaller players to survive by inducing ‘multi-homing’. So does linear pricing, which consists in saying: “users will pay per transaction, no fixed fee, and so they face no risk when joining our platform”.

Professor Tirole emphasized that the impact of multi-homing is very important in all those industries. Suppose for example that buyers single-home while sellers multi-home. That is, a seller is connected to multiple platforms whereas a buyer is connected to a single platform. In this situation the only way for the seller to interact with a buyer who operates with platform 1 is for the seller to connect to platform 1. Platform 1 has a monopoly as it controls a bottle neck, whereas the buyer could have interacted with the seller through either platform. The outcome is that the single-homing side is treated favourably by platform 1, but a monopoly price obtains in the multi-homing market. That is, the platform can charge a monopoly price to the sellers but has to charge a low price to the single-homing buyers.

One illustration of multi-homing arose in the 1990’s, when some countries experienced the introduction of no-annual fee cards from Visa and MasterCard (MC), which led American Express (AE) consumers to multi-home and made it easier for merchants to turn down AE. This forced AE to reduce the merchant fee, since the merchants knew that probably the AE customers had a Visa card or a MC in their pocket, which was cheaper for the merchant.

It is very important to understand the implications of two-sidedness for competition policy, whether for defining markets, identifying monopolization or identifying abuses of dominant position. Competition authorities may be tempted to look at one side only. But only a two-sided market analysis makes sense. For example, with a predation test, competition authorities might be suspicious of a price below marginal cost or incremental cost (detecting such a price is usually the first step in a predation claim). But in fact, there are prices far below marginal cost in most two-sided markets. There is free software, and there are free newspapers. Selling below cost is usually not predatory. In many industries, firms sell far below cost to one side and conversely they charge far above cost to the other side. This behavior may be completely unrelated to an abuse of market power.

Similarly, to be provocative, imagine various platforms colluding on one side of the market and fixing a price. Normally, price fixing yields a deadweight loss. But one must also consider the fact that, when there is a big profit on one side of the market, there will be a tremendous increase in competition on the other side. The net effect is not clear. Professor Tirole stated that although one must exert substantial caution with the preceding argument, it is a useful example of the sort of analysis that makes two-sided markets complex. He noted that there are many other interesting points related to two-sided markets, in terms of tying or exclusionary contracts, for which there is not sufficient time for discussion today. But the point is that applying conventional wisdom to two-sided markets without careful thinking is highly prone to error.

Professor Tirole concluded by noting that a substantial number of key, old and new economy industries are two-sided markets. Fitting one-sided thinking into two-sided markets can lead businesses to go bankrupt. Before intervening in such industries, it is important to benefit from the past sector experience and to enrich it through theoretical and econometric work.

The Chair thanked Professor Tirole for his presentation and asked Professor Farrell to speak.

Professor Joseph Farrell began by saying that he would take very seriously the recommendation by Professor Tirole that the markets in question should be analysed fundamentally as markets with a two-sided customer.

He began by describing terminology. A payment instrument such as a payment card, charges a fee to a merchant (M) and a fee to the cardholder (F) (which is quite often negative). The sum $M+F$, the total fee charged by the payment instrument, is called a 'fee level'. The 'fee structure' is the balance between M and F. This can be thought of as the ratio, M divided by $M + F$.

There is a close relationship between interchange and fee structure. If interchange, or a change in interchange, is passed through equally – whether it's 100% or 37% – on the two sides of the market – the acquiring side and the issuing side – then the interchange fee affects the structure and *not* the fee level charged by the payment instrument. So in the benchmark case of equal pass-through on the two sides of the market, interchange is fundamentally about fee structure and not directly about fee level. If pass-through is asymmetric then the change in interchange will affect the fee level as well as the fee structure. Contrary to what some observers may say, it is not true that a difference in competitive conditions between the acquiring side and the issuing side straightforwardly and simply leads to the conclusion that pass-through will be asymmetric. That is a complicated topic.

The way economists typically address questions like "What is the effect of interchange?" is by writing down a model and evaluating the effect of a variable such as interchange on economic welfare in the model. There is another approach that could be taken which is to look within the model at the effect on competition, properly defined, and take the view that in the long run an improvement in competition will normally improve welfare. It seems to me one can readily point to examples where competition policy authorities adopt this approach, completely contrary to the recommendations of economic models. For example there is a well established economic literature that says that in certain types of oligopoly industries the private incentives for a new entrant to come in are excessive, that is to say marginally profitable entry by a new entrant is inefficient in terms of its effect on total economic welfare in the model. Nevertheless competition authorities do not go round saying they should block such entry. One reason for this is trust in the syllogism that increased competition, in the long run, will improve welfare.

Professor Farrell stated that in his analysis of payment instruments, he would take as his baseline a competition policy standard rather than a more typical economic welfare policy standard, and he would take a whole heartedly two-sided customer perspective on payment instruments. When a market has a number of competitors, normally policymakers let firms charge whatever they want and count on competition to do a variety of good things, such as bringing prices closer to efficient levels and allocating more demand to the more efficient firms.

Professor Farrell noted that he had recently published a paper in the Review of Network Economics that explores how to apply the approach of competition policy to fee levels and structures, and asking whether fee structures might distort competition and make it work badly. Interchange most directly affects structure and affects level only through asymmetric pass-through. A key part of competition normally is that firms make offers to customers and, of the offers that are made, customers choose the one they prefer. That almost goes without saying in a simple one-sided market. It turns out that with a two-sided customer it is not automatic that the customer will choose the offer that it prefers. Instead there may well be what economists call a 'principal-agent problem' between the merchant and the cardholder. The 'customer' is a two-sided creature, a transient team consisting of the merchant and the consumer. What can go wrong? In many cases, the active chooser in the two-sided customer team is the cardholder. The cardholder is choosing on behalf of the two-sided customer but might not choose what is best for the two-side customer. Interestingly, the merchant would not fight exclusively for the merchant's interest, narrowly construed, when the merchant and the consumer mutually decided what payment instrument would be used. This is because the merchant would internalize the consumer's side benefits and inherently act as a team player within the two-sided customer. But if a team of two exists, where one player is a team player and the other is selfish, and the selfish one makes decisions, there will be some biases. Professor Farrell stated his view that these biases can create a competitive distortion if, for example, the merchant predictably prefers the

use of debit to credit but the cardholder chooses credit rather than debit more often than would be best for the two-sided customer. Note that, using a social welfare standard, it is not necessarily biased relative to what would be best for this particular choice for all of society.

Transactions may occur on the less-preferred platform for the two-sided customer when (1) the 'worse' alternative tilts its fee structure more heavily to the cardholder than its rival, (2) there is a no-surcharge rule or 'price coherence' and (3) merchants go on accepting the 'worse' alternative. Merchants may accept 'worse' alternatives for several reasons, including that the payment instrument is well-established, the payment instrument may be efficient for certain transactions but not for others, and a first transaction may increase the likelihood of follow-on transactions.

When is this distortion likely to be present? It will be present where the cardholder chooses one instrument for a significant number of transactions, the merchant prefers an alternative instrument and the merchant's preference is in some sense stronger and is not internalized between the two of them. The flip side of this diagnosis is that if the merchant is broadly indifferent about what payment instrument is used, then this kind of distortion is not taking place.

The question here is, in what circumstances are payment fee structures such that the two-sided customer generally makes the choice of a payment instrument that is best for the two-sided customer. That is a different question from asking what the customer actually chooses and comparing that against the 'social efficiency' in the model. The questions differ at a philosophical level in that one seeks to support a competitive mechanism while the other, in a more technocratic fashion, seeks to promote social efficiency directly. At a more technical level, the questions differ in that the first does not count the effect on the payment instrument's marginal profits. Asking only what the effect is on the total surplus of a customer's choice can have a perverse effect. Because prices do not matter in that calculation, such a focus can weaken or eliminate competitive price discipline.

There is a closely related concern that a fee structure which imposes large charges on a merchant in the presence of price coherence has the effect of taxing transactions using other payment instruments and subsidizing cardholder use of this payment instrument. One can be concerned about the possible distortion of competition caused by a payment instrument's ability to tax rivals in order to subsidize its own use. This concern, in principle, vanishes when there is merchant indifference at the point of sale, because then an increase in use of, for example, Visa does not affect the merchant's profit-maximizing nominal price.

At the technical level, it is possible that through the choice of fee structure, a payment instrument can bring back demand that it lost by pricing above its marginal cost. It is possible that the demand boost might simply restore demand to what it would have been if its fees were equal to marginal cost, as Professors Rochet and Tirole proved some years ago. In terms of immediate social welfare effects this is good, but by causing two-sided customers to choose something other than what they would optimally choose, given the prices and non-price variables, the demand boost nevertheless obstructs the competitive mechanism. While in models there may be a good outcome, Professor Farrell suggested that, in practice, he would remain concerned. Moreover, it is only possible, not particularly probable, that the demand boost will in practice restore demand to its marginal-cost level: the economics literature has identified a variety of complex biases.

He identified three basic perspectives on fee structure. The first, which has inspired most of the economic literature, would say: treat fee structure as a public policy variable and see how it affects the value of total economic welfare. The answers appear to be complex and ambiguous. The second perspective responds by not taking the models so very seriously; it would apply a general preference for *laissez-faire*. The third perspective instead pursues a general view in favour of the competitive mechanism

and seeks to explore and potentially modify the ways in which fee structures affect the working of the competitive mechanism.

The Chair thanked Professor Farrell for his contribution. He then proceeded to ask delegations questions related to their institutions. The chair noted that the situation in the Netherlands is, in some respects, typical of Europe, with a high percentage of PIN debit card transactions, or around 30% in value terms, while credit cards are effectively a third of debit cards and are mainly used in restaurants and hotels. What is interesting in the Dutch submission is that cheques were taken out of the market in 2002. The first question is: How was this elimination achieved? Was it a decision by the Central Bank or by the bank association? Did the competition authority have anything to do with it? The second question concerns the role of Currence, the organization that administers all collective payments in the Netherlands, grants licenses, and develops and enforces the relevant regulation. It is owned by the major banks, not by all banks; in other countries, like Italy for example, the equivalent of Currence is owned by all banks. Would Currence have the power to block the entry to the market of smaller players? Finally the Dutch submission establishes some sort of a link between reduction in merchant fees for debit card transactions and the use of debit cards by consumers. Can the delegation explain how the reduction of the merchant fee has affected consumer choice, if there was any such influence?

A delegate from the Netherlands responded that to the delegate's knowledge, the Dutch banks decided to eliminate cheques because of fraud risk. The Dutch competition authority (The NMa) was not involved in the decision; the Dutch banking association was involved and as far as the delegate knew the Dutch central bank was also involved. But the Dutch central bank did not take the decision. The second question is about whether Currence would have the power to block entry in the market in favour of its owners, the banks. For new parties, Currence has to respect a set of rules and regulations that have been reviewed but not officially approved by the NMa. The NMa has so far believed those rules and regulations are objective, non discriminatory and transparent. When a new party that wants to enter the market is not happy with the decision of Currence they can start an appeal procedure in which the banks are not involved. However the NMa is investigating the role of the banks within Currence to see whether they have influenced the decisions and the policy of Currence recently. The results of this investigation are not yet known. The last question was how would the reduction in merchant fees affect consumer choice? The reduction of merchant fees started at the end of 2005 and there is not yet sufficient evidence to say something useful about the effects on the consumer choices.

The Chair then turned to Denmark. According to the Danish submission the market for cards is highly regulated, nonetheless the number of debit cards in Denmark is almost equal to the population: 3.4 million debit cards over a population of 4 million. There is no interchange fee in Denmark and merchants pay the acquirer a yearly subscription fee fixed by an Act. It looks at first sight like an efficient system because the fixed cost of acquiring is compensated by a fixed fee to merchants. However in Denmark as in the Netherlands, the market organizer, PBS, is by far the largest acquirer with over 90% of the market. This is different from the Netherlands because in the Netherlands this was the case before but now acquiring is performed by all banks, not by Currence. Why did competition on the acquiring side not emerge and why is the card market so extensively regulated in Denmark?

A delegate from Denmark stated that for the question on acquiring side competition, table 2 in the submission says the yearly subscription fee only applies to Denkc card. The other cards have a per-transaction payment fee. This means that merchants still prefer Denkc card over other cards. Before 2005, Denkc card was free of charge by law, so the acquirer was not allowed to require a fee from the merchant. This was changed in 2005 so that now there is a yearly payment. The total cost difference between Denkc card and other cards has been reduced and the Danish Competition Authority hopes that this will improve competition in the acquiring market in the long run. The government is currently investigating an interchange fee on non-physical transactions in Denmark. The fees of the acquirer were accepted as based

on its costs, but its costs included fees comparable to an interchange fee paid to the issuing banks. Whether this fee is based on costs is subject to investigation, as is the extent to which costs like these should be established through a multilateral agreement.

The Chair turned to Mexico. In Mexico merchants are charged according to a sector structure decided by the Mexican Bank Association. The merchant fee in cards therefore is not related to the number of transactions or the use of the system by the merchant, but the merchant's sector. All retail shops pay the same fee, for example. The Chair asked whether such a structure eliminates the possibility of negotiation on the part of a retailer within a sector, strongly reducing competition on the acquiring side.

A delegate from Mexico stated that in Mexico, the second largest bank holds over 60% of point-of-sale contracts. Overall, banks control about 93% of this market. The Mexican submission outlines recent developments in the regulatory framework. The framework requires the Central Bank and the Federal Competition Commission to cooperate to ensure competitive conditions. In the field of merchant fees there has not been any formal initiative to regulate. However, there has been analysis by the sectoral regulator which has triggered changes in fee structure. Specifically, interchange fees were modified from being tied to a merchant volume of sales to a sector-specific structure. This seeks to address Mexico's low penetration of payment cards on the supply side. But this approach has drawbacks, including discouraging bargaining between merchants and acquirers. A recent case brought in front of the Federal Competition Commission by retailers deals precisely with this problem, with the merchants alleging price fixing. The case was closed pending an in-depth study of the sector. The Commission is intensifying cooperation with the Central Bank to gain a deeper understanding of this market and evaluate measures to intensify competition. This is an issue where our understanding and approach are still evolving.

The Chair moved on to Lithuania, where banks must pay charges in order to join the network both for debit and credit cards. What is not clear from the report is whether these charges are one time or annual charges. Furthermore the report mentions the fact that revenues from issuing cards increased by a factor of almost four in the recent years for a number of banks. What is the explanation for that? Were some of the increased profits given back to consumers as rebates?

A delegate from Lithuania responded that banks have to pay in order to become a member of a payment system, like Visa or MC. Getting a license to produce any concrete product requires the payment of an additional fee, paid once and not annually. For the second question, revenue from issuing cards increased in some major banks but not in minor ones. The increase was significant, but approximately in proportion to the number of newly issued payment cards. The large banks have extended most of the issuance of credit cards that are much more profitable compared with debit ones. These banks do not seem to be willing to reduce cardholders' fees. For the moment, high demand for payment cards lets the issuers maintain high prices for cardholders. But there may be alternative forms of price reduction, for example minor banks reduce their price directly while the major banks offer a wider set of services for the same price, such as travel insurance.

The Chair turned to the European Commission, which has launched a fact-finding investigation into financial services, particularly retail banking and business insurance. An interim report dealing with cards was published in April 2006. The report first suggests that EU member countries differ substantially in terms of institutions, market structure and business arrangements. Entering the SEPA (Single Euro Payments Area) will probably change this. On substance the report concludes that profitability in card issuing and acquiring is high, although much higher for card issuing, implying that the revenues from interchange are not given back to consumers, but result in higher profits. Furthermore, some countries are characterized by high network joining fees so that entry of new competitors may be blocked in an unjustified way. What are the next steps of this investigation and what is the relationship with the

development of SEPA. Who is responsible for the development of SEPA, is it the Commission or the European Central Bank?

A delegate from the European Commission stated that the sector enquiry into the payment card industry was a year-long, empirical investigation into the competitiveness of the European payment card industry, with a special focus on the pricing market structures, scheme structures and interchange fees in particular. After publishing this report in April, a public consultation was launched with the intention to publish a final report with recommendations to the member states on December 31st 2006. The sector enquiry relates to the development of SEPA. The sector enquiry is of course an instrument for preparing competition law or other enforcement actions, but the scope of this sector enquiry means that it collects factual evidence that should feed into the SEPA discussion which is under severe time pressure to achieve a single Euro market by 2008. It is critical that this discussion be based on empirical evidence. Factual information was collected for the enquiry on interchange fees on the pass-on of interchange fees to cardholders, on market concentration and many key issues that are of importance for seminal papers like those of Professors Rochet and Tirole. The European Commission estimates that the achievement of SEPA could result in cost saving of about 50 to 100 billion euros every year, where 1 250 billion euros are spent with cards in Europe for over the counter payments. Who is responsible for SEPA? Both the Commission and the ECB share the responsibilities, working hand in hand, exchanging information, and closely liaising through the sector enquiry. The ECB probably has a different angle to this single European market because it is in their interest to achieve a single market. If a single European market is the objective, a policymaker might prefer an interchange fee that is equivalent or 'harmonized' in all countries. For a competition authority, while a single European market is desirable, harmonizing at, for example, 3% would not be a happy result.

The Chair moved to South Africa which, like the EC, opened a fact-finding investigation on banking. Contrary to the European Commission, South Africa opened the fact finding investigation only a month ago. The Chair asked, first, why consumers pay for debit card and not credit card transactions. There is a charge on the consumer every time he/she uses a debit card. Why anybody would use the debit card, if credit is free? The second question concerned Bankserv, the card infrastructure which is owned by the four largest banks. Can Bankserv exclude aggressive competitors from the market, not giving them access to this infrastructure?

The delegate from South Africa stated that credit cards are often preferred by customers as a result of the fact that consumers are charged per debit card use. There are a number of large retailers who have their own charge cards or debit cards and they do have some incentive to attract customers to their cards. But it does appear unusual that consumers pay for debit cards and not for credit cards. On the issue of Bankserv, there is a serious concern that Bankserv may limit entry not only with costs but also with payment mechanisms that inhibit entry and competition. There are a number of procedural and regulatory hurdles that a firm would have to cross in order to be able to introduce a payment mechanism. Even Visa or MC have indicated that they may be constrained in this regard. So one of the main objects of this enquiry is to look at access to the payment system generally and competition among payment cards. There is a large concentration of ownership by the big four banks in that structure. While the investigation is that of the Competition Authority, the Authority has engaged with the South African Reserve Bank. The bank has a department with oversight of the payment system.

The Chair turned to Professor Jean-Charles Rochet for a presentation on his assessment of the way competition operates in the card market and whether regulation of interchange fees is worthwhile.

Professor Jean-Charles Rochet stated that it was a great pleasure to speak at the meeting. He said the main substance of his remarks would concern a recent paper with Jean Tirole which would shortly be available on the Toulouse University website. Before beginning the presentation, he suggested there was a

high level of agreement among academic economists about the role of the interchange fee. For example, he suggested that he agrees with almost everything that Joe Farrell said in his presentation and he views Farrell's paper and his own new paper with Jean Tirole as offering a menu option for competition authorities depending on the objective that they want to follow: is it only efficiency of payments or is it also the surplus of users?

The crucial issue today, he stated, is that competition authorities often argue that retailers cannot reasonably turn down payment cards and are thus forced to accept excessively high merchant service charges. This argument was advocated in particular by John Vickers in his presentation in the Santa Fe conference in 2005. Professor Rochet said his presentation would proceed by first, matching this must-take argument with an empirical test called the 'tourist test' and second, identifying two reasons why this benchmark might be problematic, the first being that long-term effects are neglected and the second being that retailers are not identical but heterogeneous, and third, explaining his view of how regulation of interchange fees may be hazardous.

The punch line of the argument is that the price structure of card payments, which is how the total cost of the payment service is allocated between the two users (the cardholder and the retailer), determines the efficiency of card usage. This is not based on classical network externalities but rather on what could be called 'membership externalities'. The issue of how many consumers hold cards and how many retailers accept cards is not the main focus today.

More and more people will have one or several cards. More and more people belong to many networks. The question is which payment instrument are they going to use? The crucial thing is that when there is what Joe Farrell has called the 'two-sided customer', merchant and cardholder, the two-sided consumer and the merchant behave like a very odd couple, in the sense that it's only the cardholder who chooses, but the choice of the cardholder has an impact on the cost of the merchant and also the cost of the banks. This is a situation where the decision is made by one person, namely the cardholder, but it affects other people, and not only the bank of the cardholder – that would be a normal business relationship – but also the bank of the merchant and the merchant itself. When a cardholder decides to pay by card instead of cash or cheque – actually the argument could be adapted to address the question of credit vs. debit, but for simplicity use the cash/cheque example – this decision has an impact on two things: first, the operating costs of the retailer, because the retailer has to pay a merchant service charge. But this is not the only effect on the operating costs of the retailer, because by using the card the cardholder also avoids a cost that would be incurred by the retailer for alternative payment instrument. This cost has several components like fraud, theft, accounting, handling of cash or paper, etc. This is to the benefit of the seller who avoids the cost of using some alternative means of payments. Second, the impact of the cardholder's decision on the net cost of the banks, because the banks collect a certain revenue – which is the merchant service charge – but also the two banks, the acquirer's and the issuer's, incur a total marginal cost.

If the costs are added, the merchant service charge cancels out of course and the only thing that matters is the total cost of the card payment to the two banks minus the avoided cost to the merchant. This is really the equivalent to the marginal cost in traditional one-sided industries.

The goal is to provide the cardholder, who is the only one that decides in this couple, the correct pricing; and this was already made clear a long time ago by William Baxter in his very influential paper of 1983. There is an efficient cardholder fee which is the total usage externality, the marginal cost to society, the total cost of the transaction minus the avoided cost. If the price paid by the cardholder is less than this benchmark then the cardholder will use too many card payments. If on the contrary it is too high, then the cardholder will not use the card as often as it would be efficient. This choice of a card payment for the cardholder determines indirectly the price to the merchant. But it is the cardholder who should be facing the correct price signal. So the price to the merchant is only a consequence of that. It comes from the fact

that the total price of the service - the price paid by the merchant plus the price paid by the cardholder - is equal to the total cost plus the bank's margin. Given that the total price is equal to the total cost plus the margin, when an efficient price is selected for the buyer, there is an implicit selection of the efficient price for the seller. What is this efficient price? It is the avoided cost by the merchant plus the margin.

So why do retailers accept cards that increase the operating cost? The reason is that accepting cards increases the quality of service offered to repeat customers. Customers know that if they go to a certain store they will be able to use their card and this is good for them. It increases the revenue of the merchants. So the merchants are ready to accept payment cards even when those payment cards increase those operating costs as a result of a perceived increase in quality of services. This may be exploited by networks if consumers have only one card. If a retailer knows the consumer will not buy, for example, jewels or high margin goods unless the retailer accepts the card, then the retailer is ready to pay a high price and the networks may try to exploit that, which is essentially the must-take argument of John Vickers. But this argument is not necessarily true; there are cases in which consumers have several cards in their wallet. This can be called a multi-homing case. In this case retailers are not forced to accept all the cards. In the past, for example, AE has been rejected by some merchants. In this situation card networks cannot really enforce high merchant service charges.

Now consider the question of total user surplus. Joe Farrell has advocated elegantly and quite clearly for using total user surplus instead of total welfare. That is, one could look only at the interest of the couple, the two-sided customer, and the interest of the couple is to pay the price that corresponds to the value of the service to them. The profit margin of the bank is a cost for the couple, for the merchant and the consumer.

Now what is a 'tourist test'? The merchant service charge fails the tourist test if the retailer's net cost increases when a customer pays by card. That is to say the merchant service charge is greater than the avoided cost of the retailer. By accepting the card payment the retailer is losing money.

Why is this a 'tourist test'? Essentially because the retailer may be tempted to refuse the card payment if the customer is only a one-time shopper, knowing that the customer will never come back and that the customer has cash, and the retailer could say "No, my machine is broken so I cannot accept cards today." So it tests how a retailer would respond to tourists. This excludes consideration that accepting the card of a repeat customer may induce additional sales in the future so that retailers would be willing to accept higher prices.

What are the properties of the 'tourist test'? The tourist test threshold corresponds to the price structure that maximizes total user surplus and the one that is advocated by Joe Farrell. Indeed it corresponds to this notion of merchant indifference. If the merchant pays exactly the avoided cost corresponding to the card payment, the merchant is indifferent between card or cash because the net cost will be exactly offset by the charge. But Professor Rochet argued that, in his recent paper with Professor Tirole, they suggest that this is too restrictive because it forgets long-term effects. They believe that in some circumstances competition authorities should focus indeed only on total consumer surplus and not include the profits of the banks. This is particularly justified when the profit of the bank is completely dissipated through business stealing or useless advertisement.

But it may be that part of this profit is reinvested to provide better quality of service or that profit opportunities result in entry of new firms that stimulates diversity and lower prices. Given that the payment industry is characterized by very large fixed costs, banks need to find a way to recoup those fixed costs; and long-term user surplus is maximized for a value of the merchant service charge that is in-between the short-term value corresponding to welfare maximization and the short-term total user surplus corresponding to the tourist test threshold. So ultimately the question may be who should bear the cost of

bank margin. Joe Farrell effectively says it should not be the merchant; they say that it is probably a split between the merchant and the cardholder that is efficient in the long run.

The other problem with the merchant indifference standard of Joe Farrell's, or the tourist test developed in the recent paper with Jean Tirole, which are related, is that retailers are very heterogeneous in practice. Even if sometimes merchant charges differ from sector to sector, within a given sector some merchants are different. Take a simple example, with three retailers, A, B and C with respected avoided costs: 1%, 2% and 3% per card transaction, respectively. The merchant service charge that maximizes short-term user surplus is the average of these three numbers, i.e. 2%; so from a total user surplus perspective in short-term perspective the optimal merchant service charge would be 2%. If the perceived quality of service effect is large enough, even retailers A with 1% avoided cost will accept the card even if they lose money from it. But if the tourist test or Joe Farrell's criterion is applied, the test is not passed. It does not mean that the merchant service charge is too high; it just means that merchants are heterogeneous; some gain, some lose, but on average they break even.

Professor Rochet resumed by asking: is there really a market failure? The market failure conclusion relies essentially on the must-take argument. Retailers are forced to accept cards and this is a way banks extract surplus from the merchants. This may be true, but may also be wrong. If enough customers own several cards, the argument of the must-take card is not true, because retailers can reject one of those cards and therefore networks will be limited in the charges they can impose on merchants. Taking into account long-term user surplus and heterogeneous retailers, something more flexible than the tourist test would be valuable.

The regulation of interchange fees may be hazardous. First, it does not have a solid conceptual basis, as there is no well identified market failure because the interchange fee chosen by networks may be too high or too low depending on the circumstances. So there is no clear direction of intervention. The must-take card argument is not always valid; the implied merchant service charges are not always too high. Second, there is no simple benchmark for guiding regulators. The bank threshold and its counterpart, the tourist test, are too restrictive. Trying to find the socially best interchange fee is a very complex exercise, depending on demand elasticities that are difficult to estimate.

Professor Rochet expressed his view that there is little support from economics for the common regulatory proposals. What are the bases of these common regulatory proposals? In fact, they are mostly based on a fairness criterion seeking a 'fair' allocation of prices or cost between the two users. But this has nothing to do with efficiency. Take the case of 0 interchange fees. People say there are networks in which there is a 0 interchange fee. These networks can function, but nothing says that interchange fees should flow from the issuer to the acquirer or vice versa. Does this mean that all payment systems should be regulated in the same way? There is no basis for this.

Another proposal that is often mentioned is to base the interchange fee on the cost of the issuer, with the idea being that the interchange fee is capped to prevent the exploitation of the must-take argument. But this has no economic basis. It corresponds to a situation where the cardholder would pay some of the cost because if the interchange fee is greater than the issuer cost, then the cost will effectively be negative for the issuer and therefore the price may be negative with cash rebates or airline miles, for example. But there is no reason why in two-sided markets price cannot be negative. There are many examples, and Jean Tirole alluded to them, such as media and software, where there can be highly skewed price structures, where only one side pays and sometimes the other side even receives gifts. If policymakers regulate interchange fees, similar reasoning might also lead them to wish to regulate free newspapers, because they are also based on a two-sided mechanism. But most policymakers would not be interested in regulating free newspapers. Professor Rochet emphasized the need for policymakers to act cautiously.

