

Unclassified

English - Or. English

14 September 2021

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Cancels & replaces the same document of 14 September 2021**

**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session III:  
Competition and Payment Card Interchange Fees**

**-- Contribution from Chile --**

20-22 September 2021

The attached document from Chile (TDL) is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 20-22 September 2021 via a virtual Zoom meeting.

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**JT03480909**

## *Session III: Competition and Payment Card Interchange Fees*

### *– Contribution from Chile (TDLC)\* –*

#### **1. Introduction**

1. The services associated with the use of universally accepted credit and debit cards as payment methods have been the subject of extensive analysis by competition authorities, in particular, acquiring services that affiliate merchants to card schemes, considering the significant cost of such services for merchants and the particular characteristics of the Chilean market.

2. These services have long been provided by a single entity in Chile, Transbank, which is vertically integrated with the country's main banks. The integration of issuing, operating and acquiring activities in the same entity, which characterises this industry, has therefore been assessed, as described below. However, as a result of a 2017 regulatory change<sup>1</sup> that led to the recent suppression of the NAWI rule, new acquirers and operators have entered the market.

3. The prevailing acquisition model until the beginning of 2020 was a three-party system in which all issuers (banks) delegated merchant affiliation and acquiring processing to the money transfer company, Transbank. In a three-party system – or a proprietary system – the same actor plays the roles of issuer and acquirer. In this system, when cardholders make a purchase from a merchant, they pay the value of their purchase and commission to the issuing bank for access to the card being used to pay (this commission can even be negative). In turn, the issuing bank, the acquirer of the merchant from whom the purchase was made, transfers the value of the purchase to the merchant minus its commission (the merchant discount).

4. In April 2020, Transbank terminated all its operating and delegation contracts with issuers, meaning that their remuneration would no longer be agreed with Transbank, but governed by each brand's interchange fees. Transbank also obtained licences from Visa, Mastercard and American Express to operate as an independent acquirer for these card brands.

5. Due to these changes and because the operations of the new entrants replicate this arrangement, the regulatory authority has indicated that they are operating under a four-party system.<sup>2</sup> Unlike the previous system, issuing and acquiring are not necessarily directly linked under the four-party system, but are instead managed through the affiliation of the actors on each side of the market to one or more card brands, such that the operator

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\* Contribution from the Tribunal de Competencia or “TDLC” (Tribunal de Defensa de la Libre Competencia).

<sup>1</sup> Compendium of Financial Regulations, Central Bank of Chile, chapter III.J.2.

<sup>2</sup> Order No. 635 of 9 July 2020 of the Governor of the Central Bank.

takes responsibility for paying the affiliated merchants. To make the payment, an operator must have a licensing agreement with one or more card brands.<sup>3 4</sup>

## 2. Cases pursued before the competition authorities

### 2.1. Merger: Acquisition of Bancard by Transbank (1990)

6. Transbank began operating in early 1990, handling the administration of Visa credit cards and merchant affiliation for the acceptance of Visa cards. In November 1990, the company Tarjetas de Chile relinquished its role as acquirer for the Diners Club card, with Transbank then consolidating its position in April 1991, once the Central Preventive Commission (CPC) – one of the competition authorities that preceded the TDLC – had approved the merger of the assignment by Bancard to Transbank of Bancard’s contractual position with merchants and issuers for Mastercard (international) and Magna (local) with regard to the affiliation, administration and operation of cards.<sup>5</sup> In the second half of 2000, the affiliation and operation of American Express credit cards was also transferred to Transbank, activities that until then had been carried out by the card brand itself.

