About EuroCommerce

EuroCommerce is the principal European trade association representing European retailers and wholesalers. EuroCommerce’s membership includes leading multinational retailers, such as Carrefour, Ikea, Metro, and Tesco; national retail trade associations in 31 countries; and affiliated trade federations representing specific retail and wholesale sub-sectors. Overall, EuroCommerce represents 5.4 million businesses, employing 29 million people (one in seven European jobs), and serves 500 million consumers over one billion times a day.

About Zephyre

Zephyre is a specialist antitrust and economics advisory firm focusing on the financial services and technology sectors. Zephyre advises businesses, public sector bodies, and civil society organisations. Zephyre is currently advising on various EU antitrust and regulatory actions. Zephyre partners with other leading advisory firms.
## Contents

1. Executive summary.  

2. The Commission’s review must comprehensively evaluate the Interchange Fee Regulation.  

3. The objective of the Interchange Fee Regulation was “lower prices for everyone”.  
   3.1 EU antitrust enforcement has consistently found that payment card scheme wholesale prices and rules harm competition.  
   3.2 The EU’s 2012 retail payments Green Paper set out a vision and objective that retailers and consumers should be “able to benefit from cheap, efficient and secure electronic payment solutions”.  
   3.3 The Commission proposed ongoing regulation of payment card interchange fees and other payment card scheme rules.  

4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees.  

5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments.  
   5.1 The regulated interchange fee caps appear inconsistent with the stated basis for setting the caps in the Regulation.  
   5.2 The Regulation creates a continuing distortion of competition between card and non-card payment methods.  

6. The Interchange Fee Regulation must regulate all payment card interchange fees.  
   6.1 The exemption of commercial cards from the Regulation has resulted in a large growth of commercial card costs for merchants.  
   6.2 Exemption of inter-regional cards has caused large costs to European merchants and consumers.  
   6.3 Exemption of three-party card schemes causes further high costs to merchants and consumers, and associated distortion of competition.  
   6.4 Exemption of virtual card payment fees and business rules raises a wide range of antitrust concerns.  
   6.5 Exemption of ATM cash withdrawals creates a further large distortion of competition, and additional costs to merchants and consumers.
7. **Major infringements of the Interchange Fee Regulation appear to have gone unchallenged.** 112

7.1 Article 5 prohibits circumvention of the interchange fee caps. 114
7.2 Article 6 prohibits territorial restrictions in licensing agreements or payment card scheme rules. 121
7.3 Article 9 requires card schemes to “unblend” the amount of interchange fees and scheme fees applicable to each category and brand of payment cards. 124
7.4 Article 10 prohibits the “Honour All Products” element of the “Honour All Cards Rule”. 127
7.5 Article 11 prohibits steering rules restricting competition between payment card schemes. 132

8. **Major reforms of the Interchange Fee Regulation are now needed.** 134

9. **Annex: Application of Chapter III of the Interchange Fee Regulation to ATM cash withdrawal transactions.** 143
1. Executive summary.
1. **Executive summary.**

   EuroCommerce welcomes the European Commission’s (“the Commission”) review of the EU Interchange Fee Regulation – Regulation (EU) 2015/751 – (“the Regulation”), which regulates payment card scheme wholesale fees, known as “interchange fees”, for consumer debit and credit card transactions carried out within the European Economic Area (EEA), among other payment card scheme rules. Payments of course are a central function of the European economy, on which jobs, growth, and investment in every other sector depends.

2. EuroCommerce\(^2\) first brought complaints to the EU about Mastercard’s and Visa’s anti-competitive fees and platform rules almost 30 years ago. The Commission’s subsequent antitrust investigations – in which “the Commission and EU Courts have consistently found that rules providing for default multilateral interchange fees in 4-party payment card schemes harm competition”\(^3\) – and adoption of the Regulation have been greatly welcome to European retailers, and of course to consumers.

3. The Regulation was a response in particular to the Commission 2012 Payments Green Paper’s call for “more competition […] to mitigate the current domination of the [European] payment cards market by the two existing international card schemes [Mastercard and Visa] [including...] more choice and transparency for consumers”\(^4\). EuroCommerce strongly supported and welcomed these objectives.

4. However, since the Regulation came into force in 2015, Mastercard’s and Visa’s market share, profitability, and dominance of the European payments market have continued to grow, as illustrated by data from the European Central Bank (“the ECB”) at Figure 1 below, and echoed in recent media comments by the *Financial Times*:

   “These days, consumers have more ways than ever to pay for things. Companies from Apple and Starbucks to PayPal and Amazon have all devised new ways for [consumers] to make purchases. In theory, their rise is supposed to disrupt the lock that credit card companies have on the payment business. In practice, they simply offer different ways to connect a card to execute a transaction. As a result, credit card issuers and

---


\(^2\) And the British Retail Consortium.

\(^3\) European Commission observations (Amicus curiae observations to national courts) in Visa and MasterCard MIFs (several cases under appeal) in the England & Wales Court of Appeal, February 2018.

processors have seen their positions strengthened, not weakened, by the proliferation of payment options.

[…] All this is translating into good times for [the] credit card industry. Shares in sector leaders Visa, Mastercard and American Express have all set new highs this year.”

**Figure 1: International payment card scheme market position in Europe continues to grow.**

Source: European Central Bank.

These data and observations illustrate that Mastercard and Visa remain essential and unavoidable suppliers to the European retail sector.

The Commission’s objective in launching the Regulation was to address the “hidden fees imposed on retailers for accepting payment cards [in particular, fees known as payment card interchange fees, which...] retailers in turn pass on to consumers in higher prices [...and which] neither retailers nor consumers can

---

influence”. This would then achieve the European Parliament’s aim of “lower prices for everyone”, namely of lower retail prices for goods and services throughout Europe.

7. EuroCommerce strongly supported and welcomed these objectives and intentions of the Regulation. EuroCommerce is concerned however that the Regulation has only brought temporary savings to merchants – and consumers – which are rapidly being undone. EuroCommerce is concerned in particular that the card schemes have made large increases in unregulated fees imposed on merchants, commencing immediately after the Commission’s evaluation period for the Regulation. Such fee increases reflect various ways that the schemes have found to escape the purpose of the Regulation. Indeed, such fee increases – including announcements of further large increases to come – have already substantially negated the benefits of the regulated interchange fee caps. Alongside these changes, choice and transparency of payment methods for consumers – such as access to cash – has weakened.

8. Overall, these developments have had the effect of reinforcing the market position of the card schemes in Europe – and of card-based payments – while hastening the demise of cash and creating barriers to new non-card based-payments, and demonstrates that reform of the Regulation is now needed.

9. Concerns about the Regulation and market position of the card schemes are reflected in recent ECB comments:

“The objectives of the [Interchange Fee Regulation (IFR)] are to enhance competition and increase the efficiency of the European cards market. [...] Based on the [ECB’s] market consultation, it remains to be seen whether the objectives of the IFR have been successfully addressed. [...] Overall, perception of the IFR adoption appears rather mixed [...]. Hence, the review study planned by the European Commission for 2020 is of the utmost importance to provide more insight into market dynamics.”

8 European Parliament press release: MEPs secure deal to cap card payment fees, December 2014.
9 Of 2016 and 2017 (plus base year of 2015 before the Regulation came into effect).
10 EuroCommerce welcomes the ECB’s recently launched vision of “an industry-led, pan-European retail payment solution [...] that facilitates instant, secure and inexpensive payments.” The success of such a vision though depends on reform of the Regulation.
“Dependence on non-European global [retail payment] players creates a risk that the European payments market will not be fit to support our Single Market and single currency [...] and that service providers with global market power will not necessarily act in the best interest of European stakeholders”12.

10. We note in addition the findings of the Commission’s recent Special Advisers’ report on Competition Policy for the Digital Era13, that “large incumbent digital players are very difficult to dislodge”, that “there is reasonable concern that such firms have strong incentives to engage in anti-competitive behaviour, thereby requiring vigorous competition policy enforcement”, and that “dominant platforms have ‘regulatory power’ and have a responsibility to use that power in a pro-competitive manner”14.