The Chair noted that for many cardholders, when going shopping, there is an argument that shopkeepers could negotiate with customers and say “Use this card rather than that one”. But there is an asymmetry of information, because of course the customers are the only ones who know what is in their pocket and the retailer does not know whether the potential customer has one or more cards. Without a no-surcharge rule merchants could post a sign that says that if customers use card X they will pay Y% more. This would make the negotiation process easier.

Professor Jean-Charles Rochet agreed that if it were possible to have a perfect surcharge, i.e. the merchant charging the customer for the exact net cost that the merchant suffers, then there would be no need for a non-0 interchange fee. But in practice, there is an asymmetry of information not just over what cards are in a customer’s pocket but also over what costs are for a merchant. In several countries, retailers have the possibility to surcharge, as in Australia, since the recent reform. It turns out that very few retailers use this possibility and, when they do, it sometimes occurs in sectors where merchants have market power and the surcharges are higher than the net cost to the merchant. In theory surcharging or merchant-customer negotiation might solve the problems, but in practice this may not occur.

The Chair said that permitting a merchant to surcharge can increase the merchant’s negotiating power with card networks. In some sense, even if merchants rarely choose to implement surcharging, abolishing the no-surcharge rule can have real effects.

A delegate from Romania noted that the merchant charge can lead to taxation of other forms of payments. Professor Rochet quickly mentioned the discounts, but the delegate asked for more information on the combination of cards with rebates, such as frequent flyer miles.

Professor Jean-Charles Rochet stated that frequent flyer points are not necessarily the most efficient way to provide incentives for the cardholder to use their card. It is a mystery he never understood as to why card networks do not use simple cash rebates directly. While one might imagine that there is a deadweight loss from using those kinds of instruments, the point is precisely to give incentives to the cardholder to use the card whenever it is efficient.

The Chair noted that one explanation for the mystery is that the consumer does not know very well how much free mileage costs, and may overvalue it, while cash is less easily overvalued.

Professor Joseph Farrell said that he preferred a laissez-faire approach to rebate terms. It seems the choice of frequent flyer miles, cash back or something else is really a choice within the relationship between the issuer and the cardholder. There are information problems in that market, but he did not consider this as a case where any kind of market power is the main problem. In response to the question, he said this could be the manifestation of a possible bias but not an additional bias.

A delegate from Australia asked about the focus on multi-homing and how the panel’s analysis might change when in many countries there is a merchant market where merchants are offered a blended price for both MC and Visa. A consumer might have a MC and a Visa card in their pocket, but as far as the merchant is concerned they are identical because the price will be the same, even if the two payment networks have slightly different discounts charged to the acquirer for that merchant. The price will of course be different for other cards like AE or JCB.

A delegate from Italy said that the price of debit cards depends more on the prices and costs of other bank products than to the relationship with the acquiring side of the market. For the merchant, the price the merchant pays depends strongly on the market power of the bank towards the retailer, with the price differing by sector and size of the retailers. The cardholder pays a fixed fee for a year, so if the card is used only once a year, it is quite costly per use, whereas very cheap if used everyday, while the merchant pays

every time someone uses the card in their shop. The delegate stated the view that the two-sided market theory was most useful for the start up of credit cards and debit cards, but much less useful now that the system has wide penetration. As for the tourist test, the delegate suggested a different perspective. Suppose there are two types of retailers: large and small. In the large ones like Galeries Lafayette or Auchan, they could not refuse the cards. In the small retail shops, they could refuse the card for local buyers but would probably accept it for tourists, because tourists do not have cash to pay.

A delegate from the United Kingdom stated that when there is a difference in interchange fees between Visa and MC one might expect a response from merchants; but there has been absolutely no response from merchants in terms of relative acceptance when there has been a difference in interchange fee between these two networks.

Professor David Evans said that he did not know the facts in each country, but his guess was that blended fees, like those in the UK, exist because there is not much difference between the interchange fees charged by the different systems. The transaction cost of charging separate fees is probably too high. He said he would be very surprised if an acquirer did not start separating the rates to merchants if merchant fees diverged between the two networks. With respect to merchants not accepting cards, it has been very clear in the U.S. that when the merchant discount charged by AE has become high relative to the effective merchant discount being charged on MC and Visa cards, many merchants would not take AE cards and, in fact, as the wedge gets bigger, there are periods of time where there is a revolt on the part of merchants and restaurants and a variety of merchants make the decision to stop taking the card. So he suggested that it is not true that there is no price sensitivity at all to the merchant discount.

He suggested that, with regards to the no-surcharge rule, card system market power might be restricted by abolishing the no-surcharge rule in some instances. But there are costs for doing this. In two-sided markets, there are often rules imposed on one side or the other. Consider the example of advertising-supported magazines. There are many things that advertising-supported magazines do that sometimes harm the reader to the benefit of the advertiser. Consider magazines, such as *Vogue*. It is very difficult to find a table of contents and it is also very difficult to find the continuation of articles. That is an example of an advertiser-friendly magazine, but that does not mean policymakers should regulate its policies. In the case of surcharging, it seems that it is possible for surcharging to be used as a tool for price discrimination, as Jean-Charles Rochet's example illustrated. So policymakers should be very careful about ditching the no-surcharge rule.

Dr. Alan Frankel suggested that the payment card systems are essentially designed to take advantage of the multi-homing vs. single-homing distinction between consumers and merchants and to reinforce the distinction as much as possible. Loyalty is created towards particular cards, with frequent flyer miles for example, and merchants are restricted from influencing consumer choices, so that merchants end up acting as if consumers only use one card even though the consumers may have multiple cards. The merchants do not want to risk losing even a few sales.

A delegate from BIAC stated that BIAC advocates caution on the part of regulators because some of the interventions show that there are great differences even within the EU member states in terms of market size, network maturity, prevailing economic conditions, and government regulatory frameworks.

A delegate from BIAC stated that BIAC advocates caution on the part of regulators because some of the interventions show that there are great differences even within the EU member states in the size of the market, the maturity of networks and the economic conditions.

Professor Joseph Farrell made a general point in response to some of David Evans' comments and the presentation by Professor Tirole. He stated that it is of course very easy to point to many diverse

interposing arrangements in the operation of two-sided markets. What Professor Farrell believes distinguishes payment instruments from a lot of these, such as *Vogue*, is that when a payment instrument changes its fee structure, a large fraction of the total effect is not on the participants in this payment instrument, but rather on the consumers who choose to pay using other methods. There is an important divide between the essentially internal business arrangements, such as those chosen by *Vogue*, and the ones that, in proportional terms, result in large spillover effects on rivals, as seems to be the case with fee structures under price coherence.

2. Interchange fees and other restraints on merchants

The Chair introduced the next session as focusing largely on interchange fees and other restraints on merchants. He noted that an OFT proceeding against MC was in progress. The case proceeded with the theory that high interchange fees would lead to high merchant fees, which in turn would lead to higher prices for all consumers, not just to the users of MC. The OFT did not set the interchange fee to 0. Rather, it identified appropriate costs that the interchange fee should cover. These included fraud losses incurred by issuers, and issuer cost of authorization and risk control and the cost of processing incoming transactions. Was the decision actually enforced or was enforcement suspended because of the appeal? What is the status of the appeal at this time?

A delegate from the United Kingdom responded that the case was procedurally complex. It started as a result of a notification that MC made of its arrangements to the OFT in March 2000. After multiple opportunities for MC to respond to OFT concerns, a decision on the case was notified to MC in September of 2006. That decision was subsequently appealed and, at the time of this roundtable (June 6, 2006), was due to come before the Competition Appeal Tribunal.

With regard to the effect of the decision, MC changed its arrangements for setting its interchange fee in November 2004 and the decision applied to historic arrangements. So the decision applied to arrangements that no longer exist in the UK. In the meantime, a statement of objections was issued to Visa on their existing arrangements and a new investigation into MC current arrangements was opened.

The Chair then moved to Australia, where interchange fees of both associations, Visa and MC, have been addressed by the Reserve Bank of Australia (RBA), not by the ACCC. Credit card fees were significantly reduced two years ago. Furthermore the RBA eliminated the no-surcharge rule. This government activity was preceded by a joint study by the RBA and the ACCC. Why did the RBA act and not the ACCC? What was the legal reason? What are the RBA's views of the results of the Australian case?

A delegate from Australia stated that the RBA's involvement in this matter originated in the mid-1990's when the government began a general inquiry into the financial system in Australia. That inquiry concluded that the payment system in Australia was not working as efficiently as it might; and recommended to the government that the RBA be given responsibility and strong powers to regulate the payment system if it saw fit in the public interest to do so. The government accepted that advice and gave the RBA the powers under which it now operates. In about the year 1999, two things happened simultaneously: the RBA and the ACCC instituted an economic study into card payment systems. At the same time there was a complaint under the existing competition law against card schemes related to interchange fees. The ACCC reached the preliminary views that there was an infringement of the competition law, sought proposals from the banks and from the card schemes that might be authorized under the competition law and grew frustrated at the proposals that were put to them because they believed that none of them were likely to be capable of authorization. There was extensive discussion between the banks and the ACCC at that stage and the ACCC reached the view that dealing with interchange fees

would be better done by the RBA. The RBA had powers and responsibilities in this area that differed from those of the ACCC and, for that matter, from most central banks.

The first area of focus was gathering information so that people would understand how the systems work. At the time this work began, the mechanics and economics behind these issues were poorly understood. The RBA made a lot of statistics available. Interchange fees were virtually a state secret in Australia when this work started, as in many other countries. Market shares and transaction data are now available. That is all very important to making the market work better. The RBA has taken the view that it is beneficial to improve competition, to make access easier and to get rid of certain restrictions imposed by the schemes such as no-surcharge rules, honour-all-card rules. The RBA believes that the system works better by getting rid of those restrictions, allowing competition to work in a normal way.

There is significant competition among acquirers in the Australian market and a great deal of competition among issuers too. But interchange fees have not been subject to competition in the sense that many would imagine. That has led to some important effects; the main effect in Australia has been that there is effectively a subsidy paid to use a credit card and an imposition on cardholders who use a debit card. While it is hypothetically possible, given the two-sided nature of this market, that there are externalities that would justify such a thing, no evidence of such externalities has been made available to the RBA. The RBA's policy interpretation has been that the system would be more efficient if those interchange fees were closer and that is what is happening, in a careful way. The effect is that the interchange fees have fallen and merchant service fees have fallen. The cardholders that are paying more are credit cardholders. There has been some surcharging, with about 4 - 5 % of merchant sales being surcharged. Surcharging is more common in low margin areas.

At the time these changes were introduced in 2002 Visa, MC, AE and Diners Club all had no-surcharge rules. Visa and MC were given the opportunity to remove those voluntarily and they declined to do so. AE and Diners Club both agreed to remove their rules voluntarily. Since then there have been calls for the same sort of regulations of AE and Diners Club comparable to the four-party schemes. But the economics of these schemes work in quite different ways. In four-party schemes there seems to be no doubt – at least in the Australian case – that causality runs from interchange fees to merchant service fees. That is clearly because there is strong competition between acquiring banks. If the interchange fee falls, the merchant fee falls as well. In Australia's case, merchant service fees fell even further than the interchange fees. In the case however of AE, there are now a couple of Australian banks as partners issuing cards and discussions between AE and banks started long before the RBA reforms. Two banks have issued cards, but AE is the sole acquirer of these cards. So if a merchant does not like the merchant fee that AE is charging, the merchant cannot seek another acquirer but must instead cease accepting AE cards. So the merchant service fee paid to AE does not depend on the fee that might be paid to the bank that is issuing AE cards. So regulating the fee that was paid by AE to one of the banks would not have the same effect as in a four-party scheme. The RBA considered whether it should nevertheless attempt to regulate such a fee and collected details from the banks of the fees that were being paid by AE to them by AE. There was a fee that looked very much like interchange fee that was paid in Visa and MC schemes and there were other fees which were promotion fees, marketing fees and so forth. Consequently, if the RBA sought to regulate the AE fees paid to partner banks, there would likely be a need to regulate the total amount that was being paid by AE to its partner banks. That would have involved getting close to what Professor Evans was suggesting earlier: regulating page lay out of a magazine [see Evans, above]. The RBA looked at the relationships between AE and its merchants and found a non-steering rule. Consequently, retailers could not tell customers, for example, that they accepted AE cards but preferred certain other cards. The RBA asked AE to remove the non-steering rule and they did so voluntarily.

The Chair turned to Switzerland. The Swiss competition authority allowed Visa and MC to multilaterally set interchange fees, but they abolished the no-surcharge rule. Their submission stated that the

travel industry is generally passing on to consumers the merchant fee and, in retail, discounts for cash payments were even more frequent than before. What is the treatment of three-party systems?

A delegate from Switzerland stated that the non-discrimination rule was the subject of investigation in 2002 and, at the time, the Competition Commission ruled that the non-discrimination rule infringed competition law. However there was an appeal against this decision that is still pending before the Swiss Federal Supreme Court at this time. The decision applied to the four-party systems MC and Visa, but afterwards, AE abolished the no-surcharge rule as well. In 2003, the Competition Commission opened an investigation concerning interchange fees in the credit card industry. This investigation ended with an amicable settlement with the banks and involved several points, one of which was a cost-based approach to the interchange fee. The banks proposed this approach. The evidence in the Swiss market did not support a two-sided market approach in the sense of the economic literature.

The Chair moved on to Indonesia. In Indonesia, in order to be an issuer or an acquirer, authorization is needed from the Central Bank of Indonesia. Is it simply an authorization to operate as a bank or is it a special authorization to operate in the card sector? Furthermore, in Indonesia, what is the status of surcharging?

A delegate from Indonesia responded that the central bank serves to regulate and coordinate the smooth operation of the payment systems. The determinants of the use of payment instruments is intended to ensure that the payment instrument meets some requirements such as security requirements and efficiency, including restrictions on the use of certain payment instruments for prudential considerations. A technical acquirer does not need a license but just reports to the central bank; a financial acquirer requires a license because a financial acquirer is like a credit institution.

In Indonesia there is no government rule on surcharge because the central bank leads the market actually and it is very difficult to look for the evidence of the surcharge. Usually merchants or retailers offer some fee or surcharge, on average 2 or 3%, and usually also the cardholder accepts the additional fee. Some issuers do not allow merchants to add a surcharge and promise to reimburse if the cardholder can show evidence of the surcharge.

The Chair moved on to Russia. The Russian submission says that the stores that accept cards charge higher prices. Might one reason for this be tax compliance? When a store accepts cards, its receipts are easily monitored and the store may then pay more in taxes than when all transactions are in cash.

A delegate from Russia stated that the retail seller and consumer heterogeneity is significant. Card payment is quite rare in Russia and is concentrated in large cities. Only 10% of consumers use credit cards and 90% of operations are generated by 10% of all cardholders. These cardholders use supermarkets and fashion stores in which prices are higher than in general in the markets of some cities and towns.

The Chair moved on to Hungary. In Hungary, the interchange fee is the same regardless of the card. That is, credit and debit cards pay the same interchange fee. Does this imply that the merchant fee is also the same? Why are Visa and MC conducting a cost study? What is the reason why banks do not differentiate in terms of interchange fees between the two payment instruments? There is a point made in the Hungarian submission: the increase of importance of 'on-us' transactions, i.e., when the acquirer bank is the same as the issuing bank. Furthermore the growth of 'on-us' transactions will probably lead to a reduction in interchange fee. Why are competition authorities so critical of such developments?

A delegate from Hungary responded that merchant fees are the same with regards to debit or credit cards, but they are different with regards to merchant segments. Restaurants face higher merchant fees, for example. Large supermarket chains with high bargaining power can negotiate better conditions and this

leads to smaller interchange fees for them. In Hungary the acquiring market is very concentrated. There are only two major players, and merchants with large bargaining power can get better conditions for accepting cards. That could have the effect to drive interchange fees down, but could also have the effect that these large chains will only accept cards which are issued by their single acquirer. If large supermarket chains accept one card because it is cheaper, then the consumer will be encouraged to have this card and not others, because he or she can pay with that card in this shop. That is why 'on-us' transactions can be considered a possible problem for future competition. The cost study may be in progress because of the ongoing competition investigation and because interests of MC and Visa are not necessarily the same as the banks.

The Chair moved on to BIAC. Their excellent paper on whether or not to intervene on the card industry concludes that both regulators and antitrust authorities should be cautious. The chair said nobody is proposing structural remedies in this market as was the case in the telecom market in the 1980's or in energy or gas. Structural remedies can be difficult to reverse. On the other hand, behavioural remedies, like the elimination of interchange fees, the reduction of interchange fees, or the elimination of the no-surcharge rule, are easily reversed, should they be ineffective or create damages. So why worry?

A BIAC delegate responded that the impact of behavioural remedies should not be underestimated. The Chair's question assumes that a government easily could change course if its behavioural remedies failed to produce the desired results. In fact, though, when a government commits itself to a course of action, it becomes invested in that course of action, making it unlikely that course will be reversed. The cost of imposing behavioural remedies that may be reversed also warrants consideration. Even behavioural remedies require the industry to make costly changes that are difficult to implement. The possibility that those changes might be undone imposes additional costs related to uncertainty, and actually undoing the changes imposes even more significant costs. Furthermore, behavioural remedies could, in fact, result in structural changes. For example, partially in response to scrutiny from regulators and private plaintiffs, MasterCard eliminated its joint venture structure in an attempt to forestall further price fixing allegations. [Similarly, on September 11, 2006, Visa announced a global restructuring initiative that will culminate with a public IPO.]

The Chair's question also assumes some uncertainty over the effects of behavioural remedies, which may warrant their reversal later. Regulatory intervention should not be undertaken lightly; before intervening, the results should be projected with a high degree of certainty. Experimenting to achieve the "right" results should be avoided. To preserve the benefits of competition, BIAC consistently has said that, before regulators intervene, they should be certain that the conduct at issue is anti-competitive, that enforcement action is necessary to protect consumers, and that the measures imposed will, on balance, benefit consumers. In the payment card industry, significant controversy exists regarding each element of this test, which indicates the need for great caution when considering intervention.

Empirical evidence from the RBA's intervention in Australia further underscores the need for caution. The RBA's remedies have resulted in benefits for merchants (through lower merchant discounts) and benefits for closed systems (through increased market shares). In contrast, consumers have faced higher annual fees and lower reward rates, and the RBA has not produced evidence that merchants have passed on the benefits of lower merchant discounts to consumers. Even if the RBA were to abandon these remedies at a later date, consumers will never recover the benefits they have lost. Given the complex economics of the industry, the continuing dialogue regarding the wisdom of intervention, and the lack of solid empirical data, BIAC urges that regulators proceed cautiously in this area, even with respect to behavioural remedies.

3. Other enforcement issues, procedural matters and government intervention

The Chair stated that the meeting would now move on to the topic of government intervention and institutional choices. He requested that Professor David Evans make remarks in this area. If intervention is needed, who should intervene?

Professor David Evans began by stating that he wanted to step back from the controversy and address two issues that are fundamental. The first is: are the market distortions that are said to arise from collectively set interchange fees something that competition law and competition authorities should concern themselves with? The second is: how should competition authorities think about the regulation of interchange fees assuming that this is a job that authorities ought to be doing? Answering either question needs to start with an understanding of what market distortion might arise from interchange fees. When decisions have been taken, authorities have found first, that interchange fee agreements restrict competition. Second, such agreements are not indispensable for accomplishing a pro-competitive purpose. Third, bilaterally set interchange fees are not feasible. Fourth, centrally set interchange fee agreements would be pro-competitive if based on costs incurred by issuer banks on behalf of acquirer banks. No competition decision has found that 0 interchange fees are the right level.

Competition law ordinarily condemns price fixing because it restrains output. Here at least some of the decisions claim that the problem with letting the associations set interchange fees without any restriction is that it actually leads to too much output and too many card transactions. In addition, normally competition law condemns price fixing and insists that it stops. Here the decisions condemn price fixing but insist on a different fix.

So what is the problem with interchange fees? The story is that the interchange fee subsidizes cardholders, giving people an incentive to use credit cards over other means of payment. People therefore use credit cards too much, they use cash and other forms of payment too little and this is inefficient from a society standpoint.

This alleged market failure stems from two features of the card business: cardholders make the decision concerning the payment instrument to use and merchants cannot alter that decision because they cannot surcharge and cannot afford to decline cards given that their competitors do not. This is true even when surcharges are legal, presumably because of transaction costs.

Is this the sort of problem that competition authorities should pursue? Professor Evans suggested that, if there is a market failure like this, it really is not something the competition authorities should address because the purported failure does not involve a traditional competition policy issue. The interchange fee helps reduce transaction costs and barriers to entry into the card business. If there is a basis for believing that the interchange fee restricts competition in a way that reduces overall output or raises overall prices and thereby harms consumers, competition authorities should consider taking it on. The decisions do not read as if they are based on Joseph Farrell's claimed market failure; instead, they are analysed under an Article 81 framework, or something comparable, that does not fit with the market failure analysis.

Professor Evans continued by suggesting that competition authorities are not the right institution for fixing or thinking about fixing a market failure involving the overproduction of card transactions. A central bank, covering multiple forms of payment instruments, would be better placed for comparing relative under or over-use of different payment instruments. Moreover, it is a mistake for competition authorities to become all-purpose fixers or quasi-regulatory agencies for whole industries. The antitrust laws were not intended to ferret out market failures or fine tune the operation in the industries. The interchange fee cases are really excessive pricing cases dressed up, in Europe, in Article 81 clothing.

If there is a role for government institutions such as competition authorities or central banks, what should that role be? Professor Evans suggested that legalistic and mechanistic Article 81 analysis is not very helpful. So instead he focused on the RBA market failure approach, which has the analysis that underlies Joseph Farrell's concerns. The market failure theory can be tested with data and one could actually get the data to test it. This has not been seriously done yet. Moreover, Article 81 style cases have not argued for a 'correct' interchange fee but rather for a lower interchange fee. This is not satisfactory. While economics might not be able to calculate the right interchange fee precisely, any responsible regulator would have to start by trying to figure out what the right interchange fee is as a matter of theory and then try to approximate that interchange fee as best as possible with the available data.

Lastly, there is an extensive body of work on regulation which teaches that the benefits of a regulation should be compared against its cost. It may be hard to anticipate all the things that will happen when intervention occurs so this calculation can be difficult. But cases, such as the Australian case, do provide some basis for looking at effects of interventions. Professor Evans suggested that there is no evidence that the intervention has or will accomplish its objectives. Moreover, there have been unintended consequences of the regulation. First, AE is not subject to the interchange fee regulation, but is implementing something like interchange fees. Under the cost-based regulation, MC had a higher cost-based interchange fee under the regulation. This meant the interchange fee that they were able to charge under the regulation was higher than Visa for a while. One consequence was that banks that were in both systems started switching volumes from Visa to MC. The RBA stopped that by insisting that the cost-based interchange fee should be the same for Visa and MC.

A major unintended consequence of the competition policy interest in payment systems is that, around the world, card systems are trying to figure out how to convert themselves into unitary systems and avoid price-fixing laws. It is widely understood in the business that the threat of interchange fee litigation was one of the main reasons that MC went from a cooperative open system to something that is going to become more like AE. Bank of America, the largest bank in the U.S., is considering leaving the Visa system to start its own unitary system like AE. Other large banks are probably thinking about the same thing. Why? If they become a unitary system they can set the merchant discount at any level they want just like AE. In the U.S., since there is no excessive pricing law, there is little that could be done in that case. Competition authorities should give serious consideration to these issues before embarking on policies that would give unitary systems like AE an advantage in the market place, encouraging open cooperative systems to reform into the unitary ones. This is a major indirect consequence of the interchange fee investigations and actions around the world.

David Evans noted that he works for a number of card systems around the world. However, he added that he is working not just for well-established systems but also for emerging players in the payment card industry that see the interchange fee cases, and the consequent problems that the card systems are having, as a wonderful opportunity to get into this business.

Dr. Alan Frankel asked whether a four-party system's efforts to vertically integrate into acquiring and become a three-party system would be anticompetitive.

Professor David Evans said that he would guess that, in the U.S. for example, MC's vertical integration might be investigated by the antitrust authorities. Would such vertical integration be anti-competitive? That would be difficult to answer. There are some pro-competitive aspects to integration but also some potentially unfortunate aspects in terms of the loss in competition that is afforded by the open systems.

Professor Joseph Farrell agreed that the problems he had earlier discussed were not inherently problems about interchange or four-party schemes but rather problems about fee structure. He agreed with

David Evans that it would be regrettable if the legal structure caused too much focus on the problems created by four-party schemes and not on similar problems that might be created by three-party schemes.

Joseph Farrell disagreed with David Evans' assessment that what he calls 'market failures' are not failures in competition. As explained earlier, he believes the failure is of the most fundamental aspect of the competitive process, namely the view that customers choose what is best for the customers. Although that does not necessarily fit neatly into the standard legal boxes, ensuring the customers will choose what is best for them is certainly in the spirit of protecting competition and customer choice.

Professor Farrell noted that he agreed with most of the remarks of Jean-Charles Rochet, but disagreed with his suggestion that the merchant indifference criterion is a short-run user surplus criterion and is risky in the long run. A user-surplus standard can indeed involve such risks. But Professor Farrell expressed his opinion that a merchant indifference criterion protects the competitive process and would be better for long-run efficiency than seeking to protect payment systems from the demand consequences of their mark-ups. There is a disagreement about this point. Farrell noted that if his proposal were simply to maximize (two-sided) customer surplus, he would be concerned, for instance, to regulate fee level as well as fee structure. On the contrary, his proposal definitely allows systems that are more efficient for the two-sided customer to charge an efficiency rent—in fact, his proposal is necessary as well as sufficient for that, if the more efficient system has a less M-heavy fee structure. As Farrell noted in his paper, the proposal simply restores the customer sovereignty that is taken for granted in one-sided markets, so it has all the normal market properties of allowing efficiency rents, incentives for improvement, etc.

Professor David Evans said that when Joseph Farrell talks about a 'competition policy problem', that could perhaps be restated as a 'market failure problem that is related to how competitive markets operate'. The point Evans was making concerned what competition authorities are able to do under the law. If in the U.S. a single system like AE had 80% share, Evans suggested that under U.S. antitrust law, there would be no way to attack that result, assuming that the system arose under normal competitive circumstances. Under EC law, unless there is a reason to attack a dominant unitary system under excessive pricing doctrine, there would be no basis for attacking that particular competition problem. Unitary companies would likely implement the same AE pricing structure.

Dr. Alan Frankel noted that kickbacks or commercial bribery can undermine and subvert the competitive process. He suggested that Joseph Farrell was saying that if a market is organized in a way that pays kickbacks to people who then, through a principal-agent problem, choose to overpay for a service, that undermines the competitive process. It is not unusual to think of competition policy or competition law embracing anti-kickback or anti-commercial-bribery issues.

A delegate from the European Commission addressed the question of whether competition authorities should intervene in interchange fee cases and whether they should intervene in cases where a market failure, as identified by the RBA, occurs. The RBA is concerned about inefficiency of the payment system, while the starting point for a competition authority is different. Interchange fee agreements set a floor for the merchant service charge, thereby restricting price competition between the acquiring banks. The interchange fee agreements have the same effects as a price-fixing cartel in the acquiring market by setting a minimum floor for the merchant fee.

Theoretical models have a role to play, but what is important is evidence. If an authority is not convinced that these fees are used to enact a balancing mechanism to internalise externalities, then what is left at the end of the day is a restriction of competition. Empirical facts that the European Commission has established in its payment card inquiry, bear on the pass-on of interchange fees to the consumers. The European Commission has performed a correlation analysis based on quite an extensive database and the correlation analysis has shown that there is no clear negative correlation between the fees that cardholders

pay and the interchange fees. In other words, a considerable portion of interchange fees is simply profits by issuing banks.

Another topic that one would analyze in the future is how far scheme owners participate in the interchange fee stream. If the scheme owner sets transaction-related membership and transaction fees, and if these fees theoretically charge the issuers but not the acquirers, then the interchange fee is nothing but a mechanism to extract rents from merchants.

Another problem is a coexistence of bilateral and multilateral agreements. The multilateral agreements fix a default fee; they always apply in the absence of a bilateral agreement between acquirer and issuer. Banks in certain countries may wish to agree bilaterally on a certain fee, the so-called 'honours fee'. Typically these honours fees are lower than the default rates that are multilaterally agreed. A foreign bank that wishes to penetrate a new market in Europe has to pay the default rate, unless it is able to agree bilaterally with other banks on lower interchange fees. The existence of this particular interchange fee mechanism in Europe contributes to the segregation of Europe into 25 different markets.