7. The CPC approved the Bancard transaction following the favourable report of the *Fiscalía Nacional Económica* [National Economic Prosecutor’s Office – FNE] and the banking regulator, who reported that Bancard’s contracts with the issuers were due to expire imminently and that a merger was inevitable. The CPC argued that greater competition was possible at the level of credit card issuers, since the “administrator”, Transbank, being owned by them, should lower administration costs, which would allow issuers to attract more customers to their own cards by offering more beneficial conditions for cardholders, as a positive effect of vertical integration. However, the CPC had previously required the parties to remove a non-compete clause without a time limit that obliged Bancard and its related parties to obtain Transbank’s consent to launch credit card administration and operation activities. This clause was ultimately limited to five years, a factor that was fundamental to the approval of the transaction.<sup>6</sup>

### 2.2. Transbank’s self-regulation plan (2005)

8. In January 2004, in response to complaints from some businesses regarding the services provided by Transbank and the level of its commissions (merchant discounts),<sup>7</sup> the FNE filed an injunction against Transbank for conduct that would have impeded competition in the relevant acquiring market, in particular, through certain charges and practices arising from vertical integration with issuers (and joint acquiring through a single operator).

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<sup>3</sup> Fiscalía Nacional Económica [National Economic Prosecutor’s Office – FNE] report, case No. 463-20, Request for an opinion by Transbank S.A. on the tariff system implemented by Transbank as of 1 April 2020. Para. 50.

<sup>4</sup> The 2017 Central Bank regulations provided for the creation of companies called payment service providers, also called “sub-acquirers”, which provide acquiring and affiliation services, and must have a contract for processing with an operator.

<sup>5</sup> CPC Opinion No. 757/1991.

<sup>6</sup> CPC Opinion No. 787/1991.

<sup>7</sup> CPC Opinion No. 1270/2003.

9. As part of this process, in 2005 the parties entered into a settlement agreement whereby Transbank was required to comply with certain behavioural obligations intended to remedy the issues raised by the FNE. It was also required to establish a self-regulation plan for the merchant discounts or fees it charges, which must be public, generally applicable, objective and free from arbitrary discrimination.

10. The approved tariff system provides for a percentage fee applied to the total amount of each transaction, and sets out different tariff categories and sub-categories (for example: supermarkets and food, covering supermarkets, food and fast food). Each tariff category has a maximum percentage commission and volume discounts, based on the volume of card transactions (either the average amount of the transactions or the average volume or number of transactions). To determine the discount to be applied to each merchant, each tariff category has a “double-entry table”, which makes it possible to determine the commission applicable to a certain number of transactions based on their average value.

## 2.3. Review of the self-regulation plan

### 2.3.1. Regulatory Amendment Proposal No. 19 of the TDLC, 2017

11. Transbank’s self-regulation plan has been the subject of analysis in various proceedings before the TDLC. Two cases in particular stand out as they not only affected Transbank’s tariff system, but also the overall payments system.

12. Both the TDLC and the FNE have the power to recommend that legal and regulatory provisions be repealed, amended or even enacted, to promote competition.<sup>8</sup> When the FNE submitted a request for an opinion on the amendment of the authorisation of the merger between Transbank and Bancard (see section: Acquisition of Bancard by Transbank), the TDLC, exercising its power to make recommendations, initiated proceedings to determine whether new regulations should be issued for services related to the use of credit and debit cards as payment methods.

13. The FNE’s request that led to the TDLC’s ex officio action appealed to the need to apply new conditions to acquiring services due to the concerted action of issuing banks in the acquiring services market, and the existing level of vertical integration, which offered banks little incentive to handle acquiring themselves, rather than jointly through Transbank, or to entrust it to a different third party.

14. After extensive analysis, the TDLC issued Proposal No. 19 of 2017 which recommended the following proposed legislative amendments in the payment card industry,<sup>9</sup> to be implemented as far as possible in their entirety to promote free competition:<sup>10</sup>

- Pursue the comprehensive regulation of the payment cards industry, from the perspective of the card schemes, establishing regulations that are in accordance with this.

<sup>8</sup> Article 18(4) and Article 39(g) of Decree Act No. 211, establishing the rules protecting free competition.

<sup>9</sup> See the official TDLC press release [https://www.tdlc.cl/nuevo\\_tdlc/proposicion-19/](https://www.tdlc.cl/nuevo_tdlc/proposicion-19/).

<sup>10</sup> The TDLC recommended that the implementation of these proposals should be preceded by a rigorous regulatory impact assessment that considers and justifies, among other aspects, whether the benefits of adopting each measure outweigh the costs of introducing new regulations or amending existing ones. Measure 4.1. Proposal No. 19 of 2017.