11. Mastercard and Visa are of course themselves global digital platforms, characterised by large returns to scale, network externalities, and data-driven services15. Moreover, their market capitalisation is now of the same order of magnitude – and they have substantially higher profit margins – when compared to the other global tech giants, such as Amazon, Apple, Facebook, Google, and Microsoft16. The ability of the global payment card schemes to raise their prices substantially and to set their own platform rules reflects such market power.

12 “Towards the retail payments of tomorrow: a European strategy”, Speech by Benoît Coeuré, Member of the Executive Board of the ECB, at the Joint Conference of the ECB and the National Bank of Belgium on “Crossing the chasm to the retail payments of tomorrow”, Brussels, 26 November 2019, European Central Bank.


14 See the same concerns also stated by European Commission Executive Vice-President Margrethe Vestager that when a firm (or firms) have “won” a given digital market, then those firms become the “de facto the private regulator” of the market and that when such “gatekeepers [that] own the market […] don’t apply privately set rules of fair competition, then obviously [policy makers and regulators] have an issue” and “therefore it is necessary to keep focusing on what happens with dominant companies in such fast-moving markets”. (European Parliament Hearing of Executive Vice-President-Designate Vestager of 8 October 2019, transcript para. 1-039-0000 and 1-049-0000.)

15 For example, Mastercard describes itself as a “technology company in the global payments industry” that “connects consumers, financial institutions, merchants, governments, digital partners, businesses and other organizations worldwide” (see most recent Mastercard annual report). Visa describes itself as “the world’s leader in digital payments” and its “mission is to connect the world through the most innovative, reliable and secure payments network – enabling individuals, businesses and economies to thrive” (see most recent Visa annual report).

16 Mastercard and Visa’s combined market capitalisation is now exceeded only by Amazon, Apple, Google, Microsoft, and Saudi Aramco (as at end 2019). Mastercard and Visa also have much higher profit margins (57% combined average operating margin) than all the other largest global tech giants, i.e. Amazon, Apple, Facebook, Google, and Microsoft (22% combined average operating margin). Sources: Yahoo Finance and company annual reports.
1. Executive summary. continued

and for regulation of all fees that have an equivalent object or effect as interchange fees, in particular by:

I. Regulation of the total wholesale fees charged to payment card acquirers (including but not limited to interchange fees);

II. Removal of all substantive exemptions or exclusions from the Regulation (including commercial cards, three-party card schemes, cash withdrawals at automated teller machines (ATMs), inter-regional cards, and virtual card transactions);

III. Provision for independent acquiring of three-party card schemes (in order to regulate three-party and four-party schemes equally);

IV. Provision for mandatory minimum interchange fees for cash withdrawals and deposits at ATMs (in order prevent circumvention of the Regulation, and protect consumer choice and access to cash); and

V. Strong and dissuasive penalties for non-compliance with the regulation.

13. EuroCommerce is aware that the card schemes and major banks have been lobbying strongly for “no change” to the Regulation, arguing that “concerns about excessive fees have been mitigated by the interchange fee caps”\(^7\). However, this is in contrast with EuroCommerce members’ experience of recent and significant fee rises – and at odds with the card schemes’ repeated boasts to their shareholders of successive fee rises and of further large intended rises to come, as documented in this report.

14. Last, in EuroCommerce’s view, there have been substantial infringements of the Regulation by the card schemes, which appear to have gone unchallenged, including infringement of:

- Article 5 (Prohibition of circumvention), for card schemes imposing net compensation to card issuers with an equivalent object or effect as the interchange fee;
- Article 6 (Licensing), for card schemes applying territorial restrictions in licensing agreements or payment card scheme rules;
- Article 9 (Unblending), for card schemes precluding acquirers from unblending the amount of the scheme fees applicable to each category of payment cards;
- Article 10 (“Honour All Cards” rule), for applying rules that obliges payees accepting one card-based payment instrument also to accept other card-based payment instruments; and

\(^7\) For example, Visa representative, Payments International Conference, London, November 2019.
1. Executive summary. continued

- Article 11 (*Steering rules*), for preventing payees from steering consumers to the use of any payment instrument preferred by the payee.

15. In order to develop EuroCommerce’s position, EuroCommerce commissioned Zephyre, a specialist antitrust and economics advisory firm, to make an evaluation of the background and effects of the Regulation, and to prepare this report. The report includes substantial input from EuroCommerce members and affiliated trade associations.

16. The remainder of this report describes why:
   i. the Commission’s review must comprehensively evaluate the Interchange Fee Regulation;
   ii. the objective of the Regulation was “lower prices for everyone”;
   iii. the Regulation must regulate all fees that have equivalent object or effect as interchange fees;
   iv. the Regulation must ensure neutrality between card-based and non-card-based payments;
   v. the Regulation must regulate all payment card interchange fees;
   vi. major infringements of the Regulation have apparently gone unchallenged; and
   vii. major reforms of the Regulation are now needed.
2. The Commission’s review must comprehensively evaluate the Interchange Fee Regulation.
2. The Commission’s review must comprehensively evaluate the Interchange Fee Regulation.

17. Following complaints from European merchants about the high and unavoidable costs of accepting payment cards in the EU – and subsequent longstanding EU and Member State antitrust investigations, which found that centrally-set wholesale fees in payment card schemes – known as “interchange fees” – harmed competition and consumers, the EU Interchange Fee Regulation (“the Regulation”) came into force between June 2015 and June 2016.

18. Like most EU legislation, the Regulation contains a review clause (Article 17) which requires that, by June 2019, the European Commission (“the Commission”) submits a report to the European Parliament and the European Council on whether the Regulation has achieved its intended objectives; in particular, as to the appropriateness of the levels of interchange fees allowed by the Regulation, of the effect of “steering mechanisms”, and of the level of entry of new players and innovative business models on the market.

19. In preparing for its report, the Commission has said that:

“[The Commission’s] report will compare the situation before the Regulation’s entry into force ([known as] ‘time 0’) to the situation after [...] and will look] in particular at the appropriateness of the levels of interchange fees and at the overall level of fees including the Merchant Service Charges. As well as that, it will take into account the use and cost of the various means of payments and the level of entry of new players, new technology and innovative business models on the market.”

20. The Commission will particularly consider data from banks, card schemes, and retailers. To achieve this, in 2016, the Commission issued questionnaires to payment market participants, asking for information on payment acceptance methods, and costs and fees for payment card acceptance, among other things (known as the “Zero Study”).

21. Subsequently, in 2018, the Commission issued a Call for Tenders for a “Support Study” on the application of the Interchange Fee Regulation. The Support Study’s tender specifications highlight that “Article 17 of the Regulation requires a comprehensive qualitative and quantitative analysis of the Regulation’s technical, economic and legal effects on:

---

18 European Commission website (Competition/ Financial services/ Banking & Payment systems/ Legislation in the payment services area).
21 European Commission Tender specifications COMP/2018/005.
2. The Commission’s review must comprehensively evaluate the Interchange Fee Regulation. continued

i. Fees and costs for cardholders and retailers, including interchange fees, scheme fees, card fees and merchant service charges, the interrelation between those fees and costs and the actual value of interchange fees for medium and high value debit card transactions;

ii. Sector evolution, including competition between issuers and schemes;

iii. Revenues for schemes and issuers;

iv. Merchant pass-through of fee reductions;

v. Use of commercial cards and relating surcharges; […]

vi. Technical requirements;

vii. Co-badging;

viii. Special provisions for interchange fees for domestic debit card transactions;

ix. Cross-border acquiring, comparing the effects of non-capping with capping;

x. Separation of card schemes and processing;

xi. Interchange fees for medium and high value debit card transactions.”22

22. In addition, the Tender Specifications say that “the subject of [the] Study is a comprehensive evaluation of the effects of the Regulation on the evolution of the EU card payments sector in accordance with Article 17 […]and] The findings of the Study shall inform the Commission Report to the European Parliament and to the Council on the application of the Regulation”23.

23. The Support Study was awarded to EY, in combination with Copenhagen Economics, with the objective of collecting and analysing “key qualitative and quantitative market information from all Member States since the date of application of the Interchange Fee Regulation in order to comprehensively assess its effects on the EU card payments sector”24. EY subsequently issued a series of questionnaires concerning the study to merchants, card issuers, card acquirers, three-party card schemes, four-party card schemes, consumer and user associations, and regulatory authorities, for the three-year period between 2015 and 201725. EuroCommerce understands that the Commission and EY have just presented a final version of the study to Member States.