Professor Jean Tirole said the interchange fee per se does not restrict competition in any way among acquirers and issuers. This is like saying that VAT will restrict competition among merchants and that is not the case. The two key issues, about which David Evans was very clear, are first, whether the interchange fee is too high and second, whether interchange fees can be regulated.

Is the interchange fee too high? Professor Tirole said that he and Jean-Charles Rochet have argued, as well as Joseph Farrell, that the interchange fee is actually a response to the principal-agent problem. The consumer decides on what form of payment to use and the interchange fee guides the consumer. Then it becomes an empirical question about whether there are too many or too few payments in the industry. The word kickback is surprising. Professor Tirole said he saw a transfer among two entities that guides one side of a two-sided market. These exist in many other industries, like telecoms. Should telecom regulators sue companies with termination charges? This has nothing to do with kickbacks.

The other question is whether interchange fees can be regulated. David Evans' point is very important. Competition policy should focus on competitive neutrality and should not favor one organization form over another. Under an interchange fee focus, four-party systems are regulated and three-party systems are not.

Wilko Bolt commented that a few years ago, the Netherlands had an excessive pricing case regarding the price of debit cards. Retailers were very dissatisfied about the high price for debit cards, but at the same time they were allowed to surcharge. Virtually no retailer in Holland did that. For him, this suggested that removing the no-surcharge rule would not have much effect.

The Chair noted that the possibility to surcharge would influence negotiations, even if there seemed to be relatively little surcharging in practice. He asked Dr. Alan Frankel to discuss the efficiency of the institutional structure of the card industry and whether some antitrust or regulatory intervention would be needed for protecting consumers.

Dr. Alan Frankel noted that the point of a payment system is to move money from buyers to sellers. In evaluating the effectiveness, the competitiveness and the efficiency of a payment system, the focus should be on methods for moving money from buyer to seller as quickly, cheaply and accurately as possible.

He took as a starting point the assumption that the merchant cost at the margin for processing a credit card transaction exceeds the cost for cash or pin debit. This is a likely scenario because the banks control either directly or indirectly the interchange fee, have incentives to set a high fee and either no or very weak competitive mechanisms to erode fees that are too high.

It is very likely that increases in the marginal cost incurred by all merchants in the economy will be reflected in higher retail prices. Price coherence, or the tendency for merchants not to discriminate between different payment methods when relative costs differ, means that the cash customers will participate in funding these interchange fees at the point of sale.

The platform functions as a price regulator. So why do networks claim they need interchange fees? One reason could be the chicken and egg problem – the need to “get both sides on board.” But the markets are already well established, and people are already on board. One way people try to solicit cardholders in the U.S. is through direct mail solicitations. In 2005 there were 6.06 billion direct mail solicitations mailed to U.S. potential cardholders, the response rate was down to 0.3%. The argument that there is a chicken and egg entry problem which must still be overcome is difficult to reconcile with this situation.

Another reason offered in support of interchange fees is the existence of usage externalities. The usage externality is real; the question is how to think about it and its implications. The reasoning behind this defence can be understood by supposing that credit cards actually save merchants marginal costs on each transaction. If there are transaction costs that give rise to price coherence, however, merchants might be frustrated and find consumers use cash or higher cost payments such as cheques too often, and suppose also that it's a problem that merchants cannot solve. Interchange fees, it is argued, can solve this problem on behalf of merchants. In effect, a surcharge is imposed on credit card transactions, so that the merchant becomes indifferent between cash and credit. The issuing bank then takes the surcharge revenue and rebates it to cardholders. Cardholders thus have the correct incentives to consider merchant costs along with their own, and in this example, increase their use of credit cards. If merchants were indifferent between payment methods and the interchange fee revenue were directly rebated to cardholders, that would be consistent with the usage externality theory. But merchants are not happy about the interchange fees they pay and are not indifferent at the point of sale across payment methods.

A decentralized, deregulated approach to solving the competitive problem that the banks allege exists, would allow each merchant to do the best they can to encourage one payment method or another by steering, by promotion, by having a faster checkout line for one payment method or another, or by surcharging/rebating as the merchant sees fit. It might not be perfect but it is a decentralized solution. So the question that Dr. Frankel would pose to interchange fee supporters is whether there is any evidence that the problem they discuss is a significant problem, and is the claimed solution – the collectively set interchange fee – an improvement over the decentralized, deregulated alternative in which merchants individually try to reduce transaction costs?

It is important to recognize that interchange fees are not all directly rebated to the cardholder customers. A lot of the fees are eaten up in direct mail solicitation or kept as bank profits. The EC study suggests that perhaps 25% of the interchange fee revenue goes back to the cardholders. So economic theories which assume complete pass-through of the fee revenue to cardholders are missing an important part of the economic story.

Vertical restrictions reduce the effectiveness of multi-homing by cardholders. These restrictions include, most notably, the no-surcharge rule, but also include other restrictions that are less commonly mentioned, such as the fact that a credit card is typically affiliated with just one network. If only one network can be accessed on a card or there is a rule that makes it difficult for merchants to steer from one brand to another, these rules will enhance the market power of card networks and their issuers and allow them to charge higher interchange fees without merchants being able to react as effectively.

High interchange fees stimulate the use and bank issuance of the most costly cards. This is particularly apparent in marketing efforts encouraging customers to use signature debit in the U.S. over PIN debit. Even though most industry participants would regard PIN debit as a more cost effective and

lower fraud network, the banks promote the use of signature debit. This represents a market failure; the price signals are wrong. Interchange fees and vertical restrictions have anticompetitive motives and effects, so that externalities are being exploited, not solved.

Dr. Frankel said that in Australia, MC warned of the possibility of a “death spiral” if interchange fees were reduced. The reality is that there has been a major reduction in Visa and MC interchange fees which has been matched or exceeded by a reduction in the fees merchants pay for those transactions. There have also been significant, although smaller, reductions in AE and Diners Club fees. Those fees are still falling and there has been no death spiral. In response to these facts, the networks now concede that merchant costs have fallen significantly, but they argue that merchants are keeping all of the savings for themselves rather than pass any on to consumers. It is worth noting that the card companies argue that issuing banks will tend, in competitive economies, to pass all the extra interchange fee revenue onto the cardholder. But on the merchant side, card companies claim merchants will just keep it all. Dr. Frankel suggested that most retail markets are probably as competitive, or more so, than most banking markets.

What should policymakers do? It is probably not the role of a network to weigh social costs of cheques and cash and act as if it is a legislature or a central bank with the authority to subsidize a preferred payment method and tax a disfavoured method. And there is little reason to think the networks will act to maximize social welfare if given unrestricted freedom to set interchange fees in modern electronic payment systems. One alternative option is at-par collection. This is not just an arbitrary price point on a continuum; it is a system in which each bank competes for customers independently, without coordinating with the other banks, based on its own costs and competition among the banks. In a par system, the clearing house does not require as a condition for participating in the clearing house that each member agrees to fee agreements with all other members of the clearing house. Another option is, at a minimum, to eliminate vertical restrictions, including finding ways to promote multiple network access to cards, thereby facilitating merchant choice.

The Chair moved on to the United States, which concludes its submission by saying that careful study and consideration should precede any government intervention in this complex and evolving industry. What does this mean since in 1998 the Department of Justice filed an antitrust case against Visa and MC on a number of grounds, like dual governance, and the fact that associations prohibited their associated banks from issuing AE or Discovery cards? What was the exact outcome of the case?

A delegate from the United States stated that in the spring of 1996, AE started to make overtures to U.S. banks to partner with AE and keep their MC portfolio. (Visa had passed a by-law in 1991 prohibiting its members from issuing cards on a competing network, with the exception of the MC network. Thus, in the spring of 1996, a bank could not simultaneously issue Visa cards and AE cards, but no rules prevented a MC bank from simultaneously issuing cards on the AE network.) In June 1996, MC passed a rule preventing their members from joining AE. Shortly thereafter, the Justice Department opened an investigation into that practice. In October 1998, the Justice Department filed its case, with two counts: the first count was against the exclusionary rules of the associations, alleging that the banks horizontally agreed not to compete by agreeing that none of the banks would offer AE or Discover. The Justice Department alleged the effect of these exclusionary rules was a reduction in the quality and quantity of output, resulting in harm to network level competition. The second count addressed dual governance, alleging that the governors of the two associations had mixed incentives by virtue of their respective banks' card portfolio composition when they sat as governors. (Virtually all governors of Visa had significant MC card portfolios and vice versa.) The effect alleged was the blunting of competitive initiatives in the associations. The Court held the exclusionary rules were unlawful and that the government failed to establish causation with respect to its duality claim; that is, the court stated that the government had not proved that dual governance blunted competition in the two associations, because it could have been dual issuance that blunted competition between the two associations.

As a result of the case, AE is now entering partnerships with Bank of America, BNA and Citibank. Discover has now acquired the Pulse network, which is a PIN-debit network within the U.S., and is offering signature debit cards on its network. An outcome that may be related to the case was that two or three months before trial, Visa passed a by-law stating that in order to sit on their board of directors, a director's bank card portfolio must have at least a 70% skew towards Visa.

The Chair moved to Italy, where the Bank of Italy until January 2006 was the antitrust authority for banking in Italy and required the operator for debit card transactions to stop prohibiting banks from installing multi-bank point of sale terminals at retail shops. The network operator did not comply with the order of the authority of the bank and now a non-compliance proceeding is under way. That non-compliance is handled by the Italian Antitrust Authority. The multi-bank point of sale services were being used by retailers to reduce their merchant fee by having 'on-us' transactions. The chair asked for a description of the PagoBancomat case and an explanation of the effects from having only one network operator for debit card services.

A delegate from Italy stated that at the beginning of the 1980's, all Italian banks joined to produce a debit card which at the beginning was only used at cash dispensers for cash withdrawals. In the late 1980's they started to use this card also in the point of sales for normal shopping. The Bank of Italy decided the interchange fee was an illegal price fixing agreement and required that the interchange fee should be closely related to cost. Since then the interchange fee was reduced by almost 50% and the merchant fee was also reduced in proportion. This produced a reduction of Visa, MC and AE's merchant fees.

In Italy for debit cards there is only one operator whose owner is all the Italian banks. Does this fact give market power to the Italian banks? The debit card is given free of charge for any current account. There is strong competition on the acquiring side because this card is in competition with Visa, MC and AE. Using a debit card requires a deposit account in Italy, so obviously the market can be entered by all banks but it is not possible for a company which is not a bank to offer a debit card.

The government gave the banks 6 months to produce a new electronic system that permitted merchants to deal with multiple acquirers, but they stated they were unable to do so for safety reasons. However, they are working to produce a new system.

The Chair turned to Germany, where there are 24 network operators. Looking at the numbers, competition should be vibrant. The Chair asked whether there is effective competition among these operators. Do they have geographical bank monopolies? The banking association asked in 2001 for an exemption from the Bundeskartellamt for the introduction of an interchange fee for debit cards and the Bundeskartellamt denied this authorisation. Does this mean that there is no interchange fee for debit cards in Germany now?

A delegate from Germany stated that there are 24 network operators and the market is not geographically divided. The network operators are authorised by the so-called ZKA, an association that combines the 5 central associations of German banks. The association tries to find a common position on all bank-related matters, including authorisation of network operators. Therefore authorisations are based on the agreement between the associations of the ZKA.

In 2001 ZKA notified its intention to introduce interchange fees in the German debit card system. In the statement of objections the Bundeskartellamt considered in particular that such interchange fees are typically passed on to merchants. In the long run, there would be an increase in costs to consumers in a non-transparent way. After this statement of objections, the ZKA withdrew its application. There has never been an application with regard to the credit card system, but there is an interchange fee. Recently a formal complaint about this interchange fee was made.

The Chair moved on to Finland, where the competition authority eliminated the no-surcharge rule but the Competition Council did not agree and annulled the decision. He asked whether this decision by the competition authority was enforced prior to the Competition Council decision. The submission refers to interesting technological developments in mobile phones and retail distributors offering store cards.

A delegate from Finland stated that the non-discrimination rule has been in use in Finland all the time. The travel agent associations complained that they would get a commission fee from airlines when they sell a ticket of approximately 3%, and the fee for the credit card companies is 4%, so they will often lose money on a transaction. The authority lost in court because the court said that eliminating the non-discrimination rule is not in the interest of consumers.

New developments include mobile phone payments and store cards. Mobile phone payments are used in vending machines, where the consumer can pay for services or goods with their mobile phone. Consumers can even take loans by mobile phones for a small amount, something like 100 euros, just by sending an SMS message. The amount is transferred immediately to the customer's bank account. Store cards are things that many other countries have seen, but in Finland just 6 months ago the largest retail chain sought a bank license and will very likely get it.

The Chair turned to the United States, where the 'Wal-Mart' case was recently litigated. It is not a case where the government agencies were involved. In the Wal-Mart case, Visa and MC settled their suit and agreed to abolish the honour-all-cards rule that applied to debit and credit cards so that merchants could refuse to take the more expensive payment instrument. Why was there not more focus on the no-surcharge rule?

A delegate from the United States noted that the government obviously did not represent the plaintiff in the case and that he was not in a position to state the class plaintiffs' views or intentions. With that caveat, the delegate suggested a reason that might explain why the plaintiffs had focused on the removal of the honour-all-cards rule. The merchants probably thought at that time that it was practical to negotiate lower interchange fees by threatening to drop networks, or to actually drop networks. The public documents in the Wal-Mart case reflect that merchants were aware that there was a large gap between signature debit card and PIN-debit card interchange rates and that merchants thought that once they had obtained the right to drop signature debit cards, they would be able to move all of their debit card volume to PIN-debit card networks if signature networks did not lower their interchange rates. At the time that the merchants filed the case and when they were deciding to settle it some 7 years later, in 2003, there was some evidence from the market that this approach would work. For example, in 2001, Visa publicly announced an increase of more than 100% of the interchange rates for its relatively small-size PIN debit card network, Interlink. Several other PIN debit networks at that time announced similar interchange rate increases. In response, Wal-Mart and a number of other large merchants said that if the price increases took effect they would stop accepting Interlink at their point of sale. The PIN debit networks partially backed down, reducing the size of the announced increases in interchange rates. The delegate said that it was likely that the merchants who settled the Wal-Mart case in 2003 focused on the removal of the honour-all-cards rule because they believed, based in part on their experience with Interlink and other PIN debit networks in 2001, that the threat to drop a network was likely to be an effective mechanism to negotiate lower interchange rates. In addition, the Department of Justice's complaint, in its 2003 challenge to First Data Corp.'s acquisition of Concord EFS, refers to documents that support the conclusion that payment card networks do consider merchant threats to drop networks when they set interchange rates.

The delegate noted reasons why merchants may be more interested in no-surcharge rules today than they were when they filed the Wal-Mart case. A number of the reported instances of merchant threats to drop networks and instances in which merchants actually did drop networks have involved Wal-Mart. Obviously, not every merchant retailer has the purchasing power of Wal-Mart. Second, merchant threats to

drop networks often involve networks with relatively low market shares. Public documents indicated that Interlink had less than a 10% market share in 2001 when merchants stated that they would drop the network, suggesting that threats to drop may be less effective for networks with larger market shares. Consequently, it is possible that many merchants may conclude that, on a going-forward basis, a more effective strategy for negotiating lower interchange rates is to implement a surcharge system or some other system that discriminates on price, based on the type of payment card and mechanism used. The delegate noted that his comments in no way addressed the question of whether interchange rates are too low, too high or at efficient levels.

The Chair moved on to Korea. In the BC card case, a card was set up by 11 banks which stipulated that acquiring would only be performed if retailers would open an account with one of them. The KFTC ordered a change in the contract. In fact, it is in the interest of BC that the card be used by every retailer in Korea, so why would a link to an account be required?

A delegate from Korea stated that the market share of BC was 29%. BC is the number one card company and has a dominant power to merchants. The 11 member banks that own BC have 83% of the banking market. The banks knew that retailers would not abandon the BC, so they stood to benefit by increasing the number of merchants with bank accounts in one of the 11 member banks.

The Chair moved on to Sweden with a question on procedure. In May 1995, Visa applied for a negative clearance individual exemption for a multilateral interchange fee and for introducing a no-surcharge rule. Waiting for a European Commission decision, the Swedish Antitrust Authority interrupted the proceedings until May 2001 and finally gave a negative clearance in June 2004. The Chair asked why it took so long for a negative clearance decision.

A delegate from Sweden stated that in 1995 both Visa and Europay filed pretty much the whole set of their agreements in a stack of binders and asked for a negative clearance or exemption. The Swedish authority waited for the Commission decision in 2001. When that decision came through, both Visa and Europay withdrew their earlier applications and sent new ones that contained the no-surcharge rule. The no-surcharge rule was given negative clearance in 2004.

The Chair moved on to Poland with a similar question. The association of Polish retailers filed a complaint against Visa for price fixing and for creating artificial entry barriers; the case is still open five years later. So why does it take so long to deliver a decision?

A delegate from Poland noted that the issue of interchange fees is quite complex. This complexity is the main reason why the case has taken so long. But there are other reasons. The first one is that they were waiting for an EC decision. Then the banks decided to enter into talks but it seemed that it was more a manoeuvre to draw out the proceedings than to reach a solution. Then the banks after two years decided to actually implement the EC decision in the territory of Poland. They produced a cost study a year and a half ago which contained interesting results. According to the findings, the interchange fees for credit cards should be higher right now than for debit cards. So the authority is examining the cost studies. The proceedings are in the final stages and the authority is determined to issue a decision before October 2006.

The Chair turned to Chinese Taipei where the national credit card centre applied for an exemption from the Competition Commission in order to establish an interchange fee. Initially, the Commission rejected the application; however the Ministry of Finance was in favour of the scheme. Who had the power to decide between the Commission and the Ministry of Finance? The Commission undertook a study on the credit card industry and concluded that there was nothing anticompetitive about the interchange fee.

A delegate from Chinese Taipei stated that for this specific case, related to concerted action exemption application, the Commission was authorized to monitor all the horizontal price fixing behaviours. The viewpoint from the Ministry of Finance would be to provide related information which would be taken as complementary references for the Commission's decision. The reason why the Ministry of Finance had a different viewpoint was that the interchange fee might enhance the operational efficiency of the acquisition market by lowering the cost of negotiation and related fees and charges. The Commission's view is that an appropriate fee standard is difficult to measure and price fixing is not typically necessary to support the efficiency of the operation of the credit card business in this case. The Commission study found that there are merits and drawbacks to interchange fees and did not draw a clear conclusion about whether it is appropriate to have this kind of interchange fee.

The Chair asked Mr Ruttenberg of the European Central Bank to discuss the development of SEPA, the Single Euro Payment Area.

Mr. Wiebe Ruttenberg began by noting there is not one system being built but rather one area in which several systems can coexist. The European Central Bank serves the Economic Monetary Union (EMU) consisting of 12 countries among the EU's 25.

While the EMU has had a single currency since 1 January, 1999, bank notes and coins started on 1 January, 2002. But that is regarding retail payments, the only thing in common within the Euro zone, because common standards and business practices are lacking. Countries have different standards regarding different retail payment instruments. Every country has its own infrastructure for processing payments. That is not efficient. Some nation-states have quite efficient systems, but across the EU, cross-border payments are often unduly costly. Under SEPA, a single legal and regulatory basis for making payments will be developed. There will be no difference between a national context and the Euro zone context.

While direct debit may now only be possible within a national context, from 2008 onwards a German customer should be able to subscribe to a Belgian magazine and pay with a pan European direct debit. Customers will be able to make payments from one country to another as efficiently, cheaply and safely as in the national context today by using a single payment account and a single set of payment instruments (credit transfer, direct debit and card).

In 2002, the European Payment Council (EPC) was created and initiated by commercial banks. The commercial banks were faced by directive 2560/2001/EC which stated that payments across the border must have the same price as the national payments. For example in the Netherlands where credit transfer is free of charge, a credit transfer to another country should also be free of charge. For an ATM withdrawal abroad the cardholder should pay the same price as in the card-issuing country. In the Netherlands, a withdrawal is free of charge, so in Germany, withdrawals using the Dutch customer's card should also be free of charge, though the bank has to pay for it.

The timeline for the SEPA project is that the implementation should be ready for 2008 and at the end of 2010 a vast majority of the payment transactions should have been migrated to the new SEPA products. As already mentioned, the SEPA project aims to develop common instruments, standards, procedures and infrastructures in order to foster substantial economies of scale. Three products affected are credit transfer, direct debit and card payments.

For banks, SEPA is not an option. It will be implemented. Should banks fail to deliver, a structure will be put in place. Mr. Ruttenberg noted that there are other options besides commercial bank implementation. A number of central banks already have an operational function of operating retail systems.

Regarding credit transfer and direct debit, the standards are almost agreed. Regarding cards, there is still a lot of work to be done.

What does SEPA for cards and debit cards mean? Nowadays, the traditional national model is that debit cards are domestic. A holder of a Belgian debit card cannot use the Belgian scheme abroad but instead must use the co-branding scheme, usually Visa or MC. It means that an Italian merchant should be able to say, with a German card, that they would like to use the German scheme and there should not be any barriers for implementing that.

An important part of this card framework is that debit card schemes must separate their scheme management, their scheme ownership, their scheme governance and the infrastructures which process the payment transactions.

This means that a bank will be able to choose to issue, for example, MC debit card scheme but not use the infrastructure of MC but rather the infrastructure of Carte Bancaire, for example. It means that there will be more choice for banks, more competition for infrastructure and more possibilities for efficient pricing.

The ECB has no authority on competition issues but follows with interest the work of the European Commission on the interchange issue.

SEPA should not result in a lack of choice and low competition; different business propositions will co-exist and there will be no sabotage of any option. It is no secret that MC and Visa are in a very good starting position to be leaders in the market for debit card schemes in the next couple of years. The important message from the Euro system to the commercial banks is that they should think very carefully about the choices they are making now, so as not to end up in a situation where later there is almost a monopoly of debit card schemes in Europe.

The Chair moved on to Dr. Wilko Bolt who has studied the effects of transaction costs in the choice of payment instruments. His research is relevant for better identifying the solution to the problem of encouraging consumers to use and choose the least expensive payment system.

Dr. Wilko Bolt introduced his study about transaction pricing of electronic payments. He observed that the two-sided market work is very interesting in theory. He wanted to do something empirical. He compared two countries: Norway and the Netherlands. Norway has had price data available for a long time. Norwegian banks offer a menu of prices across different payment instruments to consumers, whereas in the Netherlands transactions are free, there is a 0 price. In Norway, paper based credit transfers are expensive, electronic transfers are cheap, debit cards are cheap, ATM is expensive, and the prices seek to steer consumers towards efficient outcomes.

Terminal availability is an important factor in this study. At the point of sale, prices seem to have little impact on the distribution between cash or ATM and debit cards, but the shift was more driven by the availability of terminals. He suggested that terminal availability is a good proxy for non-price attributes like speed and convenience. In bill payments, there was a strong price response that moved consumers away from paper-based towards electronic transfers.

Given that the shift from paper cash to electronic cash may induce large social benefits, it is perhaps also important for antitrust authorities to know this. They can break the ice to banks and say: "Pricing is important; somebody has to first allow coordination on the timing of implementing prices". That is the way they did it in Norway: the timing of implementing prices was coordinated, but not the level.

From this analysis, a back of the envelope cost-benefit analysis suggests that banks can really save if they shift from paper and cash to electronics.

In conclusion, if banks want to start pricing, then in some sense they must make sure that not only relative price matters but also absolute price matters. Absolute prices affect the behavioural response to payment instruments. There is a role for antitrust authorities to break the ice and permit modest bank coordination, because none of the banks want to be the first to implement pricing. Back in 1992, one big bank in Holland started to price the paper-based giro transfers; the next day 15 000 people moved to the Post bank which was free.

The Chair asked Jean Tirole to make a brief comment.

Professor Jean Tirole said that consumers react to prices, which is not very surprising. The role of the interchange fee is to induce cardholders to consume more or less; that may result in over consumption or under consumption. Interchange fees are not collective price fixing; they are about guiding the consumer to make efficient or inefficient choices with respect to card payments. That will work only if issuers somehow pass through the interchange fee either through lower card payments per year or especially usage charges which are lower. There is a concern that if the banking sector acts as a cartel, interchange fees may not be passed back to cardholder; but in this case, the best policy is not to attack the interchange fee but rather to attack the cartel directly. Professor Tirole expressed his view that the interchange fee is not a good way of regulating merchants either, it is a roundabout way.

Should the margins of banks be taken into account? If there is a cartel, the answer is no. But if the banks innovate and reduce prices for the consumers through seeking higher margins, yes. In patent policy, for example, monopoly margins are the reward for innovation. Now in cards, identifying the right view is difficult, but clearly margins should be taken into account, at least partly.

Should the interchange fee be regulated by government? This calls for a little modesty. Professor Tirole noted that he had worked in telecoms, electricity and other areas where the market failures were clear. Regulation distorts, but with a very clear market failure, there was a consensus that net benefits would arise from regulating those industries, breaking up monopolies and so forth. Here the market failure is not so clear. It would be valuable to know more, rather than just adopting rules like 'cost based' or '0 interchange fee' which are not well justified. There are many other transfer prices in the economy which are not 0 or cost based and where there are no complaints.

This morning Alberto Heimler suggested that behavioural remedies are easily reversible. The test is really whether the card system really functions well or decently when there is a 0 interchange fee or cost-based interchange fee. But how do observers know whether there are enough card transactions? How do observers know there are enough card transactions compared to cash transactions or cheque transactions? An empirical test is needed to identify whether potential benefits of regulation would counter-balance inefficiencies of regulation. David Evans' point from this morning is important: assume the interchange fees are too high and therefore should be reduced. What will the industry be like in five or ten years? If four-party platforms are subject to competition law challenges, unitary systems will be ascendant, but there may be merchant fees that are 2 - 3% higher than the current level because these firms cannot be sued. Is this a good outcome?

The Chair noted the problem that often the presence of cartels is not clear. There are often high switching costs between banks and depositors do not switch, so competition on the side of depositors is not that strong. If depositors were to switch and get back all the money that their bank is getting from the interchange fee, then there might not be any problem.

The Chair thanked the panellists for their valuable presentations and comments. He noted that their presence had been extremely valuable to those present in the room, as was the presence of delegates from central banks. The Chair then closed the session.

RÉSUMÉ DES DÉBATS

Le Président, Alberto Heimler, ouvre la table ronde sur les systèmes de paiement par carte en précisant que cette session portera en priorité sur les questions liées aux cartes de débit et de crédit. Dans ce domaine, il existe trois grandes options de politique de la concurrence. La première consiste à considérer qu'aucune intervention n'est nécessaire parce qu'il n'y a pas de défaillance du marché. La deuxième consiste à penser qu'une intervention est nécessaire parce que certaines pratiques qui ont cours dans le secteur des cartes de crédit induisent un renforcement artificiel du pouvoir de marché qui n'est pas éliminé par la concurrence. Enfin, la troisième option repose sur l'idée qu'il y a défaillance du marché mais qu'il est tellement difficile d'intervenir que mieux vaut s'en abstenir.

Les commissions d'interchange, l'interdiction d'appliquer un supplément en cas de paiement par carte et la règle qui impose l'obligation d'accepter toutes les cartes ont déjà été débattues et ont fait l'objet de discussions animées ces dernières années. Le Président de la table ronde annonce que plusieurs économistes et responsables connus, dont Wilko Bolt, David Evans, Joseph Farrell, Alan Frankel, Jean-Charles Rochet, Wiebe Ruttenberg et Jean Tirole ont été invités à prendre part à la table ronde pour permettre une meilleure analyse des problèmes en jeu et des avantages et inconvénients des différentes options. Après les avoir remerciés pour leur participation, le Président précise que le débat s'articulera autour de trois thèmes : le marché des instruments de paiement ; les commissions d'interchange et les contraintes imposées aux commerçants ; les autres questions relatives à l'application du droit de la concurrence, les aspects procéduraux et l'intervention des pouvoirs publics.