- Separate issuing, acquiring and processing activities, considering the different actors and spheres of competence (network provider, issuer, acquirer,<sup>11</sup> acquiring processor – clearly differentiating these last two roles – and issuing processor).
- To promote competition in acquiring, prohibit issuing banks from acting jointly in acquiring, with it being understood that this will require a reasonable implementation period given the contracts in force with the sole processor, Transbank.<sup>12</sup>
- Access measures: (i) require open access to processing networks for the benefit of acquirers, and regulate the conditions under which network providers may enter into contracts with acquiring service providers, to the extent that such networks have available capacity, there are no technical impediments preventing additional use and there are competitive conditions that justify it; and (ii) require payment card industry actors operating in different processing networks to interconnect, setting operational and tariff conditions, operational and technological standards, and points of exchange.
- Prohibit the NAWI rule so that companies offering acquiring services can enter into contracts with issuing banks and directly with network providers, for example, international card brands.
- Prohibit the no discrimination (no surcharge rule), i.e. prohibit the inclusion of this rule in standard contracts, allowing the merchant and the acquirer to freely decide the content of the contract in this matter, as it could result in an inefficient allocation of resources and cross-subsidies between those who use payment methods such as cards, which are generally more expensive, and those who use cash.
- Set interchange fees: the TDLC found that under the existing system, in which all card issuers affiliate merchants through Transbank, there is an implicit interchange fee, which has remained unchanged, despite decreases in merchant discounts. The TDLC indicated that, to promote competition in the acquiring sector, the authority should regulate this interchange fee in the most efficient way possible, providing adequate incentives to encourage participation in this activity.

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<sup>11</sup> From the merchant's point of view, the acquirer is its only counterparty, which offers the services required to take card payments and is responsible for the proper functioning of this service, regardless of whether it also provides acquiring processing services or whether it subcontracts this activity to a third party. Measure 2.1. Proposal No. 19 of 2017.

<sup>12</sup> The TDLC noted that this measure does not apply to the activities that Transbank undertakes as a processor of transactions carried out through payment providers, in which the economies of scale that can be achieved and the high technical and infrastructure investment requirements are relevant, all of which justifies that two or more credit and debit card issuers can use the same processor and develop a shared platform that allows them to enter into contracts with more than one acquirer. Measure 3.2. Proposal No. 19 of 2017.

### 2.3.2. *Decision No. 53 of the TDLC, 2018 – Farmacias Cruz Verde opinion*

15. The TDLC has advisory jurisdiction, meaning that economic agents may request judgements aimed at granting or denying the consulting party legal assurance<sup>13</sup> as provided in Legislative Decree No. 211 for acts or contracts executed or entered into in accordance with its decisions.<sup>14</sup>

16. Exercising this power, the TDLC ruled on a request for an opinion regarding the criteria applied by Transbank to determine the merchant discount charged in the pharmacy chain sector, considering the commission charged in other similar sectors, and whether this discrepancy was consistent with free competition.

17. In this case, Decision No. 53 established that Transbank was in breach of the requirement to establish public, objective, generally applicable and non-discriminatory merchant discounts and, therefore, was not compliant with competition regulations. Transbank was ordered to propose a new self-regulation plan to the FNE within three months. Minimum criteria were set for the amended self-regulation plan, summarised as follows:

- It may not discriminate by category or sub-category.
- Merchant discounts may be reduced (discounted) based on the number of card transactions at each merchant.
- Merchant discounts may be reduced based on the average value of the merchant's card sales.
- Reductions (discounts) applied to merchant discounts must be marginal.
- How the number of transactions and the amount (or value) of the average sale of a given merchant is calculated must be defined.
- A single double-entry table showing the merchant discounts applicable to credit cards may also show the reduction, as a percentage of the sale value, applicable to debit card transactions.
- No merchant discount applied to cards may be higher than the highest merchant discount currently charged for transactions with the same type of card.