24. In anticipation of the Commission’s review, and following previous antitrust and regulatory support to EuroCommerce, EuroCommerce asked Zephyre to prepare

22 Para. 5.
23 Para. 8.
25 Namely, the “base year” before the Regulation came into effect (2015) and two years after the Regulation came into effect (2016 and 2017).
2. The Commission’s review must comprehensively evaluate the Interchange Fee Regulation. continued

this report, for submission to the Commission’s review, to provide a comprehensive assessment of the Regulation on the European payments market from the perspective of merchants and consumers, as required by Article 17.

25. Zephyre has previously supported EuroCommerce on related matters including EuroCommerce’s response to the Commission’s market test of proposed commitments concerning Mastercard’s and Visa’s inter-regional interchange fees. Among other things, Zephyre is also currently advising over 500 European businesses in litigation concerning interchange fees and related payment card scheme rules.

26. This report reflects extensive input, support, and agreement from EuroCommerce’s membership and affiliated member associations, among other interested parties.


27 See Adventure Forest Ltd and others v Mastercard; Adventure Forest and others v Visa; Dune Group Ltd and others v Mastercard; Dune Shoes Ireland Ltd and others v Visa in the England & Wales High Court, 2017.
The objective of the Interchange Fee Regulation was “lower prices for everyone”.

3. The objective of the Interchange Fee Regulation was “lower prices for everyone.”

27. The EU Interchange Fee Regulation originated in longstanding complaints by European retailers against the high and unavoidable costs of accepting card payments in the EU. These complaints led to successive EU and Member State antitrust enforcement action against the major international payment card schemes, Mastercard and Visa, in addition to various national payment card schemes. The EU’s chief finding in these investigations was that centrally set wholesale fees in European payment card schemes – known as “multilateral interchange fees” (MIFs) – harm competition and consumers.

28. These antitrust findings in turn led to the EU’s 2005 Sector Inquiry into Retail Banking\textsuperscript{28}, the EU’s 2012 Retail Payments Green Paper\textsuperscript{29}, and the Commission’s subsequent proposal for an EU regulation of card payment interchange fees\textsuperscript{30}.

29. For reference, Figure 2 below shows the participants of so-called “four-party”\textsuperscript{31} payment card schemes (also known as “open payment card schemes” or “open loop” card schemes) that are subject to the Regulation, when used for purchase transactions, in particular:

- the \textit{payer} (the person or organisation making the payment), known as the cardholder;
- the \textit{payee} (the person or organisation receiving the payment), known as a merchant;
- the \textit{payer’s} (cardholder’s) \textit{payment service provider (PSP)}, known as the card issuer; and
- the \textit{payee’s} (merchant’s) \textit{PSP}, known as a merchant acquirer (or card acquirer); and
- the \textit{payment card scheme}, for example, Mastercard, Visa, or a national payment card scheme.

\textsuperscript{28} Commission press release IP/05/719: “Competition: Commission opens sector inquiries into retail banking and business insurance”.


\textsuperscript{31} The “four parties” refers to the cardholder, merchant, card issuer, and merchant acquirer (but not including the payment card scheme itself).
3. The objective of the Interchange Fee Regulation was “lower prices for everyone”.

continued

Figure 2: Four-party payment card schemes comprise multiple participants and fees.

- cardholders may pay a **cardholder fee** to the card issuer (or receive rewards or other incentives from the card issuer);
- cardholders may also pay a **surcharge** to the merchant, on top of the purchase price of the goods or services being purchased (for example, for use of certain types of payment card);
- merchants pay **merchant service charges (MSCs)** to the merchant acquirer to accept card payments;
- merchant acquirers normally pay **interchange fees** to card issuers (known as multilateral interchange fees (MIFs) when set centrally by the payment card scheme[32]);
- card issuers may pay **issuer scheme fees** to payment card schemes; and
- merchant acquirers pay **acquirer scheme fees** to payment card schemes.

30. In addition, Figure 2 shows the various fees between respective participants, in particular that:

31. This remainder of this section explains the origins and objectives of the Regulation.

[32] And known as bilateral interchange fees (BIFs) when agreed bilaterally between card issuers and merchant acquirers.
3. The objective of the Interchange Fee Regulation was “lower prices for everyone”.

3.1 EU antitrust enforcement has consistently found that payment card scheme wholesale prices and rules harm competition.

32. European retailers have raised longstanding and successive complaints about payment card fees, in particular, led by EuroCommerce and the British Retail Consortium (BRC), the EU’s and UK’s leading retail trade associations respectively.

33. In 1992, the BRC complained that Europay’s (now Mastercard) and Visa’s cross-border payment card interchange fees unlawfully restricted competition. In 1997, EuroCommerce additionally complained that Mastercard and Visa’s interchange fees restricted competition, alongside other card scheme rules, in particular, Mastercard and Visa’s no discrimination rules (NDRs) and honour all cards rules (HACRs). In 2009, EuroCommerce made a further complaint, that Visa’s intra-regional interchange fees – namely, for the fees for transactions between European Economic Area (EEA) Member States – and associated scheme rules for consumer and commercial debit and credit cards in the EEA infringed EU competition law, resulting in harm to merchants and consumers.

34. In reply to these complaints, the Commission opened a series of antitrust investigations into Mastercard and Visa’s wholesale fees and associated scheme rules. In response, Visa offered various voluntarily commitments to reduce its interchange fees and change its card scheme rules. This led to temporary exemptions of Visa’s interchange fees and associated rules from further investigation. In contrast, Mastercard did not offer at any time (until recently) to change its interchange fees or relevant scheme rules. This ultimately led to the Commission ordering Mastercard to reduce its interchange fees for cross-border payment card transactions within the EEA.

35. Specifically, the Commission carried out a series of investigation of interchange fee and related payment card scheme rules, including:

- in 2000, the Commission found that certain Visa card scheme rules restricted competition, including objections that Visa’s interchange fee represented a restrictive collective price agreement.

---

34 See European Commission press release IP/00/1164: “Commission plans to clear certain Visa provisions, challenge others” and IP/01/1198: “Commission clears certain provisions of the Visa International payment card system”.

---

EuroCommerce submission to the EU Interchange Fee Regulation Review
February 2020
3. The objective of the Interchange Fee Regulation was “lower prices for everyone”.

- in 2002, the Commission exempted Visa’s cross-border interchange fees, following Visa’s agreement to reduce these fees;\(^\text{35}\)
- in 2006, the Commission issued objections that Mastercard’s interchange fees for cross-border payment card transactions within the EEA restricted competition – by inflating the charges to merchants for accepting card payments – contrary to EU competition law, followed by a Prohibition Decision confirming the Commission’s finding, including an order for Mastercard to reduce its interchange fees, which Mastercard subsequently appealed against;\(^\text{36}\)
- in 2008, the Commission announced new proceedings against Visa concerning whether Visa’s cross-border interchange fees within the EEA and Visa’s Honour all Cards Rule infringed EU competition law, leading Visa to make voluntary commitments to reduce its intra-EEA interchange fees for consumer debit cards;\(^\text{40}\)
- in 2012, the Commission sent supplementary objections that Visa’s intra-EEA interchange fees for consumer credit cards violated EU antitrust rules, leading Visa to offer voluntary commitments to reduce these fees;\(^\text{42}\)
- in 2013, the Commission opened an in-depth investigation into Mastercard’s “inter-bank” fees, in particular, into Mastercard’s fees for payments made by cardholders from non-EEA countries (known as inter-regional interchange fees), MasterCard’s rules for cross-border acquiring

---

\(^{35}\) See European Commission press release IP/02/1138: “Commission exempts multilateral interchange fees for cross-border Visa card payments” and Commission decision of 24 July 2002 Case No COMP/29.373 — Visa International — Multilateral Interchange Fee, known as the “Visa II Decision”.