1. Le marché des instruments de paiement

Le Président fait observer qu'en arrivant à la caisse, un client a le choix entre plusieurs instruments de paiement : espèces, chèque, carte de débit ou de crédit. L'efficience est garantie lorsque, étant donné les caractéristiques de l'instrument choisi, c'est celui caractérisé par le coût le plus faible qui est choisi. Or, bien souvent, ce n'est pas ce scénario qui se produit. Le marché des instruments de paiement étant souvent qualifié de dual, le Président invite le Professeur Jean Tirole à présenter ce type de marchés.

Le Professeur Jean Tirole commence par évoquer les marchés « multifaces », dans lesquels une plateforme essaie d'attirer au moins deux versants d'un marché qui souhaitent effectuer une transaction ou interagir l'un avec l'autre. Par exemple, une plateforme de jeux vidéo comme la PlayStation, la Nintendo ou la X-Box doit attirer à la fois les éditeurs de jeux, qui veulent vendre des jeux à des joueurs, et des joueurs prêts à acheter les consoles pour lesquelles ces jeux ont été conçus. De même, l'éditeur d'un système d'exploitation comme Palm ou Windows essaie d'attirer à la fois des concepteurs d'applications et des utilisateurs. Les portails, les journaux et les chaînes de télévision cherchent à attirer des annonceurs d'une part et du public d'autre part. Les plateformes de paiement par carte de crédit cherchent à séduire à la fois des commerçants et des porteurs de cartes. Mais un problème de l'œuf et de la poule se pose : la plateforme doit conquérir les deux versants du marché sans pour autant perdre d'argent.

La théorie du marché dual s'applique à une diversité de domaines : plateformes d'enchères, de négociation de valeurs mobilières, d'appariement, plateformes de télécommunications comme Internet, revues universitaires et galeries marchandes. Les plateformes consacrent beaucoup de temps à réfléchir au modèle économique qu'elles vont choisir et à le tester. Elles fixent leur tarif en fonction de ce que chaque versant du marché peut assumer et des externalités intergroupes. Les plateformes induisent évidemment

des externalités de demande des deux côtés, de sorte que la structure des tarifs devrait être conçue pour attirer les deux versants du marché. La notion d'allocation « équitable » des coûts n'influe pas sur ce calcul, contrairement au surplus créé sur chaque versant du marché, qui lui, est pris en compte. Ainsi, si un acheteur crée beaucoup de valeur pour un vendeur, la plateforme peut imposer un tarif élevé au vendeur et, par voie de conséquence, consentir un tarif faible à l'acheteur parce que son objectif est d'attirer des acheteurs créateurs de valeur pour le vendeur. Les portails financés par la publicité, les chaînes de télévision et la presse écrite constituent les exemples les plus évidents de ce type de plateformes, le public pouvant bénéficier des services gratuitement ou, à tout le moins, à un prix inférieur au coût, parce que ce public a une valeur élevée pour l'autre versant du marché, constitué par les annonceurs.

Les étudiants en économie ou en gestion apprennent en principe dès leur premier cours la règle que les chefs d'entreprise appliquent quotidiennement pour fixer leurs tarifs. Selon cette règle, qui est la règle type de maximisation des bénéfices, il devrait y avoir une relation inverse entre le prix demandé pour tout bien ou service, exprimé en termes relatifs (prix moins coût marginal sur prix), et l'élasticité de la demande. L'élasticité de la demande se définit comme le pourcentage d'augmentation de la demande induit par une baisse de prix de 1 %. Par conséquent, si l'élasticité de la demande est forte, l'entreprise pratique un prix proche du coût marginal, tandis qu'elle peut pratiquer un prix plus élevé si l'élasticité est faible.

Il se trouve que cette règle s'applique également aux marchés de type dual malgré leur complexité. Ainsi, par exemple, lorsque l'on calcule le prix à imposer à un acheteur, le coût devrait être conçu comme un coût d'opportunité, inférieur à celui du service rendu à l'acheteur en question. La raison en est qu'attirer des acheteurs supplémentaires induit des recettes du côté des vendeurs, soit par le biais d'une tarification à l'utilisateur ou à la transaction, soit parce qu'il devient possible d'augmenter la commission d'adhésion en faisant valoir la présence d'acheteurs sur l'autre versant du marché. Il faut donc considérer que le coût marginal est en réalité un coût d'opportunité, qui comprend de ce que rapportera, sur l'autre versant du marché, le fait d'attirer des opérations ou des membres sur ce versant.

Ce raisonnement est certes théorique, mais la théorie importe réellement parce qu'elle prédit – et que la pratique confirme – que le prix peut être bas, parfois nul, voire négatif comme dans le cas des cartes de crédit, pour un versant du marché dès lors que la présence d'un acheteur se traduit par des recettes substantielles sur le versant des vendeurs.

Reste à examiner comment cette théorie fonctionne dans la pratique. Elle se traduit souvent par une tarification asymétrique, les tarifs appliqués à un versant du marché étant égaux ou inférieurs au coût, tandis que ceux imposés à l'autre versant sont élevés. Cette pratique se rencontre fréquemment dans de nombreux secteurs. Ainsi, le logiciel permettant de lire les documents au format pdf. est proposé gratuitement, mais pour créer un tel document, l'utilisateur doit acheter le logiciel, qui plus est à un prix relativement élevé par rapport au coût marginal (fondamentalement nul). A priori, cette asymétrie s'explique sans doute par le fait que l'auteur du document est prêt à payer. À l'inverse, dans le cas d'un film ou d'un livre, les utilisateurs paient, mais pas les auteurs. Souvent les plateformes de systèmes d'exploitation comme Palm ou Windows ne réalisent pas leurs bénéfices du côté des concepteurs, mais du côté des utilisateurs. Là encore, le prix est nul pour un versant du marché et élevé pour l'autre. En ce qui concerne le type de plateformes dont il est question aujourd'hui, en l'occurrence les plateformes de paiement par carte (de débit ou de crédit), la commission commerçant est relativement élevée, tandis que le prix demandé aux porteurs est très faible, en réalité souvent négatif si la carte leur permet de bénéficier des programmes de fidélité des compagnies aériennes ou prévoit des périodes de financement gratuit. Il s'agit, là aussi, de pratiques très courantes en matière de tarification.

Les plateformes – et ce, dans de nombreux secteurs – tendent à réguler les interactions entre les utilisateurs finals dans la mesure où elles cherchent à attirer les deux versants et à parvenir à un équilibre à travers d'autres instruments que les seuls prix, en l'occurrence les commissions d'adhésion et d'usage.

Souvent, elles protègent les consommateurs en permettant une forte concurrence à l'intérieur de la plateforme, via une architecture ouverte. Il arrive également qu'elles encadrent les prix lorsque la concurrence est insuffisante. Tout utilisateur d'un iPod sait que le prix du service est actuellement encadré par application d'un plafond fixé à 99 cents. De même, certains pays interdisent l'application d'un supplément en cas de paiement par carte, même s'il arrive que cette interdiction ne soit pas d'application obligatoire en raison des coûts de transaction. Les plateformes remplissent de nombreuses autres fonctions de protection courantes : octroi de licence, communication d'informations et application. Elles sont en effet motivées par le fait qu'en protégeant le consommateur, elles peuvent gagner plus d'argent (ou en perdre moins) sur le versant des acheteurs. En d'autres termes, cette régulation est une autre stratégie pour attirer les consommateurs.

Le modèle économique des plateformes multifaces est souvent complexe et il est important d'en prendre conscience pour émettre un jugement à leur sujet.

Les stratégies concurrentielles des plateformes sont intéressantes à plusieurs égards. On peut prendre l'exemple de systèmes autres que les télécommunications, dans lesquels il n'y a pas d'interconnexion, comme les cartes et les logiciels. D'une part, en raison des externalités de réseau, les utilisateurs veulent utiliser la même plateforme que les autres, ce qui peut aboutir à un scénario dans lequel le côté gagnant emporte tous les avantages et entraîner une évolution vers une plateforme unique. À noter toutefois que la contestabilité dynamique empêche que ce phénomène conduise systématiquement à la détention d'une position dominante à long terme, comme en témoigne le secteur des jeux vidéo, où les acteurs en position dominante se sont succédés.

Il peut arriver que les plateformes duales ne parviennent pas à l'équilibre à un instant précis. Ainsi, dans le domaine de la téléphonie mobile, des lecteurs médias et des cartes, de nombreuses plateformes survivent. La différenciation permet parfois la survie des petits acteurs en favorisant le multi-hébergement. La tarification linéaire, qui consiste à faire payer les utilisateurs à chaque transaction au lieu de leur imposer un tarif forfaitaire, de manière à ce qu'ils ne courent aucun risque lorsqu'ils rejoignent la plateforme, remplit la même fonction.

Le Professeur Tirole insiste sur le rôle très important du multi-hébergement dans tous ces secteurs. Ainsi, dans une situation où les acheteurs optent pour l'hébergement unique et les vendeurs pour le multi-hébergement, en d'autres termes où le vendeur est connecté à plusieurs plateformes, tandis que l'acheteur n'est connecté qu'à une seule plateforme, l'unique moyen donc dispose le vendeur pour interagir avec un acheteur utilisant la plateforme 1 est de se connecter à la plateforme 1. Cette dernière détient un monopole puisqu'elle contrôle un goulot d'étranglement, alors que l'acheteur aurait pu conclure une transaction avec le vendeur en utilisant l'une quelconque des plateformes. La plateforme 1 réserve donc un traitement favorable au versant du marché qui opte pour un hébergement unique, mais pratique un prix de monopole sur le côté qui choisit le multi-hébergement. En d'autres termes, la plateforme peut imposer un prix de monopole aux vendeurs mais doit consentir un tarif faible aux acheteurs qui ont opté pour un hébergement unique.

L'apparition dans certains pays des cartes sans frais annuels lancées par Visa et MasterCard dans les années quatre-vingt-dix, est une illustration du phénomène du multi-hébergement. Cette initiative a en effet conduit les clients d'American Express à opter pour le multi-hébergement et a permis aux commerçants de refuser plus facilement les cartes American Express. American Express a alors dû baisser le montant de la commission imposée aux commerçants, ces derniers sachant que le porteur d'une carte American Express pouvait probablement aussi payer avec une carte Visa ou MasterCard, ce qui leur coûterait moins cher.

Il est très important de bien comprendre les implications de la dualité des marchés pour la politique de la concurrence, que ce soit pour la délimitation des marchés, le repérage de la monopolisation ou de l'abus

de position dominante. Les autorités de la concurrence peuvent être tentées de ne s'intéresser qu'à un seul versant du marché. Or, seule une analyse tenant compte de la dualité de ces marchés est pertinente. Ainsi, lorsqu'il s'agit de déterminer s'il y a pratique d'éviction, un prix inférieur au coût marginal ou incrémental peut attirer les soupçons des autorités de la concurrence (la détection de ce type de prix constitue généralement la première étape de l'examen visant à déterminer s'il y a pratique d'éviction). Or, en réalité, sur la plupart des marchés de type dual, certains prix sont nettement inférieurs au coût marginal. Ainsi, il existe des logiciels gratuits, des journaux gratuits. La vente à un tarif inférieur au coût n'est en général pas considérée comme une pratique d'éviction. Dans nombre de secteurs, les entreprises pratiquent des prix nettement inférieurs au coût vis-à-vis d'un côté du marché et nettement supérieurs à ce coût vis-à-vis de l'autre côté et cette pratique peut n'avoir aucun rapport avec un abus de position dominante.

De même, en poussant le raisonnement à l'extrême, on peut imaginer une situation dans laquelle diverses plateformes s'entendent sur les prix vis-à-vis d'un versant du marché. En principe, une entente sur les prix entraîne une perte sèche. Mais il faut également tenir compte du fait que la réalisation d'un bénéfice élevé d'un côté du marché entraîne une forte intensification de la concurrence de l'autre côté. L'effet net est difficile à apprécier avec certitude. Tout en incitant à prendre cet argument avec précaution, le Professeur Tirole estime qu'il constitue un exemple édifiant du type d'analyse qui montre la complexité des marchés de type dual. Il souligne que ces marchés soulèvent quantité d'autres questions intéressantes, en matière de ventes liées ou de contrats d'exclusion, qu'il n'est pas possible de traiter dans le cadre du temps imparti aujourd'hui. Quoi qu'il en soit, appliquer le raisonnement habituel aux marchés de type dual sans mener une réflexion approfondie comporte d'importants risques d'erreurs.

Pour conclure, le Professeur Tirole fait observer qu'un grand nombre de secteurs clés, tant de l'ancienne que de la nouvelle économie, sont de type dual. Leur appliquer le même raisonnement qu'aux autres types de marchés risque de conduire les entreprises à la faillite. Avant d'intervenir dans ces secteurs, il est important d'en analyser l'expérience passée et d'enrichir cette analyse par des travaux théoriques et économétriques.

Le Président remercie le Professeur Tirole pour sa présentation et passe la parole au Professeur Farrell.

En préambule, le Professeur Joseph Farrell déclare prendre très au sérieux la recommandation du Professeur Tirole, selon laquelle il convient d'analyser ces marchés comme des marchés dont le client est dual.

Il commence par des précisions terminologiques. Une carte de paiement est un instrument de paiement dont l'utilisation a un prix pour le commerçant (M) et un prix (très souvent négatif) pour le porteur de la carte (F). La somme $M+F$, qui correspond au prix total imposé par l'instrument de paiement, constitue le « niveau » du prix. La « structure » du prix correspond à la répartition entre M et F et peut être assimilée au rapport de M sur $M+F$.

Il existe un lien étroit entre la commission d'interchange et la structure du prix. Si cette commission, ou ses modifications, est répercutée à parts égales – qu'elle le soit à 100 % ou à 37 % – des deux côtés du marché – acquéreur et émetteur – elle a une incidence sur la structure et *non* sur le niveau du prix imposé par l'instrument de paiement. Ainsi, si l'on prend pour référence le cas où la commission est répercutée de manière égale des deux côtés du marché, elle influe fondamentalement sur la structure et pas directement sur le niveau du prix. En cas de répercussion asymétrique, toute modification de la commission d'interchange influe à la fois sur le niveau et la structure du prix. Contrairement à ce qu'affirment certains observateurs, le fait que la situation concurrentielle ne soit pas la même pour le côté acquéreur et le côté émetteur ne doit pas automatiquement amener à conclure que la commission d'interchange est répercutée de manière asymétrique. Il s'agit en effet d'une problématique complexe.

Généralement, pour apprécier les effets de la commission d'interchange, les économistes construisent un modèle et évaluent, dans ce modèle, l'effet d'une variable telle que la commission d'interchange sur le bien-être économique. L'autre approche envisageable consiste à examiner, dans le modèle, les effets de la commission sur la concurrence, correctement définie, et de partir du principe qu'à long terme le renforcement de la concurrence entraîne normalement une amélioration du bien-être. Il semble que les exemples dans lesquels les autorités de la concurrence adoptent cette approche, totalement contraire aux recommandations des modèles économiques, ne manquent pas. Ainsi, tout un pan de la littérature économique considère que sur certains marchés oligopolistiques, les incitations privées attirant les nouveaux entrants sont excessives ; en d'autres termes, une entrée marginalement rentable n'est pas efficiente en termes d'effets sur le bien-être économique dans le modèle. Or, les autorités de la concurrence n'en concluent pas pour autant qu'elles devraient empêcher ce type d'entrée sur le marché, notamment parce qu'elles croient dans le syllogisme selon lequel à long terme, une intensification de la concurrence améliore le bien-être.

Le Professeur Farrell précise que, dans son analyse des instruments de paiement, il prend pour référence l'approche de la politique de la concurrence plutôt que celle, plus classique, de la politique du bien-être économique et qu'il aborde les instruments de paiement sous l'angle du client dual. Lorsque plusieurs concurrents sont présents sur un marché, les responsables de l'action publique laissent en principe les entreprises fixer librement leurs tarifs et comptent sur la concurrence pour jouer un rôle positif, par exemple pour rapprocher les prix des niveaux d'efficience et orienter la demande vers les entreprises les plus efficaces.

Le Professeur Farrell a récemment publié un article dans la *Review of Network Economics*, dans lequel il examine comment appliquer l'approche de la politique de la concurrence au niveau et à la structure du prix et étudie si la structure du prix est de nature à fausser la concurrence et à en empêcher le bon fonctionnement. La commission d'interchange a une incidence directe sur la structure du prix, tandis qu'elle n'a une incidence sur son niveau que si elle est répercutée de manière asymétrique. Le jeu normal de la concurrence veut notamment que les entreprises fassent des offres parmi lesquelles les clients choisissent celle qu'ils préfèrent. Or, si ce principe va quasiment de soi dans un marché non dual, dans un marché dual, le client ne choisit pas automatiquement l'offre qu'il préfère. En effet, un problème que les économistes qualifient de « problème de relation d'agence » peut s'interposer entre le commerçant et le porteur de la carte. Le « client » est une entité « duale », une équipe temporaire constituée du commerçant et du consommateur. Divers dysfonctionnements sont possibles. Ainsi, bien souvent, le membre de l'équipe qui fait un choix actif est le titulaire de la carte. Or, il fait un choix au nom du client dual, mais peut ne pas choisir l'option qui répond le mieux aux intérêts de ce dernier. À noter que le commerçant ne se battra pas pour défendre exclusivement ses propres intérêts, au sens étroit, s'il se met d'accord avec le consommateur sur l'instrument de paiement utilisé. La raison en est que dans ce cas, il internalise les avantages retirés par le consommateur et agit fondamentalement comme un membre de l'équipe que constitue le client dual. Mais dans le cas où l'un des membres agit vraiment dans un esprit d'équipe tandis que l'autre est égoïste et est, de surcroît, celui qui prend les décisions, des biais interviennent. Selon le Professeur Farrell, ces biais sont de nature à fausser la concurrence si, par exemple, selon toute attente, le commerçant a une préférence pour les cartes de débit, tandis que le porteur préfère trop souvent les cartes de crédit pour que cela serve les intérêts du client dual. À noter que si l'on adopte l'approche du bien-être social, il n'y a pas obligatoirement de biais par rapport au choix qui serait le meilleur pour la société dans son ensemble.

Il arrive que des transactions soient effectuées sur la plateforme qui convient le moins au client dual lorsque (1) la « plus mauvaise » option a une structure de prix plus défavorable pour le porteur de la carte que l'option concurrente (2) l'application d'un supplément pour paiement par carte est interdite ou il y a « cohérence des prix » et (3) les commerçants continuent à accepter la « plus mauvaise » option. Le fait que les commerçants continuent à accepter la « plus mauvaise » option peut s'expliquer par plusieurs

raisons : ainsi, il est possible que l'instrument de paiement soit un instrument bien établi, qu'il soit efficient pour certaines opérations mais pas pour d'autres et qu'une première utilisation pour une transaction augmente la probabilité de l'utiliser pour les transactions suivantes.

Cette distorsion peut se produire lorsque le porteur de la carte choisit un instrument pour effectuer un nombre significatif d'opérations, lorsque le commerçant préfère un autre instrument et que sa préférence est en quelque sorte plus forte et n'est pas internalisée entre lui et le porteur. À l'inverse, si le commerçant est globalement indifférent vis-à-vis de l'instrument choisi, ce type de distorsion ne se produit pas.

À cet égard, la question qui se pose est de savoir dans quelles circonstances la structure du prix est telle que le client dual fait, en principe, le choix le plus intéressant pour lui. Cela ne revient pas à s'interroger sur ce que le client choisit en réalité et à apprécier ce choix au regard du critère « d'efficacité sociale » dans le modèle. Ces questions diffèrent sur un plan philosophique, l'une cherchant à soutenir un mécanisme concurrentiel, tandis que l'autre vise, d'une manière plus technocratique, à promouvoir directement l'efficacité sociale. Elles diffèrent également sur un plan plus technique, dans la mesure où la première ne tient pas compte de l'effet du choix sur les bénéfices marginaux de l'instrument de paiement. Or, se contenter d'examiner les retombées du choix du consommateur sur le surplus total peut avoir un effet pervers. En effet, les prix n'intervenant pas dans le calcul, une telle approche peut affaiblir voire éliminer la discipline des prix induite par la concurrence.

L'autre problème, étroitement lié à ce qui précède, est qu'un instrument de paiement dont la structure de prix impose des coûts élevés à un commerçant en cas de cohérence des prix a pour effet de taxer les transactions réglées avec d'autres moyens de paiement et de subventionner sa propre utilisation par le porteur. Le fait que la concurrence puisse être faussée par la capacité d'un instrument de paiement à imposer une taxe à ses rivaux pour subventionner sa propre utilisation peut susciter des inquiétudes légitimes. Toutefois, en principe, ce problème disparaît en cas d'indifférence du commerçant au point de vente, parce qu'alors, l'utilisation accrue d'un instrument, par exemple de la carte Visa, est sans incidence sur le prix nominal auquel le commerçant maximise ses bénéfices.

Sur le plan technique, il est possible qu'un instrument de paiement puisse, à travers le choix de sa structure de prix, récupérer la demande qu'il a perdue en fixant un prix supérieur à son coût marginal. Comme l'ont montré les Professeurs Rochet et Tirole il y a quelques années, il est possible que ce phénomène ait simplement pour effet de ramener la demande au niveau auquel elle aurait été si le prix avait été égal au coût marginal. Cette stimulation de la demande est certes positive en termes de retombées immédiates sur le bien-être social, mais peut empêcher le jeu de la concurrence puisqu'elle amène le client dual à faire un choix autre que le choix optimal qu'il aurait fait en tenant compte des variables tarifaires et non tarifaires. Tout en reconnaissant que les retombées peuvent apparaître positives dans les modèles, le Professeur Farrell reste préoccupé quant à ce qu'il en est dans la pratique. De plus, il est seulement possible, et non très probable, que la stimulation de la demande ramène effectivement la demande au niveau auquel elle aurait été si le prix était égal au coût marginal : la littérature économique a en effet identifié divers biais complexes.

Il définit ensuite trois approches de base de la structure du prix. Selon la première, qui est la plus représentée dans la littérature économique, il convient de traiter la structure du prix comme une variable de politique publique et d'étudier ses incidences sur la valeur du bien-être économique total. Cette approche aboutit à des résultats complexes et ambigus. Face à cela, la deuxième approche ne prend pas les modèles autant au sérieux et repose sur une préférence générale pour le laisser-faire. La troisième approche, en revanche, traduit un point de vue favorable au jeu de la concurrence ; elle vise à déterminer et, éventuellement, à modifier les moyens par lesquels la structure du prix influe sur le fonctionnement de la concurrence.

Le Président remercie le Professeur Farrell pour sa contribution et s'adresse aux délégations pour leur poser des questions sur leurs institutions. Il relève qu'à certains égards, la situation des Pays-Bas est représentative de celle de l'Europe : les paiements par carte de débit à code PIN représentent un fort pourcentage des transactions, soit environ 30 % en valeur, tandis que les cartes de crédit représentent un tiers des cartes de débit et sont essentiellement utilisées dans les restaurants et les hôtels. Il note que le rapport des Pays-Bas comporte une information intéressante, à savoir que les chèques ont été retirés du marché en 2002 et demande comment ce retrait s'est fait, s'il résulte d'une décision de la Banque centrale ou de l'association bancaire et si les autorités de la concurrence ont joué un rôle quelconque. Sa deuxième question concerne le rôle de Currence, l'organisation qui gère l'ensemble des systèmes de paiement de masse aux Pays-Bas, accorde les licences, élabore la réglementation et veille à son application. Elle est détenue par les grandes banques, mais pas par toutes les banques alors que dans d'autres pays, par exemple en Italie, l'équivalent de Currence appartient à toutes les banques. Le Président demande si Currence aurait le pouvoir d'empêcher l'entrée sur le marché de petits acteurs. Enfin, le rapport des Pays-Bas établit un lien entre la réduction de la commission commerçant pour les paiements par carte de débit et l'utilisation de ces cartes par les consommateurs. Le Président invite la délégation à expliquer comment une telle réduction influe, le cas échéant, sur le choix du consommateur.

Un délégué des Pays-Bas répond qu'à sa connaissance, les banques néerlandaises ont décidé de supprimer les chèques à cause des risques de fraude. L'autorité néerlandaise de la concurrence (NMa) n'a pas été impliquée dans cette décision ; en revanche, l'association bancaire néerlandaise l'a été, de même que, pour autant que le sache le délégué, la banque centrale. Ce n'est toutefois pas la banque centrale qui a pris la décision. Il passe ensuite à la deuxième question, qui porte sur le point de savoir si Currence aurait le pouvoir d'empêcher l'entrée sur le marché et de protéger ainsi les banques, auxquelles elle appartient. En ce qui concerne les nouveaux entrants, Currence doit respecter un ensemble de règles qui ont été examinées mais pas encore officiellement approuvées par la NMa. Jusqu'à présent, la NMa considère que ces règles sont objectives, non discriminatoires et transparentes. Lorsqu'un nouvel acteur cherchant à entrer sur le marché n'est pas satisfait de la décision de Currence, il a à sa disposition une procédure de recours dans laquelle les banques ne sont pas impliquées. Toutefois, la NMa enquête actuellement sur le rôle que jouent les banques au sein de Currence, pour déterminer si elles ont influé sur les décisions et orientations de cette organisation ces derniers temps. Les conclusions de cette enquête ne sont pas encore connues. Le délégué répond ensuite à la troisième question, qui a trait à la manière dont la réduction de la commission commerçant peut influencer le choix du consommateur. Les tarifs appliqués aux commerçants ont commencé à baisser fin 2005, si bien qu'on ne dispose pas encore d'informations suffisantes pour tirer des conclusions probantes sur les effets de cette baisse sur les choix des consommateurs.

Le Président s'adresse ensuite au Danemark. D'après le rapport du Danemark, bien que le marché des cartes soit fortement réglementé, il y a quasiment autant de cartes de débit que d'habitants, puisqu'on en compte 3.4 millions pour 4 millions d'habitants. Au Danemark, il n'y a pas de commission d'interchange ; les commerçants paient à l'entité acquéreuse une cotisation annuelle, fixée par la loi, pour leur affiliation. À première vue, ce système paraît efficient parce que le coût d'acquisition fixe est compensé par une cotisation fixe facturée au commerçant. Toutefois, au Danemark comme aux Pays-Bas, l'entité qui organise le marché, en l'occurrence PBS, est de loin la plus grosse entité acquéreuse puisqu'elle détient plus de 90 % du marché. À noter qu'aux Pays-Bas, cette situation prévalait autrefois, mais aujourd'hui ce sont toutes les banques qui sont acquéreuses, pas Currence. Le Président demande pourquoi il n'y a pas eu apparition de la concurrence sur le côté acquéreur et pourquoi le marché des cartes est à ce point réglementé au Danemark.

En réponse à la question relative à la concurrence du côté acquéreur, un délégué du Danemark indique que, comme le montre le tableau 2 du rapport, la cotisation d'affiliation annuelle ne concerne que la carte Dankort. Les autres cartes imposent une commission à la transaction. Par conséquent, les commerçants continuent de préférer Dankort aux autres cartes. Avant 2005, la loi disposait que Dankort était gratuite, si

bien que la banque acquéreuse n'était pas autorisée à imputer une commission au commerçant. Cette règle a changé en 2005, et la cotisation annuelle a été créée. La différence de coût total entre Dankort et les autres cartes a été réduite et les autorités danoises de la concurrence espèrent que cette réduction améliorera, à terme, la concurrence sur le marché acquéreur. Le gouvernement examine actuellement la possibilité de mettre en place une commission d'interchange sur les transactions dématérialisées. La commission de l'entité acquéreuse a été acceptée comme étant basée sur ses coûts, mais ces coûts incluaient une commission comparable à une commission d'interchange payée aux banques émettrices. La question de savoir si cette commission est basée sur les coûts doit être examinée, de même que celle de savoir s'il faudrait établir le montant de ce type de coûts dans le cadre d'un accord multilatéral.

Le Président s'adresse ensuite à la délégation du Mexique. Au Mexique, le prix imposé aux commerçants dépend d'un barème sectoriel établi par l'association bancaire mexicaine. Par conséquent, la commission n'est pas déterminée par le nombre de transactions ni par l'usage du système par le commerçant, mais par le secteur dans lequel ce dernier opère. Ainsi, tous les commerces de détail paient le même prix. Le Président demande si une telle structure exclut toute possibilité de négociation de la part d'un commerçant au sein d'un secteur, auquel cas elle réduirait considérablement la concurrence du côté acquéreur.