18. This Decision was the subject of an appeal to the Supreme Court of Justice. In its judgement, the Court called on the relevant authorities, given current international practice and the characteristics of the Chilean market, to consider adopting measures to regulate the merchant discount that Transbank may charge to merchants.<sup>15</sup> This statement was referring to the regulation of interchange fees at international level, in particular Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (Grounds Nos. 24, 28, 29, 30 of the Court's judgement).

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<sup>13</sup> TDLC Ruling No. 5/2004 on how to process complaints or injunctions, on the one hand, and requests for opinions, on the other, when they relate to the same facts, in relation to the “non-contentious” proceedings provided for under Article 31 of the current text of Legislative Decree No. 211.

<sup>14</sup> Pursuant to Article 32 of Legislative Decree No. 211, the acts or contracts approved “shall not give rise to any liability in this matter, except in the event that, subsequently, and on the basis of new information, they are qualified as contrary to free competition by the Competition Tribunal itself”.

<sup>15</sup> Judgement of 27 December 2019, Supreme Court Case No. 24.828-2018.

19. Although the judgement overruled Decision No. 53 of 2018, it did declare that since Transbank's practices were not compatible with the competition regulations, Transbank must "adapt its self-regulation plan in accordance with the instructions contained in this judgement, pursuant to which it must establish merchant discounts that are public, justified, objective, reasonable, generally applicable, non-discriminatory and respectful of the constitutional guarantee of equality before the law, with respect to which, in addition, it may not differentiate between merchants based on the volume of transactions, the total amounts in predetermined periods, category or sub-category (...)".

20. Nevertheless, this Decision was adopted "awaiting the adoption by the competent authority of relevant regulations for a four-party system or one that fully replaces the existing one".

### 3. 2020 opinion on Transbank's new self-regulation plan (case pending)

21. In May 2020, Transbank submitted a request for an opinion to the TDLC, seeking a declaration of conformity with the competition regulations in respect of its new tariff system implemented as of 1 April 2020, which involves the self-regulation of its acquiring margin (rather than the merchant discount as was previously the case). This tariff system proposes a pricing scheme applicable to: (i) issuers; (ii) payment processing service providers; (iii) merchants; and (iv) operators.

22. According to its submission to the TDLC, Transbank is operating in the payment card acquiring market under the four-party system. It also argues that circumstances in the payment card industry have changed, which means that the self-regulation plan that Transbank followed under the three-party system has become devoid of purpose, as this self-regulation plan was based on an operating model not used by Transbank since 1 April 2020.

23. According to Transbank, the self-regulation plan approved by the TDLC in 2005 is no longer valid as a result of the settlement agreement with the FNE, since its scope of application refers to Transbank operations under the old three-party system.

24. The various issues raised in this request for an opinion, together with the contributions and requests of the various actors in the acquiring market, including the new acquiring operators, will be decided on by the TDLC in its ruling, which may simply approve the new tariff system adopted by Transbank, approve it under certain conditions, or reject it.

### 4. Setting interchange fees

25. Taking up the measure proposed by the TDLC in Proposal No. 19 of 2017, a new act regulating payment card interchange fees came into force, with the process of setting the fees currently under way.<sup>16</sup> The act creates a new institutional framework (a panel of experts known as the Committee for Setting Caps on Interchange Fees) which will set provisional interchange fees within six months.<sup>17</sup>

<sup>16</sup> Act No. 21.365, published in the Official Gazette on 6 August 2021.

<sup>17</sup> The Committee is composed of four members appointed by the Minister of Finance, the Board of the Central Bank of Chile, the Financial Market Commission (the financial regulator and supervisory authority) and the FNE.

26. The act defines interchange fees as any type of income or payment that an issuer is entitled to receive from an operator, directly or indirectly in connection with transactions settled and/or paid by the latter, for the use of cards issued by the former, whether the payments corresponding to the transactions are made directly or through the relevant card brand owner. The same act provides that the rates set will constitute caps on interchange fees.

27. A process was therefore established to ensure the participation of all interested parties, in which issuers and operators, card brand owners, payment processing service providers contracted by them, affiliated entities, consumer associations and, in general, any interested party, may give their opinion and send their proposals for consideration. The decision that determines the caps on interchange fees should consider the comments of the interested parties and take a position based on all of them.