\(^{38}\) Mastercard appealed against the Commission decision, first to the European Union General Court and then to the European Union Court of Justice. In 2014, the Court of Justice rejected Mastercard’s appeals. See Commission MEMO/12/377: “Antitrust: Commission welcomes General Court judgment in MasterCard case”, JUDGMENT OF THE GENERAL COURT of 24 May 2012 in Case T-111/08 Mastercard v European Commission, Commission Memo: “Antitrust: Commission welcomes Court judgment confirming that MasterCard’s payment card interchange fees are anti-competitive” and Judgment of the Court of Justice of 11 September in Case C-382/12 P Mastercard and Others v European Commission.


3. The objective of the Interchange Fee Regulation was “lower prices for everyone”. continued

(rules that limited the scope for merchants to benefit from better offers by banks established elsewhere in the EEA), and related business rules or practices (including Mastercard’s Honour All Cards Rule)\(^43\) – which subsequently led to Mastercard offering voluntary commitments to reduce its inter-regional interchange fees\(^44\) and to the Commission fining Mastercard €570 million for obstructing merchants’ access to cross-border card payment services\(^45\); and

- in 2017, the Commission sent further objections to Visa concerning Visa’s inter-regional interchange fees for consumer payment cards\(^46\), leading Visa to make voluntary commitments to reduce these fees\(^47\).

36. The Commission’s various decisions finding that payment card interchange fees restrict competition have themselves led to successive claims for damages by retailers and consumers against Mastercard and Visa, especially in the UK\(^48\). The Commission has itself intervened in these claims in strong support of claimants, in particular:

“The [European] Commission and EU Courts have consistently found that rules providing for default [multilateral interchange fees (MIFs)] in 4-party payment card schemes harm competition in the [payment card] acquiring market by impeding the ability of merchants to negotiate the fees charged by acquirers below the threshold imposed by the MIF.

 [...] The specific characteristics of four party payment systems, and the two-sided markets involved, merit particular scrutiny under [competition law] because normal pricing constraints do not apply. Those features facilitate the imposition of high costs on merchants, through coordinated behaviour by the banks, the impact of which is further exacerbated by the


\(^{44}\) See CASE AT.40049 - MASTERCARD COMMITMENTS OFFERED TO THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 9 OF COUNCIL REGULATION NO 1/2003 and European Commission - Press release: Commission accepts commitments by Mastercard and Visa to cut inter-regional interchange fees (2019).

\(^{45}\) See European Commission - Press release: Commission fines Mastercard €570 million for obstructing merchants’ access to cross-border card payment services (2019).


\(^{47}\) See CASE AT.39398 - VISA INTER-REGIONAL MIFS COMMITMENTS OFFERED TO THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 9 OF COUNCIL REGULATION NO 1/2003 (2018).

\(^{48}\) See for example, Sainsbury’s v Mastercard (2016); Asda, Arcadia, Argos, WM Morrison, and others v Mastercard (2017), Sainsbury’s v Visa (2017), Merricks v Mastercard (2017), Adventure Forest Ltd and others v Mastercard (2017); Adventure Forest and others v Visa (2017); Dune Group Ltd and others v Mastercard (2017); Dune Shoes Ireland Ltd and others v Visa (2017), among others.
3. The objective of the Interchange Fee Regulation was “lower prices for everyone”.

significant upward pressure on MIFs arising out of inter-system competition between card schemes and the appetite of card-holders for rewards and other benefits. Unlike price signals in conventional markets, higher MIFs make a scheme more attractive to issuers and card-holders, but draw increasing amounts of revenue away from merchants, to the detriment of their customers.”

Furthermore, regulators in many other countries have adopted similar regulatory actions concerning payment card interchange fees and related payment card scheme rules. For example, in the UK, now 30 years ago, the then national competition authority found that Mastercard and Visa’s credit card non-discrimination rules restricted competition:

“Mastercard’s and Visa’s credit card ‘no discrimination rules’ [...] operate against the public interest and should be prohibited, as it restricts the freedom of retailers to set their own prices.”

In the US, regulators have found that payment card anti-steering rules (of which card scheme no discrimination rules are one type) have caused major anti-competitive harm to consumers, for example:

“[Payment card scheme] anti-steering rules have effectively eliminated competition among credit-card networks on the fees charged to merchants. [...] Eliminating price competition and blocking rivals in this $50 billion market are paradigmatic anticompetitive harms. [...] [The anti-steering rules] impose ‘actual, sustained adverse effects on competition,’ [...] by stifling price competition, blocking rivals, raising merchant fees, and ultimately inflating the retail prices paid by all [consumers and businesses]. [...] The anti-steering rules make it ‘nearly impossible’ for a new firm to enter the market. [...] The anti-steering rules distort the market—and harm both merchants and cardholders—by precluding legitimate forms of competition on both sides of the platform.”

Such payment card non-discrimination and anti-steering rules are now prohibited by the EU Interchange Fee Regulation.

---

49 European Commission observations (Amicus curiae observations to national courts) in Visa and MasterCard MIFs (several cases under appeal) in the England & Wales Court of Appeal, February 2018.
51 Reply Brief for the United States in the Supreme Court of the United States in US v American Express, No. 16-1454, United States Department of Justice, 2018.
3. The objective of the Interchange Fee Regulation was “lower prices for everyone”.

3.2 The EU’s 2012 retail payments Green Paper set out a vision and objective that retailers and consumers should be “able to benefit from cheap, efficient and secure electronic payment solutions”.

40. Further to merchants’ complaints about payment card schemes and the Commission’s subsequent antitrust investigations, in 2005, the Commission launched a sector inquiry into retail banking with particular focus on payment cards. The inquiry found multiple competition concerns in the markets for payment cards and payment systems, including:

- “highly concentrated [payment] markets in many Member States”;
- “large variations in merchant fees across the EU”;
- “large variations in interchange fees between banks across the EU”;
- “high and sustained profitability, particularly in card issuing”;
- “payment card scheme rules and practices that weaken competition at the retailer level”; and
- “divergent technical standards that prevent many service providers from operating on a pan-EU scale”.

41. Following publication of the Commission’s interim sector inquiry report, the Commission said that several market players had already taken voluntary action to address some of the most serious problems identified.

42. Further to the sector inquiry and ongoing antitrust investigations, in 2012, the Commission launched a payments Green Paper: Towards an integrated European market for card, internet and mobile payments. The Green Paper set out the Commission’s objective that secure, efficient, competitive and innovative electronic payments were crucial if consumers, retailers and companies are to enjoy the full benefits of the European Single Market.

---

50 See Commission press release IP/05/719: “Competition: Commission opens sector inquiries into retail banking and business insurance”.


The objective of the Interchange Fee Regulation was “lower prices for everyone”.

In particular, the Green Paper set out the wide range of reasons why the European retail payments market was neither efficient nor competitive, including:

- how “more competition” was needed to “mitigate the current domination of the payment cards market by the two existing international card schemes”, and especially the need for “more choice and transparency for consumers”;
- how “the real cost of payment services is often opaque, especially for card payments, both for consumers and for merchants and that this leads to higher payment costs in the EU economy”;
- how “the cost implications of alternative payment choices are often not visible to consumers, [...] owing to complex fees between the different payment service providers and] charges from the payment service provider to the merchant selling a good or service” and that this results in “often the most expensive payment method is used and costs are indirectly passed to all consumers through increased prices”;
- how “payment cards are the most common and frequently used electronic payment instrument for retail payments, reflecting a steep increase of the volume of card payments, but that the resulting scale effects have not led to any significant fall in consumer costs or merchant fees”;
- how, “under the ‘classic’ business model of four-party card schemes, interchange fees are paid by the merchant’s payment service provider (‘PSP’) to the cardholder’s PSP for each card transaction, typically set multilaterally by means of a decision binding all PSPs participating in a payment card scheme, and how such multilateral interchange fees (MIFs) had been subject to longstanding competition law and regulatory scrutiny, resulting in various decisions prohibiting specific MIF arrangements under EU competition rules”;
- how “high MIFs may act as entry barriers to low-cost card schemes and other payment systems [...] a wide variety of different levels of interchange fees could lead to distortion of the Single Market and market fragmentation”;
- how “certain card scheme rules stifle competition and likely increase the cost of card payments, including the No Discrimination Rule [...] under which retailers are prohibited from directing their customers towards the use of the payment instrument they prefer through surcharging, offering rebates or other forms of steering” and Honour All Cards Rule, “under which merchants are obliged to accept all cards within the same brand, even if the fees related to them are not the same”;

23 EuroCommerce submission to the EU Interchange Fee Regulation Review February 2020
3. The objective of the Interchange Fee Regulation was “lower prices for everyone”. continued

- how “while the characteristics of multilateral interchange fees generally apply with respect to four-party schemes, [...] three-party schemes [also] apply an ‘implicit’ interchange fee that may raise similar issues of lack of competitive constraints”; and
- how the “problems of high [interchange fees] and a lack of transparency” appear to be particularly relevant to commercial cards, under which commercial cardholders may be “incentivised with bonuses and other advantages to make use of this means of payment”.