Un délégué du Mexique répond que la deuxième banque mexicaine par la taille détient plus de 60 % des contrats avec les points de vente. Globalement, les banques détiennent environ 93 % de ce marché. Le rapport soumis par le Mexique décrit les évolutions récentes du cadre réglementaire. Désormais, la banque centrale et les autorités fédérales de la concurrence (*Federal Competition Commission*) sont tenues de coopérer pour garantir une situation concurrentielle. Aucune mesure officielle n'a été prise pour réglementer la commission commerçant, mais une analyse réalisée par l'autorité de réglementation sectorielle a débouché sur une modification de la structure de cette commission. Plus précisément, la commission d'interchange n'est plus liée au volume des ventes réalisées par un commerçant mais dépend d'un barème propre au secteur d'activité de ce dernier. Ce changement vise à remédier à la faible pénétration des cartes de paiement du côté de l'offre au Mexique. Il présente toutefois des inconvénients, l'un d'entre eux étant qu'il exclut toute possibilité de négociation entre commerçants et acquéreurs. Les autorités fédérales de la concurrence se sont récemment intéressées à cette question dans le cadre d'une affaire dont elles ont été saisies par des détaillants alléguant une entente sur les prix. Il a été sursis à toute décision en attendant une étude approfondie du secteur. Les autorités de la concurrence renforcent leur coopération avec la banque centrale pour mieux appréhender ce marché et examiner les mesures qui permettraient d'intensifier la concurrence. Le Mexique affine encore son analyse de cette question et n'a pas arrêté d'approche définitive.

Le Président passe ensuite à la Lituanie, où les banques doivent payer pour adhérer au réseau, tant pour les cartes de débit que pour les cartes de crédit. Le document soumis par la Lituanie ne précise pas clairement si ces frais d'adhésion sont à régler une seule fois ou annuellement. En outre, le document fait allusion au fait que les recettes découlant de l'émission de cartes ont presque quadruplé ces dernières années dans un certain nombre de banques. Le Président demande quelles raisons expliquent cette hausse et si cette augmentation des bénéfices a été en partie répercutée sur les clients sous forme de réductions de prix.

Un délégué de la Lituanie confirme que les banques doivent payer pour adhérer à un réseau comme Visa ou MasterCard. Pour obtenir l'autorisation de créer un produit précis, quel qu'il soit, elles doivent acquitter des frais supplémentaires, dus une seule fois et non annuellement. En ce qui concerne la deuxième question, les recettes résultant de l'émission de cartes ont augmenté dans certaines grandes banques, mais pas dans les petites. Cette hausse a été non négligeable, mais à peu près proportionnelle au nombre de nouvelles émissions de cartes. Les grandes banques ont émis davantage de cartes de crédit, beaucoup plus rentables que les cartes de débit. Elles ne semblent pas vouloir réduire les tarifs qu'elles

imposent aux titulaires de cartes. Pour l'instant, la demande de cartes étant forte, les émetteurs peuvent continuer à imposer des tarifs élevés aux porteurs. Toutefois, d'autres formes de réductions peuvent être consenties ; par exemple, les petites banques réduisent directement leurs tarifs, tandis que les grandes banques proposent davantage de services pour le même prix, par exemple des assurances voyage.

Le Président se tourne ensuite vers la Commission européenne, qui a ouvert une enquête sectorielle sur les services financiers, en particulier sur la banque de détail et l'assurance des entreprises. Un rapport intermédiaire portant sur les cartes de paiement a été publié en avril 2006. Il révèle d'une part d'importantes disparités entre les États membres, en termes d'institutions, de structures de marché et de pratiques des entreprises. La création de l'espace unique de paiement en euros (Single Euro Payments Area, SEPA) changera probablement la donne à cet égard. Sur le fond, le rapport conclut que le secteur des cartes de paiement est rentable pour les émetteurs et les acquéreurs, même s'il l'est nettement plus pour les émetteurs, ce qui signifie que les recettes résultant des commissions d'interchange ne sont pas restituées aux consommateurs mais affectées à l'augmentation des bénéfices. En outre, dans certains pays, les frais d'adhésion au réseau sont élevés, ce qui peut faire obstacle de manière injustifiée à l'entrée de nouveaux acteurs sur le marché. Le Président demande quelles sont les prochaines étapes de cette enquête et quel lien elle a avec la création du SEPA. Il souhaite également savoir qui, de la Commission européenne ou de la Banque centrale européenne (BCE), est en charge de la création du SEPA.

Un délégué de la Commission européenne répond que l'enquête sur le secteur des cartes de paiement a duré un an. Elle comportait une étude empirique de la situation concurrentielle du secteur européen des cartes de paiement, en particulier de la structure du marché en termes de tarification, de la structure des réseaux et une étude des commissions d'interchange. La publication de ce rapport, en avril, a été suivie par une consultation publique, l'objectif étant de publier un rapport final avec des recommandations aux États membres le 31 décembre 2006. Cette enquête sectorielle est en lien avec la création du SEPA. Elle a évidemment vocation à servir d'outil pour décider d'actions à mener en matière de droit de la concurrence et d'application de ce droit, mais, en l'espèce, du fait de sa portée, elle doit permettre de recueillir des données factuelles qui devraient être prises en compte dans le cadre des discussions sur le SEPA, pour lesquelles il ne reste plus beaucoup de temps si l'on veut atteindre l'objectif de création d'un marché unique des paiements en euros à l'horizon 2008. Il est essentiel que ces discussions se fassent sur la base de données empiriques. L'enquête a donc permis de recueillir des données factuelles sur les commissions d'interchange, sur la manière dont elles sont répercutées sur les titulaires de cartes, sur la concentration du marché et sur nombre d'autres aspects importants pour des articles séminaux comme ceux des Professeurs Rochet et Tirole. La Commission européenne estime que la mise en place du SEPA pourrait permettre de réaliser de 50 à 100 milliards d'euros d'économies par an, dans un contexte où les paiements directs par carte représentent 1 250 milliards d'euros en Europe. En ce qui concerne la question de savoir qui est chargé du SEPA, le délégué explique que la Commission et la BCE partagent cette responsabilité ; elles travaillent en étroite coopération, échangent des informations et entretiennent un dialogue étroit dans le cadre de l'enquête sectorielle. La BCE voit probablement le SEPA sous un autre angle que la Commission, dans la mesure où elle a intérêt à la création d'un marché unique des paiements. Si l'objectif est de créer un tel marché, tout décideur public risque de préférer que la commission d'interchange soit identique ou « harmonisée » dans tous les États. Une autorité de la concurrence, aussi favorable à un marché unique soit-elle, ne saurait se contenter d'une harmonisation à, par exemple, 3 %.

Le Président se tourne ensuite vers l'Afrique du Sud, qui, comme la Commission européenne, a ouvert une enquête sur le secteur bancaire. Toutefois, contrairement à celle de la Commission, cette enquête n'a été lancée qu'il y a un mois. Le Président commence par demander pourquoi les consommateurs paient pour les transactions par carte de débit et pas pour les transactions par carte de crédit. Des frais leur sont en effet imposés à chaque utilisation de leur carte de débit. Dès lors, il est permis de se demander ce qui pourrait motiver l'utilisation d'une carte de débit si l'utilisation d'une carte de crédit est gratuite. La deuxième question porte sur Bankserv, l'infrastructure de cartes détenue par les quatre plus

grandes banques du pays. Le Président souhaite savoir si Bankserv peut exclure les concurrents agressifs du marché en leur refusant l'accès à cette infrastructure.

Le délégué de l'Afrique du Sud répond que les consommateurs préfèrent souvent les cartes de crédit parce que des frais leur sont imposés à chaque utilisation de leur carte de débit. Certains grands détaillants ont toutefois leurs propres cartes accréditives ou de débit qu'ils rendent attrayantes pour les consommateurs en leur attachant des mécanismes incitatifs. Il est toutefois effectivement inhabituel que les consommateurs aient à payer lorsqu'ils utilisent une carte de débit et pas lorsqu'ils utilisent une carte de crédit. Quant à Bankserv, elle est effectivement sérieusement soupçonnée de limiter l'entrée sur le marché non seulement à travers les coûts, mais aussi à travers des mécanismes de paiement qui font obstacle à l'entrée et à la concurrence. Pour pouvoir introduire un mécanisme de paiement, une entreprise doit en effet franchir divers obstacles procéduraux et réglementaires. Même les sociétés Visa et MasterCard ont signalé qu'elles pourraient avoir des problèmes à cet égard. L'une des principales finalités de l'enquête est d'examiner la question de l'accès au système de paiement en général et la concurrence entre les cartes de paiement. La propriété de cette infrastructure est très concentrée entre les mains des quatre grandes banques. Bien que l'enquête soit conduite par l'autorité de la concurrence, cette dernière coopère avec la banque centrale sud-africaine qui a un service chargé de la surveillance du système de paiement.

Le Président invite ensuite le Professeur Jean-Charles Rochet à présenter son évaluation du fonctionnement de la concurrence sur le marché des cartes de paiement et à préciser s'il juge qu'une réglementation de la commission d'interchange présenterait un intérêt.

Le Professeur Jean-Charles Rochet déclare avoir grand plaisir à prendre la parole à cette table ronde et précise que le contenu de son intervention s'inspirera essentiellement d'un article qu'il a récemment écrit avec Jean Tirole et qui sera prochainement disponible sur le site Internet de l'Université de Toulouse. Avant de commencer sa présentation, il fait observer qu'il y a un consensus relativement fort entre les économistes universitaires sur le rôle de la commission d'interchange. Ainsi, il souscrit à la plupart des arguments avancés par Joe Farrell dans sa présentation et considère que cette présentation et l'article dont lui-même est l'auteur avec Jean Tirole offrent aux autorités de la concurrence un ensemble de solutions parmi lesquelles elles peuvent faire une sélection selon l'objectif qu'elles veulent poursuivre, à savoir selon qu'elles visent uniquement l'efficacité des paiements ou également le surplus des utilisateurs.

Selon lui, la question essentielle est que les autorités de la concurrence avancent souvent que les commerçants ne peuvent décemment pas refuser les cartes de paiement et sont de ce fait contraints d'accepter des commissions trop élevées. Cet argument a notamment été défendu par John Vickers, dans la communication présentée à l'occasion de la conférence de Santa Fe en 2005. Le Professeur Rochet explique qu'il va commencer par tester cet argument, selon lequel le commerçant est obligé d'accepter le paiement par carte, à l'aide d'un modèle empirique baptisé « test du touriste » avant d'indiquer les deux limites potentielles de ce test, la première étant que les effets à long terme sont négligés et la seconde tenant au fait que les commerçants ne sont pas identiques mais hétérogènes. En troisième lieu, il exposera son avis sur les conditions dans lesquelles une réglementation des commissions d'interchange pourrait se révéler dangereuse.

L'élément central de cet argument est que la structure du prix des paiements par carte, à savoir la manière dont le coût total de l'opération de paiement est réparti entre les deux utilisateurs (le porteur et le commerçant), détermine l'efficacité de l'utilisation de la carte. Cette efficacité n'est pas basée sur des externalités de réseau classiques, mais plutôt sur ce que l'on pourrait appeler des « externalités d'adhésion ». La question de savoir combien de consommateurs détiennent des cartes et combien de commerçants les acceptent n'est cependant pas au centre des réflexions menées dans le cadre de cette table ronde.

De plus en plus d'individus ont une ou plusieurs cartes et adhèrent à plusieurs réseaux. Dès lors, la question qui se pose est celle de l'instrument de paiement qu'ils vont utiliser. Le point essentiel est que lorsque le client est, selon le terme utilisé par Joe Farrell, un « client dual », constitué du porteur et du commerçant, le couple ainsi formé est très atypique, dans le sens où le porteur est le seul à choisir alors que son choix a un impact sur le prix que devra payer le commerçant mais aussi les banques. Il s'agit d'une situation dans laquelle le choix est fait par une seule personne, en l'occurrence le porteur, mais a une incidence sur d'autres acteurs, qui sont non seulement la banque du porteur – ce qui correspond à une relation commerciale normale – mais aussi la banque du commerçant et le commerçant lui-même. Lorsque le porteur décide de payer par carte au lieu de régler en espèces ou par chèque – en réalité, cet exemple est choisi par souci de simplicité car la démonstration pourrait également valoir pour le choix entre carte de crédit et carte de débit – sa décision a un impact sur deux éléments. D'une part, elle se répercute sur les charges d'exploitation du commerçant, en l'obligeant à payer une commission mais aussi en lui évitant d'avoir à supporter le coût de l'utilisation d'un autre moyen de paiement. Ce coût évité a plusieurs composantes : la fraude, le vol, les frais comptables, le coût de la manipulation d'espèces ou de papier etc. Il est avantageux pour le vendeur de ne pas avoir à assumer le coût de l'utilisation d'un autre mode de paiement. D'autre part, la décision du titulaire de la carte a une incidence sur les coûts nets des banques, ces dernières encaissant des recettes – la commission commerçant – mais devant supporter l'une et l'autre – l'acquéreuse et l'émettrice – un coût marginal total.

Si l'on ajoute les coûts, la commission commerçant s'annule et le seul coût qui importe est le coût total du paiement par carte pour les deux banques minoré du coût évité au commerçant. En réalité, ce coût est équivalent au coût marginal dans les marchés traditionnels non duaux.

Comme l'a déjà démontré il y a longtemps William Baxter dans son article très influent de 1983, l'objectif est d'offrir un juste prix au porteur de la carte, seul membre du couple à décider. Il existe un prix efficient pour le porteur, qui correspond aux externalités d'usage totales, au coût marginal pour la société, au coût total de la transaction minoré des coûts évités. Si le porteur doit payer un prix inférieur à ce prix de référence, il fera trop de paiements par carte. S'il doit au contraire payer un prix trop élevé, il n'utilisera pas suffisamment sa carte pour qu'il y ait efficience. Ce choix du tarif appliqué au porteur de la carte détermine certes indirectement le prix imposé au commerçant, mais c'est au porteur qu'il faut donner le bon signal de prix. Le prix imposé au commerçant n'en est qu'une conséquence, ce qui s'explique par le fait que le prix total du service – la somme du prix payé par le commerçant et de celui payé par le titulaire de la carte – est égal à la somme du coût total et de la marge de la banque. Le prix total étant égal à la somme du coût total et de la marge, le fait d'imposer un prix efficient à l'acheteur amène à choisir implicitement le prix efficient pour le vendeur, égal à la somme des coûts qu'il évite et de la marge.

La raison pour laquelle les commerçants acceptent des cartes qui augmentent leurs charges d'exploitation est que cela leur permet d'améliorer la qualité du service proposé à leur clientèle régulière. Les clients savent que s'ils fréquentent un magasin donné, ils pourront utiliser leur carte et que c'est dans leur intérêt. Le commerçant augmente ainsi ses recettes, ce qui explique qu'il soit prêt à accepter les cartes, même si leur utilisation se traduit par une hausse de ses charges d'exploitation du fait de l'amélioration perçue de la qualité des services. Ce phénomène peut être exploité par les réseaux si les consommateurs ne détiennent qu'une seule carte. Si le commerçant sait que le client n'achètera des bijoux ou des produits à forte marge, par exemple, que s'il accepte un paiement par carte, il est prêt à payer un prix élevé, ce que les réseaux peuvent être tentés d'exploiter. C'est ce raisonnement qui constitue le fondement de l'argument développé par John Vickers, selon lequel les commerçants sont contraints d'accepter les paiements par carte. Or, il ne se vérifie pas toujours, car il arrive que les consommateurs possèdent plusieurs cartes. Un tel scénario pourrait être qualifié de multi-hébergement. Les commerçants ne sont alors pas tenus d'accepter toutes les cartes. Autrefois par exemple, certains d'entre eux refusaient les cartes American Express. Dans un tel cas de figure, les réseaux n'ont pas réellement la possibilité de leur imposer des commissions élevées.

En ce qui concerne la question du surplus total des utilisateurs, Joe Farrell a, avec élégance et clarté, proposé de se baser sur le surplus total des utilisateurs et non sur le bien-être total. En d'autres termes, il s'agit de n'examiner que l'intérêt du couple – le client dual –, qui est de payer le prix correspondant à la valeur du service qui lui est rendu. La marge bénéficiaire de la banque représente un coût pour le couple, tant pour le commerçant que pour le consommateur.

Concernant le « test du touriste », la commission commerçant ne réussit pas ce test si le paiement par carte entraîne une hausse du coût net supporté par le commerçant, en d'autres termes si la commission imputée au commerçant est supérieure aux coûts qu'il évite, c'est-à-dire s'il perd de l'argent en acceptant un paiement par carte.

La raison fondamentale pour laquelle ce test a été baptisé « test du touriste » est que le commerçant peut être tenté de refuser un paiement par carte si le consommateur n'est qu'un client de passage, parce qu'il sait alors que ce client ne reviendra jamais et qu'il possède des espèces. Le commerçant peut alors fort bien prétendre qu'il n'accepte pas les cartes ce jour-là parce que son terminal est en panne. Ce test examine donc comment un commerçant réagirait vis-à-vis de touristes. Il ne tient pas compte du fait que le commerçant peut être disposé à payer une commission plus élevée parce qu'accepter la carte d'un client régulier peut, à terme, se traduire par une hausse des ventes.

Reste à définir les caractéristiques du « test du touriste ». Le seuil correspond à la structure de prix qui maximise le surplus total des utilisateurs ; c'est celle qui est préconisée par Joe Farrell. Ce seuil correspond en effet à la notion d'indifférence du commerçant. Si le prix que paie le commerçant est strictement égal aux coûts évités grâce au paiement par carte, il accepte indifféremment d'être payé par carte ou en espèces puisque le coût net est strictement compensé par la commission. Toutefois, le Professeur Rochet précise que dans l'article qu'ils ont récemment écrit ensemble, le Professeur Tirole et lui-même jugent ce raisonnement trop restrictif parce qu'il néglige les effets à long terme. Ils estiment que dans certains cas, les autorités de la concurrence ne devraient effectivement s'intéresser qu'au surplus total des consommateurs, sans tenir compte des bénéfices des banques. Cet argument vaut notamment lorsque le bénéfice de la banque est totalement éliminé par la diversion de la demande (*business stealing*) ou par une publicité inutile.

Mais il peut également arriver qu'une partie de ce bénéfice soit réinvestie pour améliorer la qualité des services ou que la perspective de réaliser des bénéfices attire de nouveaux entrants qui favorisent la diversité et tirent les prix à la baisse. Le secteur des instruments de paiement se caractérisant par l'importance de ses coûts fixes, les banques doivent trouver le moyen de récupérer ces coûts ; le surplus à long terme des consommateurs est maximisé lorsque la valeur de la commission commerçant est comprise entre la valeur à court terme correspondant à la maximisation du bien-être et le surplus total des consommateurs à court terme correspondant au seuil retenu dans le test du touriste. Au final, la question posée pourrait donc être de savoir à qui il incombe de supporter le coût de la marge de la banque. Joe Farrell estime que ce ne doit pas être le commerçant tandis que les Professeurs Rochet et Tirole considèrent qu'une répartition du coût entre le commerçant et le porteur de la carte constitue probablement la solution efficiente à long terme.

L'autre limite des deux approches voisines que sont la notion d'indifférence du commerçant définie par Joe Farrell et le test du touriste présenté dans le récent article publié avec Jean Tirole, a trait au fait que dans la pratique, les commerçants sont très hétérogènes. Même si, comme cela est parfois le cas, les commissions varient selon les secteurs, les commerçants peuvent être différents au sein d'un même secteur. Ainsi, si l'on considère trois détaillants (A, B et C) dont les coûts évités sont respectivement de 1 %, 2 % et 3 % pour chaque transaction par carte, la commission qui maximise le surplus des utilisateurs à court terme est égale à la moyenne de ces trois chiffres, soit 2 % ; par conséquent, selon l'approche reposant sur le surplus total des utilisateurs, à court terme, le niveau optimal de la commission commerçant

devrait être de 2 %. Si l'effet induit par l'amélioration perçue de la qualité du service est suffisamment important, même le détaillant A, dont les coûts évités sont limités à 1 %, acceptera le paiement par carte, y compris si cela lui fait perdre de l'argent. Or, si on applique le test du touriste ou le critère défini par Joe Farrell, la commission ne réussit pas le test. Il ne faut pas pour autant en déduire que la commission commerçant est trop élevée, mais simplement que les commerçants sont hétérogènes : certains d'entre eux sont gagnants, d'autres perdants mais en moyenne, ils s'équilibrent.

Le Professeur Rochet s'interroge ensuite sur le point de savoir s'il y a réellement défaillance du marché. La conclusion selon laquelle il y a défaillance du marché repose essentiellement sur l'argument aux termes duquel le commerçant est obligé d'accepter les paiements par carte. Selon cet argument, les commerçants sont contraints d'accepter les cartes, ce qui permet aux banques d'obtenir un surplus de leur part. Or, ce raisonnement peut être juste tout comme il peut ne pas l'être. Ainsi, il ne l'est pas si les consommateurs sont suffisamment nombreux à posséder plusieurs cartes, le commerçant ayant alors la possibilité de refuser l'une d'entre elles, ce qui réduit la marge de manœuvre des réseaux concernant la commission qu'ils peuvent imposer. Par conséquent, si l'on tient compte du surplus des utilisateurs à long terme et de l'hétérogénéité des commerçants, un modèle plus souple que le test du touriste serait utile.

Il peut être dangereux de réglementer les commissions d'interchange. La première raison est que l'on manque de fondements conceptuels solides puisqu'il n'y a pas de défaillance du marché clairement définie du fait que la commission d'interchange appliquée par les réseaux peut être trop élevée ou trop faible selon les circonstances. Par conséquent, le sens dans lequel il faudrait intervenir n'est pas clair. L'argument selon lequel le commerçant est obligé d'accepter les paiements par carte n'est pas toujours valable, et la commission qui lui est imposée n'est pas toujours trop élevée. Par ailleurs, il n'existe pas de critère simple susceptible de servir de référence aux autorités réglementaires. Le critère du seuil de la banque et le test du touriste sont trop restrictifs. Tenter de déterminer la commission d'interchange socialement optimale est une tâche complexe, qui dépend d'élasticités de la demande difficiles à évaluer.

Le Professeur Rochet estime que la théorie économique ne plaide guère en faveur des propositions de réglementation commune. En réalité, ces propositions reposent essentiellement sur un critère d'équité, traduisant la volonté de parvenir à une répartition « équitable » des prix ou des coûts entre les deux utilisateurs. Or, cela n'a rien à voir avec l'efficacité. Ainsi, si l'on considère une situation où la commission d'interchange est nulle, comme cela semble être le cas dans certains réseaux, ces réseaux peuvent fonctionner, alors que rien ne dit que des commissions d'interchange devraient circuler de l'émetteur à l'acquéreur ou vice-versa. Or, on ne peut pas en conclure pour autant que tous les systèmes de paiement devraient être réglementés de la même manière. Une telle affirmation serait sans fondement.

L'autre proposition souvent évoquée consiste à faire reposer la commission d'interchange sur les coûts de l'émetteur, l'idée étant de la plafonner pour éviter toute exploitation du fait que le commerçant est obligé d'accepter le paiement par carte. Toutefois, cette proposition ne repose sur aucun fondement économique. Elle correspond à une situation dans laquelle le porteur paierait une partie du coût parce que si la commission d'interchange est supérieure au coût de l'émetteur, le coût sera en réalité négatif pour l'émetteur et, par conséquent, le prix imposé au porteur risque d'être négatif avec possibilité, par exemple, de bénéficier de remises ou d'accéder aux programmes de fidélité des compagnies aériennes. Mais dans un marché dual, rien ne s'oppose aux prix négatifs. Il en existe de nombreux exemples ; Jean Tirole en a cité quelques-uns, par exemple les marchés des lecteurs médias et des logiciels, qui peuvent avoir une structure de prix très asymétrique, un seul versant du marché payant tandis que l'autre reçoit même parfois un bonus. Si les responsables de l'action publique décidaient de réglementer les commissions d'interchange, ils pourraient, en suivant le même raisonnement, être amenés à réglementer également la presse gratuite, puisqu'elle repose aussi sur un mécanisme dual. Or, la majorité d'entre eux ne souhaitent pas réglementer la presse gratuite. Le Professeur Rochet insiste sur le fait que les décideurs publics doivent faire preuve de prudence.

Le Président fait allusion à un argument selon lequel les commerçants pourraient négocier avec leurs clients et leur demander d'utiliser telle carte plutôt que telle autre. Or, l'information est asymétrique, puisque les clients sont évidemment les seuls à savoir quelle(s) carte(s) ils possèdent, tandis que le commerçant ignore si son client potentiel en a une ou plusieurs. En l'absence de règle interdisant d'appliquer un supplément en cas de paiement par carte, les commerçants pourraient apposer une affiche indiquant que les clients qui utilisent la carte X paient Y % de plus. La négociation serait ainsi plus facile.

Le Professeur Jean-Charles Rochet reconnaît que s'il existait un supplément parfait, en d'autres termes si le commerçant pouvait faire payer à ses clients un supplément strictement égal au coût net que lui-même supporte, l'existence d'une commission d'interchange non nulle serait superflue. Or, dans la pratique, l'asymétrie de l'information concerne non seulement les cartes que possède un client mais aussi les coûts supportés par le commerçant. Dans certains pays, les détaillants ont la possibilité d'imposer un supplément ; c'est par exemple le cas en Australie, depuis la récente réforme. Or, il apparaît qu'ils sont très peu nombreux à user de cette possibilité et parfois, ceux qui le font opèrent dans des secteurs où ils ont un pouvoir de marché et imposent des suppléments supérieurs à leur coût net. L'application d'un supplément ou la négociation entre commerçant et client constitue peut-être une solution en théorie, mais pas toujours dans la pratique.

Le Président fait observer que permettre aux commerçants d'appliquer un supplément peut augmenter leur pouvoir de négociation vis-à-vis des réseaux de cartes. D'une certaine manière, même si les commerçants sont peu nombreux à choisir d'appliquer un supplément, la suppression de la règle qui interdit cette pratique pourrait avoir de réels effets.

Un délégué de la Roumanie souligne que la commission commerçant peut se solder par la taxation d'autres modes de paiement. Le Professeur Rochet a fait brièvement allusion aux remises et le délégué souhaite des informations complémentaires sur les avantages attachés aux cartes, par exemple l'accès aux programmes de fidélité des compagnies aériennes.

Le Professeur Jean-Charles Rochet répond que la possibilité d'acquérir des points pour gagner des miles dans le cadre des programmes de fidélité des compagnies aériennes ne constitue pas nécessairement le moyen le plus efficace d'inciter les porteurs à utiliser leur carte. Il précise que la raison pour laquelle les réseaux de cartes ne proposent pas de simples remises est un mystère qu'il n'a jamais réussi à percer. S'il est facile d'imaginer que l'utilisation de ce type d'instruments induit une perte sèche, il serait justement judicieux de prévoir des instruments qui incitent le titulaire à utiliser sa carte dès lors que c'est efficace.

Selon le Président, l'une des explications de ce mystère pourrait être que le consommateur ne connaît pas exactement le coût des miles gratuits et est susceptible de le surestimer, ce qui est plus difficile pour les remises.

Le Professeur Joseph Farrell se dit favorable à la liberté de choix en ce qui concerne les avantages attachés aux cartes. Selon lui, le choix entre l'accès aux programmes de fidélité des compagnies aériennes, les remises directes ou autres formes d'avantages relève de la relation entre l'émetteur et le titulaire de la carte. Il reconnaît l'existence de problèmes d'information sur ce marché mais estime que le pouvoir de marché, quel qu'il soit, ne constitue pas le problème essentiel. En réponse à la question, il déclare qu'il pourrait s'agir de la manifestation d'un biais potentiel, mais pas d'un biais supplémentaire.

Un délégué de l'Australie fait allusion à l'accent mis sur le multi-hébergement et demande comment les participants à la table ronde reverraient leur analyse s'ils tenaient compte du fait que, dans de nombreux pays, il existe un marché des commerçants dans lequel ces derniers se voient offrir un tarif unifié pour les cartes MasterCard et Visa. Dans ce cas, un consommateur peut certes posséder une carte MasterCard et une carte Visa, mais pour le commerçant, ces deux cartes sont identiques puisqu'il aura à payer le même

prix, même si les deux réseaux n'imposent pas exactement la même commission à l'acquéreur au titre du commerçant en question. Le prix est bien sûr différent pour d'autres cartes, comme American Express ou JCB.

Un délégué de l'Italie estime que le prix imposé pour l'utilisation des cartes de débit dépend davantage des prix et coûts des autres produits bancaires que du rapport avec le versant acquéreur du marché. Le prix que paient les commerçants dépend pour beaucoup du pouvoir de marché de la banque vis-à-vis d'eux, et varie selon le secteur dans lequel ils opèrent et selon leur taille. Les titulaires de cartes paient une cotisation annuelle fixe, si bien que le coût par transaction est élevé s'ils n'utilisent leur carte qu'une fois par an, tandis qu'il est faible s'ils l'utilisent quotidiennement ; en revanche, le commerçant paie à chaque règlement effectué par carte. Selon le délégué, la théorie du marché dual était certes fort utile lorsque les cartes de crédit et de débit ont fait leur apparition, mais l'est beaucoup moins maintenant que ce mode de paiement s'est largement imposé. Au sujet du test du touriste, le délégué propose une autre approche. Si l'on part du principe qu'il y a deux catégories de commerçants – les grands et les petits –, les grands comme les Galeries Lafayette ou Auchan ne peuvent pas refuser les cartes ; en revanche, les petits peuvent refuser les paiements par carte pour les acheteurs locaux tout en les acceptant probablement pour les touristes, ces derniers ne pouvant pas payer en espèces.

Un délégué du Royaume-Uni estime que, lorsque la commission d'interchange n'est pas la même pour les cartes Visa et MasterCard, on pourrait s'attendre à ce que les commerçants réagissent ; or, lorsqu'il y a eu une différence entre les deux réseaux, il n'y en a eu absolument aucune réaction en termes d'acceptation relative.

Le Professeur David Evans déclare que, bien que ne connaissant pas la situation qui prévaut dans tous les pays, il pense que les tarifs unifiés, comme ceux pratiqués au Royaume-Uni, existent parce qu'il n'y a guère de différence entre les commissions d'interchange imposées par les différents systèmes. Imposer deux commissions différentes serait probablement une opération trop coûteuse. Il ajoute qu'il serait très surprenant qu'un acquéreur ne se mette pas à imposer deux tarifs différents aux commerçants si un écart apparaissait entre les commissions commerçant imposées par les deux réseaux. Concernant la non-acceptation de cartes par les commerçants, aux États-Unis, lorsque la commission facturée par American Express est devenue élevée par rapport à celle imposée pour les paiements par cartes Visa et MasterCard, nombre de commerçants ont refusé les cartes American Express et, en réalité, l'écart se creusant, à certaines périodes détaillants et restaurateurs se révoltent et certains d'entre eux décident d'arrêter d'accepter la carte. Par conséquent, selon le Professeur David Evans, l'affirmation selon laquelle il n'y a pas de sensibilité-prix eu égard à la commission commerçant est fausse.

Par ailleurs, il estime que supprimer, dans certains cas, la règle interdisant d'appliquer un supplément en cas de paiement par carte pourrait aboutir à une réduction du pouvoir de marché des systèmes de cartes. Toutefois, une telle mesure comporterait un coût. Dans les marchés duaux, il est fréquent que des règles soient imposées à l'un ou l'autre des côtés du marché. Ainsi, dans le cas des magazines financés par la publicité, il apparaît que nombre de leurs pratiques sont parfois préjudiciables au lecteur et favorables à l'annonceur. Dans une revue comme *Vogue*, par exemple, il est très difficile de trouver une table des matières et tout aussi compliqué de trouver la suite des articles. C'est un exemple de magazine favorable aux annonceurs, ce qui ne signifie pas pour autant que ses pratiques devraient être réglementées par les pouvoirs publics. Concernant l'application d'un supplément en cas de paiement par carte, il semble possible de l'utiliser comme un outil de lutte contre la discrimination par les prix, comme le montre l'exemple de Jean-Charles Rochet. Par conséquent, les responsables de l'action publique doivent bien réfléchir avant de décider de supprimer l'interdiction d'appliquer un supplément.

Pour le Dr. Alan Frankel, les systèmes de cartes sont conçus pour tirer avantage de la distinction entre multi-hébergement et hébergement unique entre les consommateurs et les commerçants et pour renforcer

cette distinction le plus possible. Ils favorisent la fidélité vis-à-vis de certaines cartes, par exemple en permettant à leurs porteurs de bénéficier des programmes de fidélité des compagnies aériennes ; les commerçants ne peuvent pas influencer le choix du consommateur, si bien qu'ils finissent par agir comme si le consommateur n'utilisait qu'une seule carte, même s'il est possible qu'il en ait plusieurs. Le commerçant ne veut pas risquer de manquer ne seraient-ce que quelques ventes..

Un délégué du BIAC déclare que le BIAC appelle les instances de réglementation à la prudence, car certaines interventions montrent l'existence d'importantes disparités entre les États membres de l'Union européenne en termes de taille du marché, de maturité des réseaux, d'environnement économique et de cadre réglementaire mis en place par les pouvoirs publics.

Le Professeur Joseph Farrell intervient pour réagir à la fois à certains commentaires de David Evans et à la présentation du Professeur Tirole. Selon lui, il est évident que l'on peut citer de nombreuses pratiques interférant avec le fonctionnement des marchés duaux. Il pense cependant que le marché des instruments de paiement se distingue de nombreux autres marchés duaux, par exemple celui des magazines comme *Vogue*, par le fait que lorsqu'un instrument de paiement modifie sa structure de prix, une importante partie de l'effet total de ce changement ne se fait pas sentir sur ceux qui participent à l'utilisation de cet instrument, mais plutôt sur le consommateur qui choisit un autre mode de paiement. Il existe une grosse différence entre les pratiques fondamentalement internes à une entreprise, comme celles choisies par *Vogue*, et celles qui ont, proportionnellement, des retombées considérables sur les concurrents, comme cela semble être le cas de la structure des prix dans un contexte de cohérence des prix.

2. Commission d'interchange et autres contraintes imposées aux commerçants

Le Président annonce que la session suivante portera en grande partie sur les commissions d'interchange et autres contraintes imposées aux commerçants. Il relève qu'une action engagée par l'Office of Fair Trading (OFT) contre MasterCard est actuellement en cours. La thèse avancée dans cette affaire est que des commissions d'interchange élevées se soldent par des commissions commerçant élevées, qui à leur tour, renchérissent les prix payés par tous les consommateurs, qu'ils soient ou non utilisateurs de MasterCard. Au lieu de décider de fixer la commission d'interchange au niveau zéro, l'OFT s'est attaché à définir les coûts qu'elle devrait couvrir, à savoir les pertes dues aux fraudes subies par les émetteurs, le coût de l'autorisation et du contrôle des risques pour l'émetteur ainsi que le coût de traitement des transactions entrantes. Le Président demande si la décision est exécutoire ou si l'appel a eu un effet suspensif. Il souhaite également savoir où en est actuellement la procédure d'appel.

Un délégué du Royaume-Uni répond que l'affaire est complexe sur le plan de la procédure. L'action a été engagée après la notification par MasterCard de certains de ses accords à l'OFT, en mars 2000. Après avoir donné à MasterCard de nombreuses possibilités de répondre à ses interrogations, l'OFT lui a notifié sa décision en septembre 2006. Un appel a ensuite été interjeté et, à la date de la table ronde (6 juin 2006), on est en attente d'une décision de la part du *Competition Appeal Tribunal*.

Suite à la décision de l'OFT, MasterCard a modifié ses accords de fixation des commissions d'interchange en novembre 2004, étant entendu que la décision avait un effet rétroactif. Par conséquent, elle s'appliquait à des accords qui n'existent plus au Royaume-Uni. Dans l'intervalle, une communication des griefs a été adressée à Visa concernant les accords actuellement en vigueur et une nouvelle enquête a été ouverte sur les accords actuels de MasterCard.

Le Président passe ensuite à l'Australie, où la question des commissions d'interchange fixées par les deux associations, Visa et MasterCard, relève de la banque centrale (Reserve Bank of Australia, RBA), non de la Commission de la concurrence et de la protection des consommateurs (Australian Competition and Consumer Commission, ACCC). Les commissions pour les cartes de crédit ont été nettement réduites il y a

deux ans. Par ailleurs, la RBA a supprimé la règle interdisant d'appliquer un supplément en cas de paiement par carte. L'intervention de la puissance publique a fait suite à une étude effectuée conjointement par la RBA et l'ACCC. Le Président souhaite savoir pourquoi c'est la RBA et non l'ACCC qui est compétente ; il souhaite connaître le fondement juridique de cette situation. Il souhaite également connaître l'avis de la RBA sur le résultat de la réforme australienne.

Un délégué de l'Australie répond que l'origine de l'implication de la RBA remonte au milieu des années quatre-vingt-dix, période à laquelle le gouvernement a lancé une enquête générale sur le système financier australien. Cette enquête a abouti à la conclusion que le système de paiement ne fonctionnait pas avec autant d'efficacité qu'il l'aurait pu et a recommandé au gouvernement de confier à la RBA le soin de le réglementer si elle jugeait que cela allait dans le sens de l'intérêt public et de l'investir d'importants pouvoirs à cet effet. Le gouvernement a suivi ces recommandations et a investi la RBA des prérogatives qu'elle a actuellement. Aux alentours de 1999, deux événements se sont produits simultanément : d'une part, la RBA et l'ACCC ont conduit une étude économique sur les systèmes de paiement par carte et, d'autre part, au cours de la même période, une plainte a été déposée en vertu du droit de la concurrence alors en vigueur contre les systèmes de paiement par carte concernant les commissions d'interchange. L'ACCC a d'abord considéré qu'il y avait violation du droit de la concurrence et a invité les banques et les réseaux de cartes à faire des propositions compatibles avec le droit de la concurrence ; elle n'a toutefois pas été satisfaite par ces propositions, aucune d'entre elles ne lui semblant susceptible d'être autorisée par le droit de la concurrence. À ce stade, de longues discussions ont eu lieu entre l'ACCC et les banques et, au terme de ces pourparlers, l'ACCC est parvenue à la conclusion que la RBA serait mieux placée pour traiter la question des commissions d'interchange. Les compétences et prérogatives de la RBA dans ce domaine n'étaient pas les mêmes que celles de l'ACCC et, d'ailleurs, de la plupart des banques centrales.

Sa première priorité a été de recueillir des informations pour que la population comprenne le fonctionnement des systèmes. Lorsque ce travail a commencé, les mécanismes et les principes économiques qui les sous-tendaient étaient en effet méconnus. La RBA a publié de nombreuses statistiques. À l'époque, en Australie, comme dans beaucoup d'autres pays, les commissions d'interchange relevaient quasiment du secret d'État. Aujourd'hui, on dispose de données sur les parts de marché et sur les transactions, ce qui est extrêmement important pour améliorer le fonctionnement du marché. La RBA a considéré que renforcer la concurrence, faciliter l'accès au marché et éliminer certaines des restrictions imposées par les réseaux – par exemple l'interdiction d'appliquer un supplément en cas de paiement par carte ou l'obligation d'accepter toutes les cartes – étaient autant de mesures qui auraient des effets positifs. Elle estime que le marché fonctionne mieux si on supprime ces restrictions et si on laisse jouer librement la concurrence.

Le marché australien se caractérise par une concurrence forte entre les acquéreurs et relativement intense entre les émetteurs. Toutefois, les commissions d'interchange n'ont pas été soumises au jeu de la concurrence au sens où on l'entend généralement. Cette situation a eu certains effets importants. Le premier est qu'en Australie, l'utilisation d'une carte de crédit est en réalité subventionnée tandis que l'utilisation d'une carte de débit est taxée. Théoriquement, compte tenu de la nature duale de ce marché, cette situation pourrait se justifier par l'existence d'externalités ; or, la RBA ne dispose d'aucune données prouvant l'existence de ces externalités. Elle a opté pour l'interprétation selon laquelle l'efficacité du système serait meilleure si l'on réduisait la différence entre les commissions d'interchange et c'est effectivement l'orientation suivie aujourd'hui, avec timidité. Cela s'est traduit par une baisse des commissions d'interchange et des commissions commerçant. Quant aux porteurs, ceux qui paient le plus sont les titulaires de carte de crédit. Des suppléments pour paiement par carte ont parfois été appliqués, de l'ordre de 4 à 5 % du prix de vente. Cette pratique est plus courante dans les secteurs à faible marge.

Lorsque ces changements ont été introduits, en 2002, les réseaux Visa, MasterCard, American Express et Diners Club interdisaient tous l'application d'un supplément en cas de paiement par carte. Visa

et MasterCard se sont vu offrir la possibilité de supprimer cette interdiction sur une base volontaire mais ont refusé. En revanche, American Express et Diners Club ont accepté. Depuis, l'idée de soumettre American Express et Diners Club à une réglementation comparable à celle qui régit les systèmes quadripartites a été émise. Toutefois, ces systèmes fonctionnent selon des mécanismes économiques tout à fait différents. Dans un système quadripartite, il ne fait apparemment aucun doute – du moins dans le cas de l'Australie – que le lien de causalité est orienté de la commission d'interchange vers la commission commerçant. Ce sens de la causalité s'explique sans nul doute par l'existence d'une forte concurrence entre acquéreurs. Toute baisse de la commission d'interchange induit une baisse de la commission commerçant. En Australie, la commission commerçant a même baissé davantage que les commissions d'interchange. Toutefois, dans le cas d'American Express, deux banques australiennes sont maintenant émettrices et les discussions entre American Express et les banques ont commencé bien avant les réformes de la RBA. Deux banques émettent des cartes, mais American Express est le seul acquéreur. Par conséquent, un commerçant qui conteste la commission que lui impose American Express n'a pas la possibilité de chercher un autre acquéreur, et son seul recours est de cesser d'accepter les cartes American Express. La commission payée par le commerçant à American Express ne dépend donc pas de celle qui pourrait être versée à la banque qui émet ces cartes. Il s'ensuit qu'une réglementation portant sur la commission payée par American Express à l'une des banques émettrices n'aurait pas le même effet que dans un système quadripartite. La RBA s'est interrogée sur le point de savoir si elle pourrait néanmoins essayer de réglementer cette commission et a demandé aux banques des renseignements sur les commissions que leur versait American Express. Une des commissions s'apparentait beaucoup à la commission d'interchange versée dans les réseaux Visa et MasterCard, tandis que d'autres correspondaient à des commissions au titre des actions de promotion ou du marketing par exemple. Par conséquent, si la RBA voulait réglementer les commissions payées par American Express à ses banques partenaires, il faudrait que cette réglementation porte sur l'intégralité du montant payé. Cette démarche aurait été comparable à celle évoquée précédemment par le Professeur Evans concernant la réglementation de la mise en page d'un magazine [voir Evans, supra]. La RBA a examiné les relations entre American Express et les commerçants affiliés à son réseau et a constaté qu'une règle interdisant aux commerçants d'orienter les clients vers des instruments de paiement moins onéreux était appliquée. Les commerçants ne pouvaient donc pas dire à leurs clients, par exemple, que, bien qu'acceptant les cartes American Express, ils préféreraient d'autres cartes. La RBA a demandé à American Express de supprimer cette règle, ce qu'American Express a fait.

Le Président se tourne ensuite vers la Suisse. La Commission de la concurrence a autorisé Visa et MasterCard à fixer les commissions d'interchange sur une base multilatérale, mais a supprimé la règle interdisant l'application d'un supplément en cas de paiement par carte. D'après le rapport soumis par la Suisse, en règle générale, dans le secteur du tourisme la commission commerçant est répercutée sur les consommateurs et, dans le secteur du commerce de détail, les remises pour paiement en espèces sont encore plus répandues qu'avant. Le Président souhaite savoir comment ces systèmes tripartites sont traités.

Un délégué de la Suisse répond que la règle de non-discrimination a fait l'objet d'une enquête en 2002 et qu'à l'époque, la Commission de la concurrence l'a jugée contraire au droit de la concurrence. Il a toutefois été interjeté appel de cette décision et l'affaire est toujours en instance devant le Tribunal fédéral. La décision de la Commission s'appliquait aux systèmes quadripartites Visa et MasterCard, mais par la suite, American Express a également supprimé la règle interdisant l'application d'un supplément. En 2003, la Commission de la concurrence a ouvert une enquête sur les commissions d'interchange dans le secteur des cartes de crédit. Cette enquête a débouché sur un règlement amiable avec les banques portant sur plusieurs points, dont l'un concernait l'adoption d'un mode de calcul de la commission d'interchange basé sur les coûts. Ce sont les banques qui ont proposé ce mode de calcul. La situation du marché suisse n'allait pas dans le sens d'une approche reposant sur le concept de dualité du marché au sens où l'entend la littérature économique.

Le Président passe ensuite à l'Indonésie. En Indonésie, une autorisation de la banque centrale est indispensable pour être émetteur ou acquéreur. Le Président souhaite savoir si cette autorisation est simplement une licence autorisant à exercer en tant que banque ou une autorisation spécifique d'exercer des activités dans le secteur des cartes de paiement. Il demande par ailleurs quelle est la situation de l'Indonésie concernant l'application d'un supplément en cas de paiement par carte.

Un délégué de l'Indonésie répond que la banque centrale a un rôle de réglementation et de coordination visant à assurer le bon fonctionnement des systèmes de paiement. Les règles régissant l'utilisation des instruments de paiement ont pour objet de garantir qu'ils remplissent certaines conditions, en termes de sécurité et d'efficacité ; des restrictions sont notamment appliquées à l'utilisation de certains instruments de paiement pour des raisons prudentielles. Les acquéreurs qui remplissent une fonction technique n'ont pas besoin d'une autorisation et doivent seulement rendre compte à la banque centrale, tandis que ceux qui ont un rôle financier ont besoin d'une licence parce qu'ils sont assimilables à un établissement de crédit.

En Indonésie, le gouvernement n'interdit pas l'application d'un supplément en cas de paiement par carte, parce que c'est en réalité la banque centrale qui organise le marché et qu'il est très difficile de rechercher des preuves qu'un supplément a été facturé. En général, les commerçants appliquent une commission ou un supplément de 2 ou 3 % et le titulaire de la carte l'accepte. Certains émetteurs n'autorisent pas les commerçants à facturer un supplément et s'engagent à rembourser si le titulaire de la carte peut apporter la preuve du supplément réglé.

Le Président passe ensuite à la Russie. D'après le rapport, les magasins qui acceptent les cartes majorent leurs prix. Le Président souhaite savoir si cette situation pourrait avoir un lien avec la discipline fiscale. Lorsqu'un commerçant accepte les cartes, ses recettes sont plus faciles à contrôler, si bien qu'il risque de payer plus d'impôts que si toutes ses ventes étaient réglées en espèces.

Un délégué de la Russie répond qu'il y a une forte hétérogénéité, au niveau tant des détaillants que des clients. Le paiement par carte est rare en Russie et concerne les grandes villes. 10 % des consommateurs seulement utilisent une carte de crédit et 10 % de l'ensemble des porteurs sont à l'origine de 90 % de l'ensemble des opérations par carte. Ils fréquentent les grandes surfaces et les grands magasins, qui pratiquent dans certaines villes des prix plus élevés que les marchés.

Le Président passe ensuite à la Hongrie. Dans ce pays, la commission d'interchange est la même pour toutes les cartes. Par conséquent, elle est identique pour les cartes de débit et de crédit. Le Président demande s'il s'ensuit que la commission commerçant est également identique pour toutes les cartes. Il souhaite aussi savoir pourquoi Visa et MasterCard effectuent une étude de coûts et pour quelle raison les banques appliquent la même commission d'interchange à ces deux instruments de paiement. D'autre part, le rapport soumis par la Hongrie signale la montée en puissance des opérations dites « on us », dans lesquelles l'émetteur et l'acquéreur sont un seul et même établissement bancaire. En outre, cette montée en puissance va probablement conduire à une réduction de la commission d'interchange. Le Président demande pourquoi les autorités de la concurrence se montrent aussi critiques vis-à-vis de ce phénomène.

Un délégué de la Hongrie répond que les commissions commerçant sont les mêmes pour les cartes de débit et de crédit, mais qu'elles diffèrent selon le secteur d'activité du commerçant. Ainsi, les restaurateurs, par exemple, doivent payer une commission plus élevée, tandis que les grandes chaînes de supermarchés, qui disposent d'un fort pouvoir de négociation, peuvent négocier de meilleures conditions et obtenir des commissions plus faibles. En Hongrie, le marché de l'acquisition est très concentré. Seuls deux grands acteurs sont présents et les commerçants dotés d'un fort pouvoir de négociation peuvent négocier de meilleures conditions en contrepartie de l'acceptation des cartes. Cette situation pourrait tirer les commissions d'interchange vers le bas, mais aussi inciter les grandes chaînes de supermarchés à n'accepter

que les cartes émises par leur acquéreur unique. Si ces chaînes acceptent une carte parce qu'elle leur coûte moins cher, le consommateur est encouragé à choisir cette carte au détriment des autres parce que c'est celle avec laquelle il peut payer dans ces magasins en particulier. C'est la raison pour laquelle les opérations « on us » peuvent être jugées potentiellement préjudiciables à la concurrence future. L'étude de coûts est peut-être liée à l'enquête en cours sur la concurrence et au fait que les intérêts de Visa et MasterCard ne sont pas nécessairement les mêmes que ceux des banques.

Le Président s'adresse ensuite au BIAC. L'excellent rapport sur le bien-fondé ou non d'une intervention dans le secteur des cartes recommande la prudence, tant aux instances de réglementation qu'aux autorités de la concurrence. Le Président fait observer que personne ne propose de mesures correctrices structurelles pour ce marché, comme ce fut le cas pour le marché des télécommunications dans les années quatre-vingt, ou pour les marchés de l'énergie ou du gaz. Lorsque des mesures structurelles sont adoptées, il peut être ensuite difficile de faire machine arrière. En revanche, en ce qui concerne les mesures correctrices portant sur les comportements, par exemple la suppression ou la réduction des commissions d'interchange ou la suppression de la règle qui interdit l'application d'un supplément en cas de paiement par carte, il est facile de revenir en arrière si jamais elles se révèlent inefficaces ou ont des effets négatifs. Dès lors, le Président s'interroge sur les raisons d'une telle inquiétude.

Un délégué du BIAC répond qu'il ne faut pas sous-estimer les effets des mesures correctrices portant sur les comportements. Dans sa question, le Président part du principe que les pouvoirs publics peuvent facilement revenir en arrière si les mesures qu'ils ont adoptées ne produisent pas les effets escomptés. Or, lorsqu'un gouvernement prend une orientation, il s'engage sur cette voie, de sorte qu'il est peu vraisemblable qu'il puisse faire machine arrière. En outre, le coût que représente l'adoption de mesures correctrices susceptibles d'annulation ne doit pas non plus être négligé. Les mesures correctrices, mêmes lorsqu'elles portent sur les comportements, obligent les professionnels du secteur concerné à faire des changements coûteux et difficiles à mettre en œuvre. La possibilité d'annuler ces changements suppose des coûts supplémentaires, liés à l'incertitude, et leur annulation effective est à l'origine de coûts plus élevés encore. De surcroît, les mesures qui portent sur les comportements peuvent en réalité entraîner des changements structurels. Ainsi, MasterCard a, en partie suite à des investigations des instances de réglementation et de plaignants privés, renoncé à son statut de coentreprise pour essayer de faire obstacle à d'autres allégations d'entente sur les prix. [De même, le 11 septembre 2006, Visa a annoncé une restructuration mondiale dont le point fort sera un premier appel public à l'épargne.]

Dans sa question, le Président reconnaît que les effets des mesures correctrices portant sur les comportements ont un caractère incertain, susceptibles de justifier un changement de cap ultérieur. Or, l'intervention réglementaire ne doit pas se faire à la légère ; avant d'intervenir, il faut prévoir les résultats avec un certain degré de certitude et éviter de tester des solutions pour obtenir les « bons » résultats. Le BIAC a toujours affirmé que, pour préserver les effets positifs de la concurrence, les instances réglementaires doivent, avant d'intervenir, s'assurer que le comportement en cause est effectivement anticoncurrentiel, qu'une intervention est nécessaire pour protéger les consommateurs et que les mesures imposées vont, globalement, être favorables à ces derniers. Dans le secteur des cartes de paiement, chacun de ces critères donne lieu à de fortes controverses, ce qui prouve que la plus grande circonspection s'impose en matière d'intervention.

Par ailleurs, les données empiriques relatives à l'intervention de la RBA en Australie vont également dans le sens d'une invitation à la prudence. Les mesures prises par la RBA ont eu des effets positifs pour les commerçants (qui ont vu leur commission baisser) et pour les systèmes fermés (qui ont vu leur part de marché s'accroître). En revanche, les consommateurs ont vu leur cotisation annuelle augmenter et les avantages attachés aux cartes diminuer ; en outre, la RBA n'a pas fourni d'éléments prouvant que les commerçants ont répercuté la baisse de leur commission sur les consommateurs. Par conséquent, même si la RBA revenait sur ces mesures dans l'avenir, les consommateurs ne récupéreraient jamais ce qu'ils ont

perdu. Compte tenu de la complexité des mécanismes économiques en jeu dans ce secteur, de la poursuite du dialogue sur le bien-fondé d'une intervention, quelle qu'elle soit, et du manque de données empiriques solides, le BIAC invite les instances de réglementation à la prudence, même en ce qui concerne les mesures correctives ayant trait aux comportements.

3. Autres questions liées à l'application du droit de la concurrence, aspects procéduraux et intervention des pouvoirs publics

Le Président annonce le passage au sujet suivant, à savoir l'intervention des pouvoirs publics et les choix institutionnels. Il invite le Professeur David Evans à donner son avis à ce sujet. Il lui demande à qui, selon lui, il appartient d'intervenir, à supposer qu'une intervention soit nécessaire.

Le Professeur David Evans commence par préciser qu'il souhaite s'écarter de la controverse et aborder deux questions fondamentales. La première porte sur le point de savoir si les distorsions du marché que sont censées provoquer les commissions d'interchange fixées collectivement sont de celles dont le droit et les autorités de la concurrence doivent se préoccuper. La seconde concerne la manière dont les autorités de la concurrence devraient concevoir la réglementation de la commission d'interchange, si tant est qu'elles doivent s'en préoccuper. Pour répondre à ces deux questions, il faut au préalable analyser les distorsions que sont susceptibles d'induire les commissions d'interchange. Lorsqu'elles ont eu à se prononcer, les autorités de la concurrence ont considéré premièrement que les accords de commission d'interchange restreignaient la concurrence, deuxièmement qu'ils n'étaient pas indispensables à la promotion de la concurrence, troisièmement qu'une fixation bilatérale des commissions n'était pas possible, quatrièmement que des commissions d'interchange fixées collectivement seraient favorables à la concurrence à condition d'être calculées en fonction des coûts supportés par les banques émettrices pour le compte des banques acquéreuses. Dans ces décisions, les autorités de la concurrence ne se sont jamais prononcées en faveur de commissions d'interchange nulles.

En principe, le droit de la concurrence condamne l'entente sur les prix parce qu'elle restreint la production. Dans le domaine des cartes, il ressort à tout le moins de certaines des décisions que laisser les associations totalement libres de fixer la commission d'interchange peut en réalité conduire à un excès de production et de transactions par carte. En outre, habituellement, le droit de la concurrence ne se contente pas de condamner l'entente sur les prix, mais œuvre pour qu'il y soit mis fin. Dans le domaine des cartes, les décisions condamnent l'entente sur les prix mais proposent une autre solution.

Le problème que pose la commission d'interchange est qu'elle subventionne les titulaires de cartes, incitant ainsi les consommateurs à préférer les cartes de crédit aux autres moyens de paiement. Ils les utilisent donc trop, n'utilisent pas assez les espèces et autres modes de paiement, ce qui est inefficace du point de vue de la société.

Cette prétendue défaillance du marché s'explique par deux caractéristiques du marché des cartes de paiement : ce sont les porteurs qui décident du moyen de paiement à utiliser et les commerçants n'ont pas la possibilité d'influencer cette décision puisqu'ils ne peuvent ni appliquer un supplément, ni refuser les cartes du fait que leurs concurrents ne le font pas. Ce raisonnement est valable même lorsque les commerçants ont le droit d'appliquer un supplément, probablement en raison des coûts de transaction.