44. The Commission invited interested parties to reply to the Green Paper. Among others, the European Parliament strongly endorsed the Green Paper56, noting that:

- “the dominant position of two non-European card payment service providers can lead to excessive and unjustified fees for both consumers and merchants, in which their respective banks take advantage of this situation”;
- “most payment costs are non-transparent”;
- “the current business model for card payments allows excessive levels of multilateral interchange fees (MIFs) [...] which constitute a major barrier to competition in the payments market [...] may be considered anticompetitive”;
- “MIFs should be regulated at the European level [...]especially considering] that Regulation (EU) No 260/2012 [...] for credit transfers and direct debits in euros provides that no per-transaction MIF [is permitted and...] calls for the same approach for card payments”; and
- “the business model for three party and mixed payment schemes may raise competition concerns similar to those for four party payment schemes; [and] therefore, [...] all card schemes – whether four party, three party or mixed schemes and any new market entrants – should be treated equally in order to ensure a level playing field and to foster competition and transparency for consumers and merchants”.

45. The European Parliament also went further than the Green Paper, calling for a comprehensive review of all retail payments – in particular including cash – noting that: “the Green Paper does not tackle the costs and societal impacts of cash or cheque payments in comparison with card, internet and mobile

---

3. The objective of the Interchange Fee Regulation was “lower prices for everyone”. continued

payments, thus preventing a comparative analysis of the economic and welfare costs and societal impacts of payments by cash or cheque” 57.

3. The objective of the Interchange Fee Regulation was “lower prices for everyone”.

3.3 The Commission proposed ongoing regulation of payment card interchange fees and other payment card scheme rules.

Following the EU retail payments Green Paper, the Commission issued a proposal for a European regulation of payment card interchange fees and related payment card scheme rules. It highlighted how widespread use of multilateral interchange fees (MIFs) in four-party payment card schemes was causing harm, in particular of:

- **harm to consumers** – “interchange fees result in higher final prices for goods and services, paid for by all consumers [...] as MIFs inflate the cost of card acceptance by merchants without leading to benefits for consumers”;

- **harm to the Single Market** – “[the] wide variety of interchange fees applied within national and international payment card schemes [...] gives rise to market fragmentation and prevents retailers and consumers from enjoying the benefits of an internal market for goods and services”; and

- **harm to market entry** – “interchange fees restrict market entry as their revenues for issuing payment service providers function as a minimum threshold to convince issuing payment service providers to issue payment cards or other payment instruments [...] which is why] in a number of Member States, national (normally cheaper) card schemes have tended to disappear”.

The Commission considered various options for addressing the problem of interchange fees, including:

- i. no action;
- ii. regulating cross-border interchange fees only;
- iii. mandating Member States to regulate domestic interchange fees;
- iv. regulating an EU-wide maximum interchange fee, including forbidding interchange fees altogether;
- v. potential exemption of commercial cards and three-party card schemes; and
- vi. regulation of merchant service charges (MSCs).

---

3. The objective of the Interchange Fee Regulation was “lower prices for everyone”.

48. Of these, the Commission proposed a combination of options iii., iv. and v., namely, EEA-wide maximum interchange fees of 0.2% for consumer debit cards and 0.3% for consumer credit cards. The Commission explained that these interchange fee levels were based on the “Merchant Indifference Test” (MIT)\(^{59}\) – which the Commission explained is defined as “the fee level a merchant would be willing to pay if he were to compare the cost of the customer’s use of a payment card with those of non-card (cash) payments”. The Commission also proposed to prohibit card scheme No Discrimination Rules, Honour All Cards Rules, and other such “anti-steering” rules.

49. Of other options envisaged by the Commission, the Proposal for the Regulation also considered:

- a “complete ban on interchange fees for debit cards”, noting that this was also “part of the most beneficial option”;
- regulation of interchange fees for “normally more expensive” commercial cards;
- regulation of implicit interchange fees for three-party payment card schemes, in recognition (i) that “implicit” interchange fees are also present in the three-party schemes, (ii) of the need for a “level playing field” between three-party and four-party schemes, and (iii) that three-party schemes tend to be even more expensive than four-party schemes; and
- rules to prevent circumvention of the regulation, including prohibition of increases in other payment card scheme fees.

50. The Commission nevertheless ultimately decided to exempt or exclude regulation of wholesale fees for certain payment card transactions, including:

- commercial cards transactions;
- cash withdrawals at automated teller machines (ATMs);
- transactions using three-party card schemes\(^{60}\);
- inter-regional card transactions; and
- scheme fees charged to acquirers.

51. Prior to the subsequent launch of the Regulation, the Commission restated the fundamental problems of transparency and lack of effective competition in payment card markets that the Regulation was intended to address, namely:

“Payment card markets are characterized by an almost complete lack of transparency and an absence of price signals on at least one side of the

\(^{59}\) Also known as the “Tourist Test”.

\(^{60}\) Except where operating as a four-party scheme.
The objective of the Interchange Fee Regulation was “lower prices for everyone”. Continued

industry (the merchant side) [...] This lack of transparency on the merchant side is mainly due to two reasons. First, point-of-sale retail prices are usually not differentiated by payment instrument. [...] Second, the ability of merchants to reject expensive means of payments is severely constrained for commercial and contractual reasons, which implies a relatively low degree of elasticity of merchant demand.”

After reaching political agreement, the Regulation came into force in several stages between June 2015 and June 2016.

---

4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees.
4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

53. Chapter II of the Regulation (Interchange Fees) specifies the regulated interchange fee caps.

54. In particular, Article 3 (Interchange fees for consumer debit card transactions) and Article 4 (Interchange fees for consumer credit card transactions) specify that “payment service providers shall not offer or request a per transaction interchange fee of more than 0.2% of the value of the transaction for any debit card transaction” or “0.3% of the value of the transaction for any credit card transaction” respectively.

55. In addition, Article 5 (Prohibition of circumvention) specifies that: “for the purposes of the application of the interchange caps in Articles 3 and 4 of the Regulation, any agreed remuneration, including net compensation, with an equivalent object or effect of the interchange fee, received by an issuer from the payment card scheme, acquirer or any other intermediary in relation to payment transactions or related activities shall be treated as part of the interchange fee”.

56. The focus of the Regulation on capping “any agreed remuneration received by an issuer” and defining such remuneration as having an “equivalent object or effect as interchange fees” was, in EuroCommerce’s view, and with the benefit of experience, an error. This is because it is inconsistent with the Commission’s stated basis and objective for the Regulation, namely, to address the “hidden fees imposed on retailers for accepting payment cards” 62 (our emphasis added), and with the Commission’s prior antitrust decisions and regulatory practice.

57. In particular, the Commission’s central stated reason for regulating interchange fees is because interchange fees set a “collective minimum wholesale price floor” on the prices charged by merchants’ payment service providers, i.e. the merchant service charges (MSCs) charged by merchant acquirers to merchants for card acceptance, namely:

4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

floor under the merchant service charge below which merchants are unable to negotiate a price." 63

58. In contrast, the level of net compensation paid to issuers – namely interchange fees net of issuer scheme fees (as shown in Figure 2 above) – is neither necessary nor sufficient for setting a collective floor on merchant service charges. For example, such net compensation could be paid from payment card schemes to card issuers from the card schemes’ shareholders’ funds. While this would be a “revenue received by an issuer”, as defined in the Regulation, it would have no likely impact on the level of merchant service charges. Accordingly, “agreed remuneration received by issuers” does not have equivalent object or effect as interchange fees.