Quant à savoir s'il s'agit du type de problème auquel les autorités de la concurrence doivent s'intéresser, le Professeur Evans estime qu'il n'y a pas lieu que les autorités de la concurrence s'intéressent à une défaillance du marché de cette nature, si elle existe, parce qu'elle ne soulève pas un problème de politique de la concurrence au sens classique. La commission d'interchange contribue à abaisser les coûts de transaction et les barrières à l'entrée sur le marché des cartes de paiement. S'il existe des raisons de penser qu'elle entrave la concurrence de telle manière qu'elle induit une baisse de la production totale ou

une augmentation du niveau général des prix et, partant, porte préjudice aux consommateurs, les autorités de la concurrence devraient s'en préoccuper. Les décisions ne semblent pas fondées sur une défaillance du marché telle que celle évoquée par Joseph Farrell mais s'analysent dans le cadre de l'Article 81 ou instrument juridique comparable, ce qui n'est pas compatible avec une analyse en termes de défaillance du marché.

Le Professeur Evans émet ensuite l'idée qu'une autorité de la concurrence n'est pas l'institution à laquelle il appartient de remédier ou d'envisager de remédier à une défaillance du marché caractérisée par une surproduction de transactions par carte. Une banque centrale, compétente pour de nombreux moyens de paiement, serait mieux placée pour comparer la sur ou sous-utilisation des différents instruments de paiement les uns par rapport aux autres. D'autre part, les autorités de la concurrence font fausse route lorsqu'elles veulent se transformer en instances remédiant à tous les problèmes ou en instances quasi-réglementaires pour des secteurs économiques entiers. Le droit de la concurrence n'a pas été conçu pour débusquer les défaillances du marché ou optimiser le fonctionnement des secteurs d'activité. Dans le cas de l'Europe, les affaires portant sur les commissions d'interchange sont en réalité des affaires de tarification excessive déguisées en affaires relatives à l'application de l'Article 81.

En admettant que des institutions publiques telles que les autorités de la concurrence ou les banques centrales aient un rôle à jouer, il reste à définir quel doit être ce rôle. Jugeant qu'une analyse formelle et mécanique sous l'angle de l'Article 81 ne serait guère éclairante à cet égard, le Professeur Evans adopte l'approche reposant sur la défaillance du marché retenue par la RBA, dont l'analyse sous-tend les préoccupations exprimées par Joseph Farrell. La théorie de la défaillance du marché peut être testée à l'aide de données et les données nécessaires peuvent être obtenues. Jusqu'à présent, cet exercice n'a pas été fait sérieusement. De plus, dans les affaires de type Article 81, l'objectif poursuivi n'était pas d'aboutir à une commission d'interchange « juste », mais à une commission d'interchange plus faible. Cette approche n'est pas satisfaisante. La science économique ne permet peut-être pas un calcul précis de la commission d'interchange, mais toute autorité réglementaire qui se respecte devrait commencer par essayer de définir théoriquement ce que pourrait être une commission d'interchange juste puis tenter de la calculer le plus précisément possible à l'aide des données disponibles.

Enfin, il ressort de nombreux travaux sur la réglementation qu'il conviendrait d'apprécier les avantages de la réglementation au regard de son coût. Cette comparaison peut certes se révéler complexe, car il peut être difficile de prévoir tout ce qui peut survenir après une intervention. Toutefois, certaines expériences, par exemple celle de l'Australie, peuvent servir de base à l'analyse des effets des interventions. Selon le Professeur Evans, on ne dispose d'aucune donnée prouvant qu'une intervention a atteint ses objectifs ou va les atteindre. En outre, il est arrivé que la réglementation ait d'autres effets que ceux escomptés. Ainsi, American Express n'est pas visé par la réglementation relative à la commission d'interchange mais impose une commission qui s'en rapproche. La réglementation obligeant à calculer la commission d'interchange sur la base des coûts a entraîné une hausse de la commission d'interchange imposée par MasterCard. En conséquence, pendant un certain temps, MasterCard a pu imposer, aux termes de cette réglementation, une commission d'interchange supérieure à celle de Visa. Cette situation a notamment incité les banques membres des deux réseaux à modifier les volumes traités en faveur de MasterCard, aux dépens de Visa. La RBA a mis un terme à cette pratique en rappelant que la commission d'interchange basée sur les coûts devait être la même dans les deux réseaux.

L'un des effets involontaires majeurs de l'intérêt porté par la politique de la concurrence aux systèmes de paiement est que dans le monde entier, les systèmes de cartes cherchent des moyens de se transformer en systèmes unitaires et d'éviter de tomber sous le coup de la législation relative à l'entente sur les prix. La majorité des professionnels du secteur savent que c'est notamment la peur des litiges relatifs à la commission d'interchange qui a poussé MasterCard à passer d'une forme coopérative ouverte à un statut plus proche de celui d'American Express. Bank of America, première banque aux États-Unis, envisage de

quitter le réseau Visa pour créer son propre système unitaire sur le modèle d'American Express. Il est probable que d'autres grandes banques aient le même projet. La raison en est qu'en se transformant en systèmes unitaires, elles pourront fixer le niveau de la commission commerçant comme bon leur semble, exactement comme le fait American Express. Or, aux États-Unis, du fait qu'il n'y a pas de réglementation sur la tarification excessive, il n'existe guère de moyen d'intervenir. Il conviendrait que les autorités de la concurrence réfléchissent sérieusement à ces questions avant d'opter pour des interventions qui donneraient à des systèmes unitaires comme American Express un avantage sur le marché, et encourageraient ainsi les systèmes coopératifs à se transformer en systèmes unitaires. Il s'agit là d'une conséquence indirecte majeure des enquêtes et interventions portant sur la commission d'interchange dans le monde entier.

Rappelant qu'il travaille pour plusieurs systèmes de cartes implantés dans le monde entier, David Evans précise que tous ne sont pas des systèmes bien établis ; il travaille également pour de nouveaux acteurs qui apparaissent dans le secteur des cartes de paiement et qui considèrent que les affaires relatives à la commission d'interchange et les problèmes qu'elles entraînent pour les réseaux de carte leur offrent une chance unique de se positionner sur le marché.

Le Dr. Alan Frankel demande si la pratique qui consisterait, pour un système quadripartite à s'intégrer verticalement en faisant également fonction d'acquéreur, et à se transformer ainsi en système tripartite, serait considérée comme anticoncurrentielle.

Le Professeur David Evans répond qu'à son avis, aux États-Unis par exemple, l'intégration verticale de MasterCard risquerait d'amener les autorités de la concurrence à ouvrir une enquête. Il juge cependant difficile de se prononcer sur le point de savoir si cette pratique serait anticoncurrentielle. Les stratégies d'intégration comportent des aspects favorables à la concurrence, mais aussi des aspects potentiellement négatifs en termes de perte de la concurrence permise par les systèmes ouverts.

Le Professeur Joseph Farrell reconnaît que les problèmes qu'il a évoqués précédemment n'ont pas fondamentalement trait à la commission d'interchange ni aux systèmes quadripartites mais plutôt à la structure de prix. Il juge, comme David Evans, qu'il serait regrettable que la structure juridique amène à trop s'intéresser aux problèmes induits par les systèmes quadripartites et pas assez aux problèmes similaires que sont susceptibles de créer les systèmes tripartites.

Joseph Farrell ne partage pas l'avis de David Evans sur le fait que ce qu'il appelle les « défaillances du marché » ne sont pas des dysfonctionnements de la concurrence. Comme il l'a déjà expliqué, il considère ces défaillances comme l'un des aspects fondamentaux du processus concurrentiel, à savoir de la conception selon laquelle les consommateurs choisissent ce qui est le mieux pour eux. Faire en sorte que les consommateurs fassent le choix qui sert le mieux leurs intérêts est sans nul doute dans l'esprit de la protection de la concurrence et de la liberté de choix des consommateurs, même si cela n'entre pas toujours exactement dans des cases juridiques standard.

Le Professeur Farrell déclare ensuite souscrire à la majorité des arguments de Jean-Charles Rochet, mais ne pas être d'accord avec lui quand il avance que le critère de l'indifférence du commerçant est assimilable à un critère de surplus des utilisateurs à court terme et comporterait un risque à long terme. Un critère de surplus des consommateurs peut comporter de tels risques mais, selon le Professeur Farrell, le critère de l'indifférence du commerçant protège le processus concurrentiel et serait plus favorable à l'efficacité à long terme qu'une stratégie visant à protéger les systèmes de paiement de la conséquence de leurs marges sur la demande. Il y a un désaccord sur ce point. Le Professeur Farrell souligne que si sa proposition consistait simplement à maximiser le surplus du consommateur (dual), il s'intéresserait, par exemple, autant à la réglementation du niveau du prix qu'à celle de la structure du prix. Au contraire, sa proposition autorise résolument les systèmes les plus efficaces pour le client dual à imposer une rente

d'efficience – en réalité, sa proposition est à la fois nécessaire et suffisante pour atteindre cet objectif, si le système le plus efficient a une structure de prix dans laquelle la commission commerçant est moins lourde. Comme il l'indique dans son article, sa proposition ne fait que rétablir la souveraineté du client, considérée comme un principe acquis dans les marchés non duaux. Par conséquent, elle possède toutes les caractéristiques du marché, comme le fait de permettre des rentes d'efficience, de favoriser les incitations à l'amélioration etc.

Le Professeur David Evans répond que ce que Joseph Farrell qualifie de « problème de politique de la concurrence » pourrait peut-être être reformulé et qualifié de « problème de défaillance du marché lié au mode de fonctionnement des marchés concurrentiels ». Son propos concerne ce que les autorités de la concurrence sont en mesure de faire dans le cadre de la loi. Ainsi, aux États-Unis, si un système unitaire comme American Express détenait 80 % du marché, la législation antitrust n'offrirait aucun moyen de contester une telle situation, si l'on suppose que le système est apparu dans des conditions concurrentielles normales. Le droit communautaire n'offrirait pas non plus de base pour régler ce problème de concurrence spécifique, sauf s'il est possible d'attaquer un système unitaire en position dominante aux termes des règles sur la tarification excessive. Il est vraisemblable que les réseaux unitaires appliqueraient la même structure de tarification qu'American Express.

Le Dr. Alan Frankel fait observer que les commissions illicites et la corruption commerciale peuvent compromettre et saper le processus concurrentiel. Selon lui, ce que Joseph Farrell a expliqué revient à dire que si un marché est organisé de telle manière que des commissions illicites sont versées à des individus qui choisissent alors, du fait d'un problème de relation d'agence, de payer un prix excessif en contrepartie d'un service, le processus concurrentiel en est compromis. Il n'est pas rare de considérer que la politique et le droit de la concurrence couvrent aussi la lutte contre les commissions illicites ou la corruption commerciale.

Un délégué de la Commission européenne intervient ensuite sur le point de savoir s'il faut que les autorités de la concurrence interviennent dans les affaires de commission d'interchange et dans celles dans lesquelles il y a défaillance du marché, au sens où l'entend la RBA. La RBA est préoccupée par l'inefficience du système de paiement, ce qui n'est pas le problème fondamental d'une autorité de la concurrence. Les accords de commission d'interchange fixent un plancher pour la commission commerçant, restreignant ainsi la concurrence par les prix entre les banques acquéreuses. Ces accords ont les mêmes effets qu'une entente sur les prix sur le marché acquéreur.

Les modèles théoriques ont certes un rôle à jouer, mais ce sont les faits qui importent. Si une autorité de la concurrence n'est pas convaincue que ces commissions sont utilisées pour mettre en œuvre un mécanisme d'équilibrage visant à internaliser les externalités, il y a, *in fine*, entrave à la concurrence. Les données empiriques recueillies par la Commission européenne dans le cadre de son enquête sur les cartes de paiement, concernent la manière donc la commission d'interchange est répercutée sur les consommateurs. La Commission a réalisé une analyse de corrélation à partir d'une base de données relativement riche et démontré qu'il n'existait pas de corrélation négative manifeste entre le prix payé par les porteurs de cartes et la commission d'interchange. En d'autres termes, une fraction substantielle de la commission d'interchange correspond tout simplement à un bénéfice réalisé par les banques émettrices.

Dans l'avenir, il serait également intéressant d'examiner dans quelle mesure les propriétaires des systèmes de cartes sont impliqués dans le flux des commissions d'interchange. Si le propriétaire du système applique des commissions d'adhésion ou d'usage liées aux transactions et si ces commissions sont supportées par les émetteurs mais pas par les acquéreurs, la commission d'interchange est tout simplement un mécanisme visant à extraire des rentes des commerçants.

Autre problème : la coexistence d'accords bilatéraux et multilatéraux. Les accords multilatéraux fixent une commission par défaut, qui s'applique systématiquement en l'absence d'accord bilatéral entre l'acquéreur et l'émetteur. Dans certains pays, les banques souhaitent parfois fixer bilatéralement une commission d'exécution (« *honour fee* »). Ces commissions sont en principe moins élevées que les taux par défaut déterminés sur une base multilatérale. Une banque étrangère souhaitant entrer sur un nouveau marché en Europe doit payer le taux par défaut, sauf si elle est en mesure de convenir d'une commission d'interchange plus faible dans le cadre d'un accord bilatéral avec d'autres banques. L'existence de ce mécanisme particulier de fixation des commissions d'interchange contribue à diviser l'Europe en 25 marchés différents.

Selon le Professeur Jean Tirole, la commission d'interchange en tant que telle ne restreint en aucune manière la concurrence entre les acquéreurs ou les émetteurs. Affirmer le contraire reviendrait à dire que la TVA restreint la concurrence entre commerçants, ce qui n'est pas le cas. Les deux questions fondamentales, sur lesquelles David Evans a été très clair, sont de savoir, d'une part, si cette commission est trop élevée et, d'autre part, si elle peut être réglementée.

Concernant la première question, le Professeur Tirole rappelle que Jean-Charles Rochet et lui-même, de même que Joseph Farrell, ont avancé l'argument selon lequel la commission d'interchange est en réalité une réaction au problème de relation d'agence. Le consommateur décide du mode de paiement et la commission d'interchange oriente son choix. Ensuite, la question devient une question empirique sur le point de savoir si le nombre de paiements par carte est insuffisant ou excessif. Le Professeur Tirole se dit surpris par l'utilisation du terme « commission illicite ». Selon lui, on est tout simplement face à un transfert entre deux entités, lequel transfert sert de référence à un côté d'un marché dual. Des transferts de ce type existent dans beaucoup d'autres secteurs comme les télécommunications. Selon lui, ils n'ont rien de commissions illicites, car si tel était le cas cela reviendrait à considérer que les autorités de régulation des télécommunications devraient poursuivre les entreprises qui facturent des redevances de terminaison.

L'autre question porte sur la possibilité de réglementer les commissions d'interchange. L'argument avancé par David Evans est très important. Il faudrait que la politique de la concurrence se concentre sur la neutralité concurrentielle et ne favorise pas une forme d'organisation par rapport à une autre. Si on analyse la situation du point de vue de la commission d'interchange, les systèmes quadripartites sont réglementés tandis que les systèmes tripartites ne le sont pas.

Wilko Bolt explique qu'il y a quelques années, les Pays-Bas ont eu à se prononcer sur une affaire de tarification excessive impliquant le prix des cartes de débit. Les commerçants contestaient le montant élevé qui leur était demandé pour les transactions par carte de débit ; toutefois, ils étaient autorisés à appliquer un supplément. Or, quasiment aucun d'entre eux ne le faisait. Wilko Bolt en conclut que la suppression de l'interdiction d'appliquer un supplément n'aurait guère d'effet.

Le Président fait observer que la possibilité d'appliquer un supplément influe sur les négociations, même si cette possibilité est rarement exploitée dans la pratique. Il demande au Dr. Alan Frankel d'évoquer l'efficacité de la structure institutionnelle du secteur des cartes et à indiquer s'il pense qu'une intervention visant à faire respecter le droit de la concurrence ou une intervention réglementaire est nécessaire pour protéger les consommateurs.

Le Dr. Alan Frankel rappelle qu'un système de paiement sert à faire circuler de l'argent des acheteurs vers les vendeurs. Pour évaluer l'efficacité, la compétitivité et l'efficacité d'un système de paiement, il faudrait se concentrer sur les méthodes utilisées pour que cette circulation soit aussi rapide, aussi peu onéreuse et aussi fiable que possible.

Il part de l'hypothèse selon laquelle le coût à la marge que représente pour le commerçant le traitement d'une transaction par carte de crédit est supérieur à celui que représente le traitement d'une transaction en espèces ou par carte de débit. Il s'agit là d'une hypothèse vraisemblable, puisque les banques contrôlent directement ou indirectement la commission d'interchange, ont intérêt à fixer une commission élevée et puisque les mécanismes concurrentiels susceptibles de tirer les commissions trop élevées vers le bas sont inexistantes ou faibles.

Toute augmentation du coût marginal supporté par l'ensemble des commerçants d'une économie risque vraisemblablement d'entraîner une hausse des prix de détail. Du fait de la cohérence des prix, ou tendance qu'ont les commerçants à ne pas introduire de discrimination entre les différents modes de paiement lorsque les coûts relatifs ne sont pas les mêmes, les clients qui règlent en espèces participent au paiement des commissions d'interchange au point de vente.

Une plateforme fonctionne comme un régulateur de prix. Il est donc permis de se demander pourquoi les réseaux prétendent avoir besoin de commissions d'interchange. Le problème de l'œuf et de la poule – la nécessité de séduire les deux côtés du marché – pourrait constituer un élément de réponse. Toutefois, il s'agit de marchés bien établis, qui ont déjà séduit. Aux États-Unis, une des méthodes utilisées pour convaincre les consommateurs de souscrire une carte consiste à les solliciter directement par courrier. En 2005, 6.06 milliards de sollicitations directes ont ainsi été envoyées à des titulaires de cartes potentiels, pour un taux de réponse qui a chuté jusqu'à 0.3 %. L'argument selon lequel il y a un problème de l'œuf et de la poule au niveau de l'entrée sur le marché qui n'a toujours pas été réglé, paraît peu cohérent par rapport à cette situation.

L'existence d'externalités d'usage est une autre des raisons avancées pour justifier les commissions d'interchange. S'il ne fait aucun doute que ces externalités sont bien réelles, il reste à déterminer comment les appréhender et quelles sont leurs implications. Pour comprendre le raisonnement qui sous-tend cet argument, on peut partir de l'hypothèse que les cartes de crédit permettent aux commerçants d'économiser le coût marginal sur chaque transaction. Toutefois, lorsque des coûts de transaction entraînent une cohérence des prix, les commerçants risquent d'être insatisfaits et de trouver que les consommateurs paient trop souvent en espèces ou avec des moyens de paiement plus coûteux, comme les chèques. Le raisonnement suppose également que le problème ne peut pas être résolu par les commerçants et consiste à avancer que les commissions d'interchange peuvent le résoudre pour eux. Dans les faits, un supplément est appliqué aux opérations par carte de crédit, de sorte que le commerçant reste indifférent au choix que fait le consommateur entre espèces et carte de crédit. La banque émettrice perçoit les recettes correspondant à ce supplément et les restitue au titulaire de la carte sous forme de réduction. Les titulaires de cartes sont donc ainsi incités à tenir compte, en plus des coûts qu'ils supportent, de ceux que doit assumer le commerçant, et, dans cet exemple, à utiliser davantage leur carte de crédit. Un scénario dans lequel les commerçants seraient indifférents au mode de paiement choisi et dans lequel les recettes correspondant à la commission d'interchange seraient directement répercutées sur les porteurs confirmerait la thèse fondée sur les externalités d'usage. Mais dans les faits, les commerçants ne sont pas satisfaits d'avoir à payer la commission d'interchange et ne sont pas indifférents vis-à-vis du mode de paiement choisi au point de vente.

Aborder le problème concurrentiel dont les banques allèguent l'existence selon une approche décentralisée et reposant sur l'absence de réglementation permettrait que chaque commerçant fasse le maximum pour favoriser telle ou telle méthode de paiement en orientant le choix du consommateur vers ladite méthode, en en faisant la promotion, en prévoyant une file d'attente plus rapide aux caisses pour les clients qui utilisent cette méthode ou en appliquant un supplément ou une remise à son gré. Sans être parfaite, une telle solution est décentralisée. Le Dr. Frankel aimerait donc savoir si les partisans de la commission d'interchange disposent d'éléments qui démontrent que le problème dont ils débattent constitue un enjeu important et si la solution qu'ils préconisent – une commission d'interchange fixée

collectivement – est meilleure qu’une solution décentralisée, reposant sur l’absence de réglementation, qui consisterait à ce que chaque commerçant cherche à réduire les coûts de transaction.

Il faut être conscient que les commissions d’interchange ne sont pas intégralement répercutées directement sur les titulaires de cartes sous forme de réduction. Elles sont en grande partie investies dans les sollicitations directes par courrier ou conservées par les banques sous forme de bénéfices. D’après l’étude menée par la Commission européenne, il est possible qu’environ 25 % des recettes correspondant aux commissions d’interchange soient répercutées sur les porteurs. Par conséquent, les théories économiques qui partent de l’hypothèse que ces recettes sont intégralement répercutées sur les porteurs occultent un aspect important de la réalité.

Les restrictions verticales réduisent l’efficacité du recours, par les porteurs, au multi-hébergement. La restriction la plus connue est la règle interdisant l’application d’un supplément en cas de paiement par carte, mais il en existe d’autres, moins fréquemment citées, comme le fait qu’une carte de crédit est en général rattachée à un seul réseau. Si une carte ne donne accès qu’à un seul réseau ou si une règle fait qu’il est difficile pour un commerçant d’inciter un consommateur à choisir une marque plutôt qu’une autre, il s’ensuit un renforcement du pouvoir de marché des réseaux de cartes et de leurs émetteurs, qui peuvent alors imposer des commissions d’interchange plus élevées, sans que les commerçants puissent réagir aussi efficacement qu’ils le feraient en d’autres circonstances.

Des commissions d’interchange élevées favorisent l’émission par les banques et l’utilisation des cartes les plus coûteuses. Les actions de marketing incitant les consommateurs à préférer les cartes de débit à signature aux cartes de débit à code PIN aux États-Unis sont particulièrement édifiantes à cet égard. Bien que la plupart des acteurs du secteur considèrent que les cartes de débit à code PIN présentent un meilleur rapport coût-efficacité et sont exposées à un moindre risque de fraude, les banques favorisent l’utilisation de cartes de débit à signature. Il s’agit là d’une défaillance du marché ; les signaux de prix ne sont pas les bons. Les commissions d’interchange et les restrictions verticales ont des causes et des effets anticoncurrentiels, si bien qu’il y a exploitation, et non résolution des externalités.

Le Dr. Frankel précise qu’en Australie, MasterCard a mis en garde contre le fait qu’une réduction des commissions d’interchange risquerait d’entraîner une « spirale de la mort ». Or, en réalité, il y a eu une forte baisse des commissions d’interchange des réseaux Visa et MasterCard, qui a été compensée par une baisse équivalente, voire plus forte, de la commission commerçant imputée en cas d’utilisation de l’une ou l’autre de ces cartes. Les commissions imposées par American Express et Diners Club ont également nettement diminué, quoique dans une moindre mesure. Ces commissions continuent de baisser, sans qu’il y ait eu de « spirale de la mort ». Face à ces évolutions, les réseaux reconnaissent certes que les coûts des commerçants ont nettement baissé, mais prétendent que les commerçants conservent l’intégralité des économies ainsi réalisées au lieu de les répercuter sur les consommateurs. À noter que les réseaux de cartes affirment que les banques émettrices tendent, dans un environnement concurrentiel, à répercuter l’intégralité des recettes de commission d’interchange supplémentaires sur les titulaires de cartes mais que de leur côté, les commerçants conservent l’intégralité des recettes pour leur propre profit. Le Dr. Frankel souligne que la plupart des marchés de commerce de détail sont probablement tout aussi concurrentiels, voire plus, que la plupart des marchés bancaires.

Reste à savoir ce que les décideurs publics devraient faire. Il n’appartient probablement pas à un réseau d’apprécier les coûts sociaux des chèques et des espèces et d’agir comme une instance législative ou une banque centrale investie du pouvoir de subventionner une méthode de paiement jugée supérieure et d’en taxer une autre, moins appréciée. Il est a priori peu probable que, s’ils sont autorisés à fixer librement les commissions d’interchange appliquées dans les systèmes de paiement électroniques modernes, les réseaux vont agir de manière à maximiser le bien-être social. L’une des solutions envisageables serait un système « au pair », dans lequel la commission serait au niveau zéro. Il ne s’agit pas uniquement d’un

niveau prix arbitraire au sein d'un éventail, mais d'un système dans lequel chaque banque cherche à conquérir des clients de manière indépendante, sans coordination avec les autres banques, en fonction de ses propres coûts et dans un contexte de concurrence entre établissements bancaires. Dans un système au pair, la chambre de compensation n'exige pas, comme condition d'adhésion, que chaque membre s'entende sur des accords de commission d'interchange avec les autres membres. Une autre solution envisageable consisterait, au minimum, à éliminer les restrictions verticales, notamment à trouver des moyens pour promouvoir l'utilisation des cartes sur plusieurs réseaux, ce qui faciliterait le choix des commerçants.

Le Président se tourne vers les États-Unis, dont le rapport se termine sur l'idée que, dans ce secteur complexe et en constante mutation, toute intervention des pouvoirs publics devrait être précédée d'une réflexion et d'une étude approfondies. Il demande ce que cela signifie, compte tenu qu'en 1998, le ministère de la Justice (*Department of Justice*) a engagé, à l'encontre de Visa et MasterCard, une action en violation de la législation antitrust en se fondant sur plusieurs griefs, tels que la dualité de gouvernance et le fait que ces associations interdisaient aux banques membres de leurs réseaux d'émettre des cartes American Express ou Discover. Il demande à connaître le dénouement exact de cette affaire.

Un délégué des États-Unis répond qu'à partir du printemps 1996, American Express a approché des banques américaines pour leur proposer de devenir partenaires d'American Express tout en conservant leur portefeuille MasterCard (en 1991, Visa avait adopté un règlement interdisant à ses membres d'émettre des cartes sur des réseaux concurrents, exception faite du réseau MasterCard. En conséquence, au printemps 1996, les banques étaient dans l'impossibilité d'émettre simultanément des cartes Visa et American Express, mais aucune règle n'interdisait à une banque affiliée à MasterCard d'émettre également des cartes American Express.) En juin 1996, MasterCard a adopté un règlement interdisant à ses membres d'adhérer au réseau American Express. Peu après, le ministère de la Justice a ouvert une enquête sur cette pratique. En octobre 1998, le ministère a engagé des poursuites en invoquant deux griefs : le premier concernait les règles d'exclusion appliquées par les associations, le ministère alléguant que les banques avaient passé un accord horizontal de non-concurrence en convenant qu'aucune d'entre elles ne proposerait de carte American Express ou Discover. Le ministère de la Justice a allégué que ces règles d'exclusion avaient pour effet de réduire la production, en termes qualitatifs et quantitatifs, ce qui était préjudiciable à la concurrence entre réseaux. Le second grief concernait la dualité de gouvernance, le ministère alléguant que les administrateurs avaient, lorsqu'ils siégeaient en tant que tels, des motivations ambiguës compte tenu de la composition du portefeuille de leurs banques respectives (la quasi-totalité des administrateurs de Visa détenaient des portefeuilles MasterCard relativement importants et vice-versa). Selon le ministère, cette situation nuisait aux initiatives concurrentielles dans les deux associations. Le tribunal a jugé illicites les règles d'exclusion et a considéré que le ministère n'avait pas établi l'existence d'un lien de cause à effet eu égard à son allégation de dualité. En d'autres termes, le tribunal a estimé que le ministère n'avait pas prouvé que la dualité de gouvernance nuisait à la concurrence, dans la mesure où rien n'excluait que le manque de concurrence entre les deux réseaux soit lié à la dualité d'émission.

Dans la foulée de cette décision, American Express négocie actuellement des partenariats avec Bank of America, BNA et Citibank. Discover a acquis le réseau Pulse, qui est un réseau de cartes de débit à code PIN aux États-Unis, et propose des cartes de débit à signature sur son propre réseau. L'autre événement qui pourrait être lié à cette affaire est que deux ou trois mois avant le jugement, Visa a adopté un règlement disposant que pour siéger au conseil d'administration, un administrateur doit représenter une banque dont le portefeuille de cartes est composé majoritairement de cartes Visa, à hauteur de 70 % au moins.