59. By comparison, and as also shown in Figure 1, the collective minimum floor on merchant service charges is equal to not just interchange fees, but to interchange fees plus acquirer scheme fees64. Accordingly, “any agreed charges made to an acquirer” have equivalent object or effect as interchange fees, in terms of setting a collective minimum floor on merchant service charges65. For example, Figure 3 below from the ECB illustrates how scheme fees have equivalent effect as interchange fees in setting a collective minimum floor on merchant service charges,

---


64 The Regulation Article 9(2) itself acknowledges that interchange fees plus scheme fees charged to acquirers set a minimum floor on merchant service charges, in its requirement that “Acquirers shall include in their agreements with payees individually specified information on the amount of the merchant service charges, interchange fees and scheme fees applicable with respect to each category and brand of payment cards, unless the payee subsequently makes a different request in writing.”

65 EuroCommerce recognises that “any agreed charges made to an acquirer” may or may not have equivalent object or effect as interchange fees in terms of whether such fees are ultimately received by issuers – or whether such fees stay with the card schemes – but this is not relevant to whether any agreed charges made to acquirers set a collective minimum floor on merchant service charges.
4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

Figure 3: Scheme fees have equivalent effect as interchange fees in setting a floor on merchant service charges.

Stylised overview of components of merchant service charges

Source: European Central Bank[^66].

Moreover, EuroCommerce expressed such concerns about acquirer scheme fees since at least as early as 2009, in particular, in reply to earlier Commission investigations of Visa’s interchange fees:

“EuroCommerce submits that increases in [acquirer] scheme fees have the same anticompetitive effects on end users as a higher MIF. [...] A problem with [regulating just MIFs] though is that there would be no way to stop the card schemes significantly increasing the card scheme fees they charge acquirers (and which will be passed on to merchants) [...] EuroCommerce therefore submits that any decision on the MIF should include strong restrictions on scheme fees. The fact that MasterCard committed to repeal its increased acquirers’ scheme fees in April 2009 [under threat of new investigation by the Commission] reinforces this argument.”[^67]


[^67]: EuroCommerce REPLY TO THE NON-CONFIDENTIAL VERSION OF THE STATEMENT OF OBJECTIONS ADDRESSED TO VISA EUROPE LIMITED, VISA INTERNATIONAL SERVICES ASSOCIATION, VISA INC. (CASE COMP/D1/39398/VISA MIF), 2009, para. 16.
4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

61. In reply to such concerns, the Commission specifically assured EuroCommerce that Visa would refrain from increasing its acquirer scheme fees – subsequent to reducing its interchange fees – and that any non-compliance would be met with strict enforcement action, namely:

“As regards EuroCommerce’s concern that Visa Europe could increase scheme fees or other charges […] the [Visa 2010 Interchange Fee] Commitments [...] contains an anti-circumvention clause according to which Visa Europe shall refrain from setting and implementing other fees that are economically and/or legally equivalent to Intra-Regional Multilateral Interchange Fees applicable to Immediate Debit transactions, including but not limited to Visa Europe’s scheme fees charged to acquirers and / or issuers. [...] Non-compliance could lead to opening of proceedings or the imposition of penalty payments under Regulation (EC) No 1/2003.”68 (our emphasis added)

62. Accordingly, Visa made commitments in 2010 and 2014 to reduce its multilateral interchange fees that contained specific undertakings that Visa would refrain from setting any new scheme fees charged to acquirers, namely:

“During the period of these Commitments, Visa Europe shall refrain from setting, or in respect of the MIFs referred to in [...] these Commitments implementing, other fees that are economically and/or legally equivalent to the MIFs referred to in [...] these Commitments, including but not limited to Visa Europe’s scheme fees charged to acquirers and/or issuers.”69 (our emphasis)

63. The Commission has also acknowledged in multiple other decisions and statements, since at least 2009, that scheme fees charged to acquirers have equal object or effect as interchange fees.

64. First, in 2009, following the Commission’s 2007 Prohibition Decision against Mastercard, the Commission said that it would not pursue antitrust infringements against Mastercard for scheme fee increases specifically following Mastercard’s decision to repeal such increases:

68 ANTITRUST PROCEDURE Case 39398 — VISA MIF: Letter from the European Commission to EuroCommerce of 5th Jun 2012, European Commission C (2012) 4776 final (known as the "Rejection Decision").
The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

“European Commissioner for Competition Neelie Kroes has indicated that, on the basis of information currently available, she [now] sees no need to pursue MasterCard for non-compliance with a 2007 Commission decision that MasterCard’s cross-border multilateral interchange fees (MIF) were in breach of EC Treaty rules on restrictive business practices. Following the 2007 Decision, MasterCard provisionally repealed its cross-border MIF on 12 June 2008 but increased its scheme fees from October 2008. [...whereas] MasterCard has [now] agreed to withdraw as of July 2009 the increases of its scheme fees imposed in October 2008.”70

Second, in 2012, the Commission positively affirmed that scheme fees charged to acquirers are one of the elements of fees that make up merchant service charges and must be recognised in regulating interchange fees, namely:

“The [Commission’s approach to setting the regulated MIF] computes the MIF by comparing the costs of cash with those of cards. One of the elements that make up the cost of cards is the cost of services provided by acquiring banks. This includes all [merchant service charge] components with the exception of the MIF, therefore it includes scheme fees. Ceteris paribus, any increase in scheme fees would increase the total cost of cards, and thereby decrease the difference between the cost of cash and the cost of cards, leading to a decrease of the [Merchant Indifference Test] compliant MIF.”71 (our emphasis)

The Commission also repeated how the Merchant Indifference Test (MIT) methodology takes into account scheme fees and that, as such, any increase in acquirer scheme fees must be accompanied by a corresponding reduction in regulated interchange fees, for example:

“The cost of acquirer scheme fees is included in the calculation of the acquirer mark-up within the MIT and, therefore, the MIT takes account of the level of these scheme fees in determining the level of the MIF. [...] In order to compute the MIF compliant with the MIT the average acquirer margin and the scheme fees paid by the acquirer are deducted from the MIT-compliant MSC [...]. Therefore, an increase in scheme fees or

70 See Commission press release IP/09/515: “Antitrust: Commissioner Kroes takes note of MasterCard’s decision to cut cross-border Multilateral Interchange Fees (MIFs) and to repeal recent scheme fee increases”, 2009.
4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

acquirer margin for card payments should lead to a lower MIF under the MIT.\(^72\)

67. Third, in 2013, the Commission considered the problem of scheme fees again in developing the Regulation:

“In 2009, MasterCard offered Undertakings to reduce its cross-border consumer MIFs [...]; and it repealed the increases in its scheme fees to acquirers which could have had a similar effect on the market to MIFs. [...] Possible circumvention [of the Regulation] could be the increase of fees from card schemes to merchants, i.e. the raising of non-MIF elements of fees, paid by merchants directly to the card schemes.”\(^73\)

68. Furthermore, a major UK regulatory review of competition in payment systems (the 2000 Cruickshank Review\(^74\)) explained how there are two types of collectively agreed wholesale prices in payment systems – payment card scheme fees and interchange fees – namely:

“Payment schemes often play an important role in determining the wholesale prices within the payment system and therefore the final prices paid by businesses and consumers. There are two types of wholesale price which may be determined collectively by the payment scheme. The first type is paid by members to the scheme operator to cover running costs and specific member services [usually called scheme fees]. The second type is paid between individual members to cover the cost of services supplied from one member to another. These are usually called interchange fees.”\(^75\)

69. The Cruickshank Review noted why – at that time – interchange fees were a much more significant issue than scheme fees, namely:

“Wholesale payments from members to operators [i.e. scheme fees] are a relatively minor source of inefficiency. This is for two reasons. First, central scheme costs are small in relation to the total costs of making a payment. Second, member run schemes have good incentives to control the level of central costs. [...] Interchange payments between members of

\(^{72}\) European Commission Rejection Decision, 53, 112.

\(^{73}\) Regulation Impact Assessment.

\(^{74}\) “Competition in UK Banking: A Report to the Chancellor of the Exchequer”, by Don Cruickshank, 2000 (known as the “Cruickshank Review”).

\(^{75}\) Cruickshank Review, para. 3.95.
pay retail and wholesale. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

payment schemes are a much more significant issue. These involve substantial sums.”

However, since the publication of the Cruickshank Review, Mastercard and Visa are no longer member-run payment card schemes. On the contrary, Mastercard and Visa are now shareholder-driven public companies, in particular:

- Mastercard and Visa no longer operate as member run schemes – i.e. as not-for-profit joint ventures – whereby scheme fees are merely “paid by members to the scheme operator to cover running costs and specific member services”;
- Mastercard and Visa instead now operate as for-profit public companies, with their principal objective to maximise profits for shareholders; and
- accordingly, Mastercard and Visa no longer have any incentive to control the level of scheme fees – on the contrary, their principal objective is to maximise scheme fees.

Hence, prior to the change in Mastercard’s and Visa’s corporate structure between 2006 and 2016 – from member-run schemes to public companies – Mastercard’s and Visa’s interests were directly aligned with interests of their member banks. This interest chiefly consisted in maximising interchange fees, as the Commission has repeatedly found, namely, of:

- maximising total fees charged to card acquirers (i.e. interchange fees plus acquirer scheme fees) – and thereby maximising fees charged to merchants (subject to discouraging merchants from accepting card payments at all); and
- maximising total fees received by card issuers (i.e. interchange fees net of issuer scheme fees).

Such interest therefore consisted in maximising interchange fees and minimising scheme fees.

Such incentives reflect that payment card schemes (and payment systems generally) compete in a “two-sided” market (also known as “multi-sided” or “platform” markets) and that competition in such markets is invariably focused on one side of the platform rather than the other, namely:

76 Cruickshank Review, para. 3.96-3.97.
77 Mastercard since 2006 (following Mastercard’s initial public offering in 2006) and Visa Europe since 2016 (following Visa Europe’s merger with Visa Inc in 2016, and Visa Inc’s prior initial public offering in 2008).
4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

- payment card schemes compete intensely on the payer side of the market, i.e. competition for cardholders and card issuers78; and
- payment card schemes tend not to compete at all on the payee side of the market, i.e. competition for merchants and merchant acquirers (and ultimately consumers)79.

74. This is reflected in the Commission’s comment that: “Payment card markets are characterized by an almost complete lack of transparency and an absence of price signals on at least one side of the industry (the merchant side).” 80

75. This means that prices always tend to be too high on the merchant side of the market (resulting in excessive costs on merchants and consumers generally), but too low on the cardholder side of the market (leading to excessive promotion of payment cards at the expense of alternative payment methods)81. As already noted, prior to the change in Mastercard and Visa’s corporate structure, scheme fees were of limited significance compared to interchange fees.

76. However, after the change in Mastercard’s and Visa’s corporate structure, the schemes’ interests became distinct from those of the schemes’ former bank members. In particular, the schemes’ interests became maximisation of their own profits. This meant that payment card scheme fees now became very significant (indeed, much more significant than interchange fees), now being the card schemes’ own source of revenue and profit.

77. Accordingly, after the change of Mastercard and Visa structure – but before the Regulation came into force – the card schemes’ interest consisted in:

- continuing to maximise the total fees charged to acquirers and merchants (i.e. interchange fees plus acquirer scheme fees), subject to dissuading merchants from accepting card payments at all; and
- minimising net fees paid to issuers (i.e. interchange fees net of any issuer scheme fees), subject to the card schemes continuing to compete for issuers.

78 This is because cardholders and card issuers tend to choose between alternative payment schemes – known as “single homing” – especially when alternative payment schemes offer equivalent merchant acceptance.
79 This is because merchants and merchant acquirers typically have no choice but to accept all alternative payment schemes – known as “multi homing” – namely, all major payment schemes are “must take” for merchants.
81 See in particular “Rethinking Antitrust Tools for Multi-Sided Platforms”, Organisation for Economic Co-operation and Development (OECD), 2018, for extensive literature review and discussion.
4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

78. This meant a strategic shift away from interchange fees to scheme fees as the payment card schemes’ chief pricing mechanism, in particular, an increase in acquirer scheme fees and decrease in issuer scheme fees (and moreover scheme fees now paid to issuers, i.e. negative issuer scheme fees82).

79. However, paradoxically, the Regulation strongly supports the payment card schemes in achieving these profit objectives, namely of maximising fees charged to acquirers and minimising fees paid to issuers. In particular, by capping the remuneration received by issuers – but not capping the total charges levied on acquirers – the chief effects of the Regulation have been to:

- stop Mastercard and Visa (and other payment card schemes) competing with each other for card issuers (and thereby for cardholders); and
- do nothing to stop the card schemes continuing to maximise fees charged to acquirers (paid for by merchants and in due course by consumers).

80. Hence, the effect of the Regulation is directly contrary to its stated objectives. In particular, the Regulation – in focusing on revenue received by issuers – creates a new and unnecessary barrier to competition (and market entry) between existing and prospective new payment card schemes.

81. In EuroCommerce’s view, this cannot have been the intention of the Regulation, as it means that the Regulation is likely, in due course, to lead to a worse outcome for merchants and consumers than no Regulation at all, by entrenching and further reinforcing the market position of the existing dominant payment card schemes83.

82. It is unsurprising therefore, since the Regulation came into force (and in particular following Visa Europe’s merger with Visa Inc), that Mastercard and Visa have significantly increased their scheme fees charged to acquirers (and expressly stated their intention to continue increasing them) – and moreover – that there has been little if any change in the card issuing market shares of the major payment card schemes since the Regulation came into force84.

82 Which Mastercard and Visa variously refer to in their Annual Reports as “rebates and incentives (contra-revenue)” and “up-front cash payments, fee discounts, rebates, credits performance-based incentives, marketing, and other support payments”. See for example Mastercard Inc Form 10-K (Annual Report), 2018; Visa Inc Form 10-K (Annual Report), 2019.

83 We note further that neither the Commission’s Proposal for the Regulation nor the Commission’s Regulation Impact Assessment explained the reasons for proposing and adopting the wording of Article 5 of the Regulation (“Prohibition of circumvention”) in place of the corresponding prohibition of circumvention provisions adopted at §5.2 of the 2010 Visa Commitments and §9.3 of the 2014 Visa Commitments.

84 Except to the extent that there may have been circumvention or other breaches of the Regulation, as discussed further below.
4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

83. Indeed, since 2015, there is now widespread evidence that reductions in interchange fees have been progressively replaced by substantial increases in scheme fees, for example:

- as reported in successive major merchant surveys in the UK, Germany, and across EuroCommerce’s membership;
- by various major European card acquirers; and
- by the card schemes themselves.

84. First, in January 2018, EuroCommerce held a survey of its members to assess the impact of the Regulation in anticipation of the Commission’s review. EuroCommerce received responses from members in 21 EU Member States, across all major retail sectors, and including both large and small businesses. EuroCommerce presented the results of the survey to the Commission in June 2018. The chief findings of the survey were that:

- the majority of respondents had experienced new and additional categories of fees for accepting Mastercard and Visa cards since the Regulation came into effect, which eroded many of the benefits of the Regulation; and
- while half of respondents had experienced a reduction in overall merchant service charge following the Regulation (as at the time of the survey), a quarter reported an increase in total fees (with the remainder reporting that fees had stayed the same or that they didn’t know).

85. In addition, subsequent to the EuroCommerce 2018 survey:

- a major German EuroCommerce member operating in several Member States has reported even higher scheme fees for Mastercard than reported by the German EHI Retail Institute (see further below), now in excess of the regulated interchange fee caps for both consumer debit cards and credit cards (of 0.3%), as shown in Figure 4 below; and
- a major UK and Ireland EuroCommerce member has disclosed increases in average card scheme fees from 0.0164% (as a percentage of sales) in 2015, to 0.0298% in 2017, and 0.0507% in 2018 in the UK, a threefold increase since the Regulation came into force, and very similar scheme fee increases for the Republic of Ireland.