Le Président passe ensuite à l'Italie. Dans ce pays, jusqu'en janvier 2006, c'était la banque centrale qui jouait le rôle d'autorité de la concurrence dans le secteur bancaire ; elle a ordonné à l'opérateur du système de cartes de débit de cesser d'interdire aux banques d'installer des terminaux points de vente multibanques dans les magasins. L'opérateur ne s'étant pas plié à cette exigence de la banque centrale, une

procédure pour non-respect est en cours devant l'autorité italienne de la concurrence. Les commerçants utilisaient les terminaux multibanques pour réduire leur commission commerçant en recourant à des transactions « on us ». Le président demande à la délégation de présenter l'affaire PagoBancomat et d'exposer les conséquences de l'existence d'un seul opérateur de systèmes de cartes de débit.

Un délégué de l'Italie explique qu'au début des années quatre-vingt, toutes les banques italiennes se sont alliées pour créer une carte de débit utilisable uniquement pour effectuer des retraits d'espèces aux distributeurs. À la fin des années quatre-vingt, cette carte a commencé à être utilisée aux points de vente pour effectuer des achats. La banque centrale italienne a estimé que la commission d'interchange constituait un accord illicite d'entente sur les prix et a exigé qu'elle soit étroitement liée aux coûts. Depuis lors, la commission a baissé de près de 50 %, ce qui a entraîné une diminution proportionnée de la commission commerçant. Il en a résulté une baisse des commissions commerçant pour les cartes Visa, MasterCard et American Express.

En Italie, il existe un seul opérateur pour les cartes de débit, qui appartient à toutes les banques italiennes. Reste à savoir si cette situation confère un pouvoir de marché à ces banques. La carte de débit est délivrée gratuitement au titulaire d'un compte courant, quel qu'il soit. La concurrence est intense du côté acquéreur du fait que cette carte est en concurrence avec Visa, MasterCard et American Express. Pour utiliser une carte de débit, il faut être titulaire d'un compte de dépôt en Italie, ce qui a pour conséquence évidente que toutes les banques peuvent entrer sur le marché mais qu'une entreprise autre qu'une banque ne peut pas proposer de carte de débit.

Le gouvernement a laissé 6 mois aux banques pour créer un nouveau système électronique qui permettrait aux commerçants de traiter avec des acquéreurs multiples, mais elles ont indiqué ne pas être en mesure de le faire pour des raisons de sécurité. Toutefois, elles travaillent actuellement à la création d'un tel système.

Le Président se tourne ensuite vers l'Allemagne, qui compte 24 opérateurs. Ce chiffre laisse penser que la concurrence est intense. Le Président demande s'il existe une réelle concurrence entre ces opérateurs. Il souhaite savoir s'ils détiennent des monopoles bancaires géographiques. En 2001, l'association bancaire a demandé à bénéficier d'une exemption de la part de l'autorité de la concurrence (le Bundeskartellamt) pour pouvoir introduire une commission d'interchange pour les cartes de débit, ce que le Bundeskartellamt a refusé. Le Président demande s'il faut en déduire qu'il n'y a actuellement pas de commission d'interchange pour les cartes de débit en Allemagne.

Un délégué de l'Allemagne répond qu'il y a effectivement 24 opérateurs et qu'il n'y a pas de fragmentation géographique du marché. Les opérateurs sont titulaires d'une autorisation délivrée par le ZKA, un comité qui regroupe les 5 associations centrales de banques en Allemagne. Le ZKA essaie de parvenir à une position commune pour toutes les affaires en lien avec la banque, notamment en ce qui concerne la délivrance d'autorisations aux opérateurs de réseau. Par conséquent, la délivrance des autorisations résulte d'un accord entre les associations membres du ZKA.

En 2001, le ZKA a notifié son intention d'introduire des commissions d'interchange dans le système allemand de cartes de débit. Dans sa communication des griefs, le Bundeskartellamt a notamment considéré que ces commissions d'interchange étaient en principe répercutées sur les commerçants et que leur introduction conduirait, à terme, à une augmentation non transparente des prix pour les consommateurs. Suite à cette communication des griefs, le ZKA a décidé de retirer sa demande. Une telle demande n'a jamais été formulée concernant le système de cartes de crédit, mais pour ces cartes, la commission d'interchange existe. Récemment, une plainte a été officiellement déposée concernant cette commission.

Le Président se tourne ensuite vers la Finlande, où le Conseil de la concurrence a contesté et annulé la décision de l'autorité de la concurrence supprimant la règle qui interdit d'appliquer d'un supplément en cas de paiement par carte. Le Président souhaite savoir si la décision de l'autorité de la concurrence est entrée en vigueur avant son annulation par le Conseil. Le rapport soumis par la Finlande fait allusion à des évolutions technologiques intéressantes en lien avec la téléphonie mobile et les cartes privatives proposées par les détaillants.

Un délégué de la Finlande répond que la règle de non-discrimination a toujours été appliquée en Finlande. Les associations représentant les agents de voyage se sont plaintes de ce que la commission que les agents perçoivent des compagnies aériennes lorsqu'ils vendent un billet est d'environ 3 %, tandis que celle qu'ils paient aux réseaux de cartes de crédit est de 4 %, de sorte qu'ils perdent souvent de l'argent dans l'opération. L'autorité de la concurrence a été déboutée par le tribunal, qui a jugé que la suppression de la règle de non-discrimination ne servait pas les intérêts des consommateurs.

Les évolutions concernent les paiements par téléphone mobile et les cartes privatives. Les consommateurs peuvent utiliser leur téléphone mobile dans des distributeurs automatiques pour payer des achats de biens et services. Ils peuvent également contracter des prêts d'un faible montant, de l'ordre de 100 euros, en envoyant un simple message SMS à partir de leur téléphone mobile. La somme empruntée est immédiatement versée sur leur compte bancaire. Les cartes privatives existent certes dans de nombreux pays, mais en Finlande, la plus grande chaîne de distribution a demandé une licence bancaire il y a six mois et va très probablement l'obtenir.

Le Président s'adresse ensuite aux États-Unis, où l'affaire dite « Wal-Mart » a été réglée récemment. En l'espèce, le gouvernement n'a pas été impliqué. Visa et MasterCard ont réglé leur litige à l'amiable et ont accepté de supprimer la règle obligeant à accepter toutes les cartes de débit et de crédit, de manière à permettre aux commerçants de refuser l'instrument de paiement le plus coûteux. Le Président souhaite savoir pourquoi la règle interdisant l'application d'un supplément en cas de paiement par carte n'a pas fait l'objet d'une plus grande attention.

Un délégué des États-Unis répond que de toute évidence, le gouvernement ne représentait pas le plaignant dans cette affaire et que lui-même n'est pas en mesure d'indiquer les points de vue ou intentions du groupe de plaignants. Cette réserve faite, le délégué avance une raison susceptible d'expliquer que les plaignants se soient concentrés sur la suppression de la règle obligeant à accepter toutes les cartes. À l'époque, les commerçants ont probablement pensé qu'il était réaliste de négocier une baisse des commissions d'interchange en menaçant de quitter les réseaux, ou en les quittant réellement. D'après les documents à la disposition du public dans cette affaire, les commerçants étaient conscients de l'ampleur de l'écart entre les taux d'interchange appliqués aux cartes de débit à code PIN et ceux appliqués aux cartes de débit à signature et pensaient pouvoir, une fois qu'ils auraient obtenu le droit de ne plus accepter les cartes de débit à signature, transférer l'intégralité des volumes de cartes de débit traités vers les réseaux de cartes à code PIN si les réseaux de cartes à signature n'abaissaient pas leur taux d'interchange. À l'époque où les commerçants ont engagé les poursuites et lorsqu'ils ont opté pour un règlement à l'amiable quelque 7 ans plus tard, en 2003, certains signaux en provenance du marché semblaient indiquer que cette stratégie pouvait fonctionner. Par exemple, en 2001, Visa a annoncé publiquement une augmentation de plus de 100 % du taux d'interchange appliqué à Interlink, son réseau, relativement modeste, de cartes de débit à code PIN. À la même époque, plusieurs autres réseaux de cartes de débit à code PIN ont annoncé des augmentations similaires de leurs taux d'interchange. Wal-Mart et un certain nombre de grands distributeurs ont réagi en annonçant qu'ils cesseraient d'accepter les cartes Interlink aux points de vente si ces augmentations entraient en vigueur. Les réseaux de cartes à code PIN se sont en partie inclinés et ont revu à la baisse les augmentations annoncées. Selon le délégué, il est probable que les commerçants impliqués dans le règlement de l'affaire Wal-Mart en 2003 se soient concentrés sur la règle obligeant à accepter toutes les cartes parce qu'ils pensaient, en partie du fait de leur expérience de 2001 avec Interlink

et autres réseaux de cartes de débit à code PIN, que la menace de quitter un réseau constituait vraisemblablement un moyen efficace de négocier une baisse des taux d'interchange. De plus, la plainte déposée en 2003 par le ministère de la Justice pour s'opposer à l'acquisition de Concord EFS par First Data Corp. fait référence à des documents qui corroborent l'idée selon laquelle les réseaux de cartes de paiement tiennent réellement compte, lorsqu'ils fixent les taux d'interchange, des menaces de départ des commerçants.

Le délégué cite des raisons susceptibles d'inciter les commerçants à se préoccuper davantage de l'interdiction d'appliquer un supplément aujourd'hui que lorsqu'ils ont engagé leur action dans le cadre de l'affaire Wal-Mart. Premièrement, Wal-Mart était impliqué dans certains des cas dans lesquels les commerçants ont menacé de quitter les réseaux et dans des cas où cette menace a effectivement été mise à exécution. Or, il est évident que tous les commerçants n'ont pas le même pouvoir d'achat que Wal-Mart. Deuxièmement, ces menaces visent souvent des réseaux détenant une part de marché relativement faible. D'après les documents rendus publics, Interlink détenant une part de marché inférieure à 10 % en 2001, lorsque les commerçants ont menacé de le quitter, ce qui laisse penser que les menaces risquent d'être moins efficaces vis-à-vis de réseaux détenant une part de marché plus élevée. Il est donc possible que beaucoup de commerçants pensent qu'à l'avenir, il serait plus judicieux, pour négocier une baisse des taux d'interchange, d'appliquer des suppléments ou un autre système introduisant une différenciation au niveau du prix selon le type de carte et le mode de paiement utilisé. Le délégué fait observer que ses commentaires ne concernent en aucun cas la question de savoir si les taux d'interchange sont trop élevés ou trop faibles ou s'ils sont efficaces.

Le Président s'adresse ensuite à la Corée. L'affaire du réseau BC concernait une carte créée par 11 banques qui avaient décidé de subordonner l'acquisition à l'ouverture d'un compte par les commerçants dans l'une d'entre elles. La KFTC a ordonné une modification du contrat. Le Président s'interroge sur cette exigence d'ouverture de compte, compte tenu que BC a en réalité intérêt à ce que la carte soit utilisée par tous les commerçants.

Un délégué de la Corée explique que BC détenant une part de marché de 29 %. BC est numéro un sur le marché des cartes et est en position dominante par rapport aux commerçants. Les 11 banques qui possèdent BC détiennent 83 % du marché bancaire. Elles savaient que les commerçants ne quitteraient pas BC et qu'elles pourraient en tirer avantage en augmentant le nombre de commerçants titulaires de comptes dans l'une d'entre elles.

Le Président s'adresse ensuite à la Suède pour poser une question de procédure. En mai 1995, Visa a demandé une attestation négative ou une exemption individuelle pour pouvoir introduire une commission multilatérale d'interchange et une règle interdisant l'application d'un supplément en cas de paiement par carte. Attendant une décision de la Commission européenne, les autorités de la concurrence ont suspendu la procédure jusqu'en mai 2001, et ont finalement délivré une attestation négative en juin 2004. Le Président souhaite savoir pourquoi il a fallu aussi longtemps pour décider de délivrer une attestation négative.

Un délégué de la Suède explique qu'en 1995, Visa et Europay ont notifié la quasi-totalité de leurs accords et demandé une attestation négative ou une exemption. En 2001, l'autorité suédoise a attendu la décision de la Commission. Lorsque cette décision est intervenue, Visa et Europay avaient l'un et l'autre retiré leurs demandes antérieures pour en formuler de nouvelles qui ne comprenaient aucune demande relative à la règle interdisant d'appliquer un supplément en cas de paiement par carte. Une attestation négative a été délivrée pour cette règle en 2004.

Le Président pose ensuite une question similaire à la Pologne. L'association des détaillants polonais a engagé une action à l'encontre de Visa pour entente sur les prix et création de barrières artificielles à

l'entrée. L'affaire étant en cours depuis 5 ans, le Président souhaite savoir pourquoi il faut un tel délai pour se prononcer.

Un délégué de la Pologne souligne que la problématique de la commission d'interchange est très complexe et que cette complexité est la principale raison pour laquelle un tel délai est nécessaire pour se prononcer dans cette affaire. Il avance toutefois d'autres éléments d'explication. D'une part, la Pologne attendait une décision de la Commission européenne. Ensuite, les banques ont décidé d'engager des pourparlers, mais il est apparu que cette initiative correspondait davantage à une stratégie dilatoire qu'à la volonté de parvenir à une solution. Puis, au bout de deux ans, les banques ont décidé d'appliquer la décision de la Commission européenne sur le territoire polonais. Il y a un an et demi, elle ont effectué une étude de coûts qui a abouti à des résultats intéressants. Ainsi, il en est ressorti que les commissions d'interchange devraient actuellement être plus élevées pour les cartes de crédit que pour les cartes de débit. L'autorité de la concurrence examine donc actuellement cette étude. La procédure arrive bientôt à son terme et l'autorité de la concurrence entend bien se prononcer d'ici à octobre 2006.

Le Président se tourne ensuite vers le Taipei chinois, où le centre national de cartes de crédit a demandé une exemption à l'autorité de la concurrence afin d'introduire une commission d'interchange. Dans un premier temps, la requête a été rejetée par l'autorité, mais le ministère des Finances est allé dans le sens du centre national des cartes de crédit. Le Président souhaite savoir qui, du ministère ou de l'autorité de la concurrence, a le pouvoir de décision. Il relève que l'autorité de la concurrence a réalisé une étude sur le secteur des cartes de crédit et est parvenue à la conclusion que la commission d'interchange n'était pas anticoncurrentielle.

Un délégué du Taipei chinois répond que dans cette affaire, qui concernait une demande d'exemption d'application de la réglementation sur les actions concertées, l'autorité de la concurrence a été autorisée à contrôler toutes les pratiques d'entente horizontale sur les prix. Le rôle du ministère des Finances consistait à fournir des informations pertinentes venant en complément des éléments sur lesquels pouvait s'appuyer l'autorité de la concurrence pour se prononcer. Le ministère n'avait pas le même point de vue parce qu'il estimait que la commission d'interchange était de nature à améliorer l'efficacité opérationnelle du marché de l'acquisition en abaissant les coûts de négociation et les commissions et frais y afférents. L'autorité de la concurrence jugeait quant à elle le juste niveau de la commission difficile à établir et estimait qu'en l'espèce, une entente sur les prix n'était pas nécessaire pour que le marché des cartes de crédit fonctionne de manière efficace. L'étude de l'autorité de la concurrence montre que la commission d'interchange présente des avantages et des inconvénients, sans aboutir à une conclusion univoque quant à savoir s'il faut ou non l'instaurer.

Le Président invite ensuite M. Wiebe Ruttenberg, de la Banque centrale européenne, à faire le point sur la mise en place du SEPA, l'espace unique de paiement en euros.

M. Wiebe Ruttenberg commence par préciser que l'enjeu est de mettre en place, non pas un système unique, mais plutôt un espace au sein duquel plusieurs systèmes peuvent coexister. La BCE est compétente sur le territoire de l'Union économique et monétaire, qui comprend 12 des 25 États membres de l'Union européenne.

Alors la monnaie unique est en place depuis le 1^{er} janvier 1999, les billets de banque et les pièces en euro ne sont en circulation que depuis le 1^{er} janvier 2002. Or, en ce qui concerne les paiements de détail, cette monnaie unique constitue le seul élément commun entre les pays qui composent la zone euro, du fait de l'absence de normes et de pratiques communes. Les différents pays de la zone euro n'appliquent pas les mêmes normes en matière d'instruments de paiement de détail et chaque pays a sa propre infrastructure de traitement des paiements, ce qui n'est pas efficace. Certains États affirment disposer de systèmes tout à fait efficaces, mais au sein de l'Union européenne, les paiements transfrontaliers sont souvent anormalement

coûteux. Le SEPA permettra la mise en place d'un cadre juridique et réglementaire unique pour effectuer les paiements. Il n'y aura plus de différence entre le contexte d'un pays et celui de la zone euro.

Alors que les prélèvements automatiques peuvent actuellement n'être possibles qu'à l'intérieur des frontières nationales, à compter de 2008, un consommateur allemand pourra en principe payer son abonnement à un magazine belge par prélèvement automatique paneuropéen (*pan European direct debit*, PEDD). Les consommateurs pourront effectuer des paiements transfrontaliers d'une manière aussi efficiente, peu onéreuse et sûre qu'ils le font aujourd'hui à l'intérieur des frontières nationales en utilisant un seul compte bancaire et une palette unique d'instruments de paiement (virement, prélèvement et carte).

Le Conseil européen des paiements (*European Payment Council*, EPC) a été créé en 2002, à l'initiative des banques commerciales. Ces dernières étaient confrontées au Règlement (CE) 2560/2001 du Parlement européen et du Conseil, qui dispose que le prix des paiements transfrontaliers doit être identique à celui des paiements effectués à l'intérieur des frontières nationales. Par exemple, dans le cas des Pays-Bas, où les virements sont gratuits, un virement vers un autre pays devrait être également gratuit. De même un porteur de carte effectuant un retrait à partir d'un guichet automatique bancaire (GAB) à l'étranger devrait payer le même prix que lorsqu'il effectue un retrait dans le pays où la carte a été émise. Ainsi, les retraits étant gratuits au Pays-Bas, tout porteur de carte doit pouvoir effectuer gratuitement un retrait en Allemagne avec une carte néerlandaise, même si cette opération a un coût pour la banque.

D'après le calendrier prévu, le SEPA devrait être prêt à entrer en vigueur à l'horizon 2008 et la migration de la grande majorité des opérations de paiement vers les nouveaux instruments créés dans le cadre du SEPA devrait être effectuée d'ici à 2010. Comme indiqué précédemment, le SEPA vise à élaborer des instruments, normes, procédures et infrastructures communs afin de favoriser les économies d'échelle. Les trois instruments de paiement concernés sont les virements, les prélèvements automatiques et les paiements par carte.

Pour les banques, le SEPA n'est pas seulement une possibilité : elles devront l'appliquer. À défaut, une structure sera mise en place. M. Ruttenberg souligne que d'autres solutions existent outre l'application par les banques commerciales. Ainsi, certaines banques centrales font déjà fonctionner des systèmes de paiement de détail.

Les normes relatives aux virements et aux prélèvements automatiques devraient être prochainement approuvées. En revanche, il reste beaucoup à faire en ce qui concerne les cartes de paiement.

La question des implications du SEPA pour les cartes de crédit et de débit est ensuite abordée. Aujourd'hui, traditionnellement, les cartes de débit sont nationales. Ainsi, le titulaire d'une carte de débit belge ne peut pas utiliser le réseau belge lorsqu'il est à l'étranger et doit recourir au co-marquage, qui consiste en un partenariat entre un réseau de cartes national et un réseau international, généralement Visa ou MasterCard. Dans le cadre du SEPA, il ne devrait pas y avoir d'obstacle à ce qu'un commerçant italien puisse utiliser un réseau allemand pour effectuer une transaction avec une carte allemande.

Un aspect important du cadre du SEPA pour les paiements par carte est qu'il exige de la part des réseaux de cartes de débit une séparation de la gestion, propriété et gouvernance de leur système et des infrastructures de traitement des transactions.

En conséquence, une banque pourra décider d'émettre une carte de débit MasterCard, par exemple, mais ne pourra pas utiliser l'infrastructure MasterCard et devra se tourner vers l'infrastructure Du Groupement des Cartes Bancaires, par exemple. Les banques auront donc davantage de possibilités de choix, la concurrence entre infrastructures sera renforcée et l'efficacité de la tarification sera favorisée.

La BCE n'est pas compétente en matière de concurrence mais suit avec intérêt les travaux de la Commission européenne concernant la problématique de l'interchange.

Il ne faut pas que le SEPA ait pour effet de restreindre la liberté de choix et la concurrence ; différentes propositions pourront coexister et aucun scénario ne sera écarté. Il n'est un secret pour personne que MasterCard et Visa sont très bien placés pour devenir leaders sur le marché des réseaux de cartes de débit dans les deux années à venir. Le message important que l'Eurosystème veut adresser aux banques commerciales est qu'elles doivent réfléchir aux choix qu'elles font maintenant, afin de ne pas se retrouver *in fine* face à un marché quasi-monopolistique des systèmes de cartes de débit en Europe.

Le Président se tourne vers le Dr. Wilko Bolt, qui a étudié les effets des coûts de transaction sur le choix des instruments de paiement. Ses travaux peuvent contribuer à trouver un moyen d'inciter les consommateurs à utiliser et choisir le système de paiement le moins onéreux.

Le Dr. Wilko Bolt présente son étude sur la tarification des transactions dans le domaine des paiements électroniques. Il souligne que les travaux sur le marché dual sont très intéressants d'un point de vue théorique mais qu'il voulait réaliser une recherche empirique. Il a comparé deux pays, en l'occurrence la Norvège et les Pays-Bas. La Norvège dispose de données sur les prix depuis longtemps. Les banques norvégiennes proposent aux consommateurs une gamme de prix pour les différents instruments de paiement, tandis qu'aux Pays-Bas, les transactions sont gratuites, en d'autres termes le prix est nul. En Norvège, les virements papier sont onéreux, les virements électroniques et les paiements par carte de débit ne le sont pas, les retraits aux GAB sont coûteux et la tarification est conçue pour orienter les consommateurs vers un choix efficient.

L'étude met en évidence l'importance de la disponibilité des terminaux. Au niveau des paiements aux points de vente, les prix semblent avoir peu d'impact sur la répartition entre espèces, GAB et cartes de débit, tandis que la disponibilité des terminaux joue un rôle plus décisif. Cette disponibilité semble donc être une variable pertinente pour mesurer des déterminants non tarifaires tels que la rapidité et la commodité. Au niveau des paiements sur facture, il existe une forte sensibilité au prix, qui incite les consommateurs à abandonner les virements papier au profit des virements électroniques.

Il est peut-être important que les autorités de la concurrence aient connaissance de cette réalité, puisque le passage du paiement fiduciaire ou papier au paiement électronique peut avoir d'importantes retombées sociales positives. Elles pourraient faciliter la tâche des banques, en insistant auprès d'elles sur l'importance de la tarification et sur le fait que quelqu'un doit se charger d'établir une coordination quant à la date d'entrée en vigueur des prix. C'est ce qui s'est fait en Norvège : il y a eu coordination du calendrier d'entrée en vigueur des prix, mais pas de leur niveau.

Dans cette étude, il ressort d'une rapide analyse coûts-avantages qu'un passage des moyens de paiement papier et fiduciaires aux moyens électroniques permettrait réellement aux banques de réaliser des économies.

En conclusion, si les banques veulent introduire une tarification, elles doivent veiller à ne pas s'attacher qu'aux prix relatifs, mais aussi aux prix absolus. Les prix absolus ont une incidence sur le comportement vis-à-vis des instruments de paiement. Les autorités de la concurrence ont un rôle à jouer en ce qu'elles pourraient faciliter les choses et autoriser une coordination, fût-elle limitée, des banques, parce qu'aucune banque ne veut être la première à introduire une tarification. En 1992, une grande banque néerlandaise a rendu payants les virements papier. Dès le lendemain, elle a vu 15 000 de ses clients partir pour la Post bank, qui proposait ce service gratuitement.

Le Président invite Jean Tirole à faire un rapide commentaire.

Le Professeur Jean Tirole fait observer qu'il n'est guère surprenant que les consommateurs réagissent ainsi aux prix. Le rôle de la commission d'interchange est d'inciter les consommateurs à consommer plus ou moins, ce qui peut entraîner soit une surconsommation, soit une sous-consommation. Les commissions d'interchange ne sont pas assimilables à des pratiques d'entente sur les prix ; elles visent à orienter les consommateurs vers des choix efficaces ou inefficaces en matière de paiement par carte. Cet objectif ne peut être atteint que si les émetteurs répercutent d'une manière ou d'une autre la commission d'interchange, soit en abaissant la cotisation annuelle ou, surtout, les tarifs à l'usage. On peut craindre que, si le secteur bancaire se comporte comme un cartel, la commission d'interchange ne soit pas répercutée sur le porteur de la carte ; cependant, dans ce cas, la meilleure stratégie consiste à attaquer, non pas la commission, mais directement le cartel. Pour le Professeur Tirole, la commission d'interchange n'est pas non plus un outil approprié pour orienter le comportement des commerçants ; ce n'est un moyen indirect.

Concernant la question de savoir s'il faut tenir compte des marges des banques, le Professeur Tirole estime que ce n'est pas le cas s'il y a entente entre les banques. En revanche, il le faut si la banque innove et réduit les tarifs imposés aux consommateurs en cherchant à améliorer sa marge. Dans le domaine des brevets par exemple, les marges de monopole récompensent l'innovation. Il est vrai qu'en ce qui concerne les cartes, la juste position est difficile à trouver, mais de toute évidence, il faut tenir compte des marges, à tout le moins en partie.

Quant à la question du bien fondé ou non d'une réglementation de la commission d'interchange par les pouvoirs publics, elle appelle une certaine modestie. Le Professeur Tirole souligne qu'il a mené des travaux sur des secteurs où les défaillances du marché étaient évidentes, comme ceux des télécommunications et de l'énergie. Il est certes clair que la réglementation fausse le marché, mais il est unanimement reconnu que lorsque l'existence d'une défaillance du marché est évidente, réglementer les secteurs concernés, par exemple pour éliminer les monopoles, a des effets positifs nets. Or, dans le secteur des cartes bancaires, la défaillance de marché n'est pas clairement établie. Il serait donc utile d'étudier davantage cet aspect, au lieu de se contenter d'adopter des règles qui n'ont pas de réel fondement, comme celle qui impose de calculer la commission d'interchange en fonction des coûts ou de la fixer au niveau zéro. Il existe dans l'économie beaucoup de coûts de transfert qui ne sont ni basés sur les coûts réels ni fixés au niveau zéro et cela ne suscite pas de réactions.

Ce matin, Alberto Heimler a émis l'idée qu'il est facile de revenir sur des mesures correctives portant sur les comportements. Or, en réalité, l'important est de chercher à savoir si le système de cartes pourrait fonctionner de manière satisfaisante ou acceptable si la commission d'interchange était nulle ou basée sur les coûts réels. Pour que les observateurs puissent savoir si les transactions par carte sont suffisamment nombreuses par rapport aux transactions en espèces ou par chèque, un test empirique permettant de déterminer si les inefficacités induites par la réglementation seraient compensées par ses effets positifs potentiels est nécessaire. La démonstration faite par David Evans ce matin est importante : on suppose que les commissions d'interchange sont trop élevées et qu'il faudrait les abaisser, et on se demande quelle sera la physionomie du secteur des cartes d'ici cinq ou dix ans. Si les plateformes quadripartites sont attaquées au titre du droit de la concurrence, les systèmes unitaires monteront en puissance ; ces entreprises ne pouvant être poursuivies, les commissions commerçant risquent d'augmenter de 2 à 3 % par rapport à leur niveau actuel. Un tel résultat peut difficilement être jugé satisfaisant.

Le Président fait observer que le problème est que souvent, l'existence d'ententes est difficile à établir avec certitude. Les coûts de changement de banques sont souvent très élevés ; de ce fait, les déposants ne changent pas, si bien que la concurrence du côté des déposants n'est pas très intense. S'ils changeaient de prestataire et récupéraient tout l'argent que la commission d'interchange rapporte à leur banque, peut-être n'y aurait-il pas de problème.

Avant de clore la session, le Président remercie les participants à la table ronde pour leurs présentations et commentaires particulièrement éclairants et souligne que leur présence et celle des délégués des banques centrales a été particulièrement appréciable pour l'ensemble des personnes présentes.