---

83 See EUROCOMMERCE IFR SURVEY – INITIAL FINDINGS & CONCLUSIONS REACHED, EuroCommerce presentation to DG COMP, June 2018.
86 For the purpose of this report.
87 For the purpose of this report.
4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

Figure 4: A large supermarket chain operating in several Member States reports very high Mastercard acquirer scheme fees.

Second, in Germany, the EHI Retail Institute has recently published results of its regular study of card-based payment systems in retail88. The study reports that Mastercard and Visa acquirer scheme fees (as a percentage of sales) have increased substantially since the Regulation came into force, especially Mastercard’s, which are now greater than the regulated consumer debit card interchange fees cap in the Regulation (of 0.2%), as shown in Figure 5 below.

4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

Figure 5: Reported acquirer scheme fees in Germany are now greater than the regulated interchange fee caps for consumer debit cards.

![Graph showing acquirer scheme fees in Germany from 2015 to 2018 for Mastercard and Visa.]

Source: EHI Retail Institute.

87. The EHI study also contains extensive complaints from merchants about the rises in acquirer scheme fees in Germany, especially Mastercard’s.

88. Third, in the UK, the British Retail Consortium (BRC) carries out an annual survey of its members’ costs of accepting alternative payment methods. The BRC’s latest annual payments survey represents almost half of UK annual retail sales. It reports that, in 2018, the cost of card acceptance for UK retailers increased by 5%, “largely driven by increases in card scheme fees, which increased by 39% in 2017 (as a percentage of turnover), and by 56% in 2018, with notices of further increases by both card schemes in 2019 and 2020, including specific fees for Strong Customer Authentication (SCA) related services - a mandatory requirement for merchants and acquirers under the revised Payment Services Directive (PSD2)”.

89. Fourth, Table 1 and Table 2 below show Mastercard and Visa UK scheme fees as reported by Lloyds Bank Cardnet (a major UK merchant acquirer) at January 2019.
4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

2017 and April 2018, by Worldline/Six Payments (a major European non-bank acquirer) at August 2019, plus corresponding current US scheme fees as reported by Wells Fargo (a large US merchant acquirer) by way of comparison.

Table 1: Some Mastercard UK scheme fees now risen beyond US levels.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Credit cards</td>
<td>0.0268% + 0.5990p</td>
<td>0.0281% + 0.7000p</td>
<td>0.1473% to 0.2204%</td>
<td>0.1375%</td>
</tr>
<tr>
<td>Debit cards</td>
<td>0.0268% + 0.5990p to 0.0411% + 0.5590p</td>
<td>0.0281% to 0.0425% + 0.7000p</td>
<td>0.0751%</td>
<td>0.1375%</td>
</tr>
<tr>
<td>Commercial cards</td>
<td>0.0268% + 0.5990p</td>
<td>0.0281% + 0.7000p</td>
<td>Add additional 0.05% to 0.60%</td>
<td>0.50% to 1.57%</td>
</tr>
<tr>
<td>International cards</td>
<td>0.0282% + 9.4458p plus 0.045% to 0.45%</td>
<td>0.0281% + 9.5410p plus 0.045% to 0.45%</td>
<td>0.5556% to 0.6787%</td>
<td>0.60% to 1.00%</td>
</tr>
</tbody>
</table>

Source: Lloyds Bank Cardnet90, Worldline/Six Payment Services91, Wells Fargo92.

90 “Cardnet transparency and disclosure items”, Lloyds Bank Cardnet, as at January 2017 and April 2018.
91 “Indicative Card Scheme Fee Rates — UK” Worldline/Six Payment Services, as at August 2019.
92 “Payment Network Pass-Through Fee Schedule”, Wells Fargo, as at April 2019.
4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees.

Table 2: Reported UK Visa scheme fees rising towards US levels.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Credit cards</td>
<td>0.0140% + 0.4421p + 0.01% (e-commerce)</td>
<td>0.0140% + 0.4880p + 0.01% (e-commerce)</td>
<td>0.0346% to 0.0640%</td>
<td>0.14% plus 0.01% (card not present)</td>
</tr>
<tr>
<td>Debit cards</td>
<td>0.0100% + 0.4421p + 0.01% (e-commerce)</td>
<td>0.0100% + 0.4880p + 0.01% (e-commerce)</td>
<td>0.0640%</td>
<td>0.13% plus 0.01% (card not present)</td>
</tr>
<tr>
<td>Commercial cards</td>
<td>0.0100% + 0.4421p to 0.0140% + 0.4421p + 0.01% (e-commerce)</td>
<td>0.0100% + 0.4880p to 0.0140% + 0.4880p + 0.01% (e-commerce)</td>
<td>Not given</td>
<td>Not shown</td>
</tr>
<tr>
<td>International cards</td>
<td>0.4640% + 6.4453p + 0.1% (e-commerce)</td>
<td>0.460% + 6.4920p + 0.1% (e-commerce)</td>
<td>0.5236% to 0.87040%</td>
<td>1.00% to 1.40% plus 0.01% (card not present)</td>
</tr>
</tbody>
</table>

Source: Lloyds Bank Cardnet\(^93\), Worldline/Six Payment Services\(^94\), Wells Fargo\(^95\).

90. These tables show that both Mastercard and Visa increased their credit card, debit card, and commercial card scheme fees substantially during the period

---

\(^93\) “Cardnet transparency and disclosure items”, Lloyds Bank Cardnet, as at January 2017 and April 2018.

\(^94\) “Indicative Card Scheme Fee Rates -- UK” Worldline/Six Payment Services, as at August 2019.

\(^95\) “Payment Network Pass-Through Fee Schedule”, Wells Fargo, as at April 2019.
4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

between January 2017, April 2018, and August 2019\textsuperscript{96}. The tables also show that Mastercard’s UK scheme fees are generally much higher than Visa’s, as also reported for Germany (reflecting that Mastercard has been operating as a for-profit card scheme much longer than Visa, in Europe). Moreover, the tables show that UK scheme fees are converging towards much higher US scheme fees.

91. In addition, comparison between Lloyds Cardnet and Worldline for the UK, and with US scheme fees, indicates that the UK scheme fees reported by Lloyds Cardnet only represent a subset of the total scheme fees imposed on UK merchant acquirers. In particular, the US scheme fee information shows an additional 12-17 Mastercard and Visa scheme fee categories\textsuperscript{97}.

92. Fifth, global payments consultancy CMSPI estimates that, of the €6.93bn estimated annual savings promised to European merchants by the Regulation (based on the mandated interchange fee reductions in the Regulation compared to pre-existing interchange fee levels before the Regulation in each Member State, updated to 2019 card volumes)\textsuperscript{98}, €1bn has already been eroded by six major scheme fee increases by Mastercard and Visa between 2016 and 2018\textsuperscript{99}. CMSPI advises that this corresponds to average Mastercard and Visa scheme fee in Europe now of 0.1% (10 basis points) of transaction value. This compares to reported scheme fee rises of €100-300m from the Commission’s evaluation study\textsuperscript{100}, illustrating how scheme fee increases have accelerated significantly since the Commission’s evaluation period of 2016 and 2017.

93. In addition, CMSPI estimates\textsuperscript{101} that were Visa to increase its average European scheme fees to the same level as Mastercard’s (as Visa is under pressure from its shareholders to achieve), then this would add an additional €1bn in annual scheme fees to European merchants. Furthermore, were Mastercard and Visa to continue raising scheme fees to the same level as currently present in the US (as the card schemes have also indicated their aspiration to achieve), and which CMSPI advises are on average 0.3% (30 basis points) of transaction value, then

\textsuperscript{96} Albeit the August 2019 reported scheme fees may not be directly comparable to January 2017 and April 2018, as coming from different sources.


\textsuperscript{98} Note that the €6.93bn estimated annual savings in the CMSPI report corresponds to the €5.99bn estimated annual savings in the Commission’s Regulation Impact Assessment at Table 62, “Option 3.4.3” (which was based on 2011 card volumes), but now updated to 2019 card volumes.


\textsuperscript{100} Reported by Vixio Payments Compliance, January 2020.

\textsuperscript{101} As provided to EuroCommerce.
4. **The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees.**

CMSPI calculates that this would add a further €3bn of annual scheme fees to European merchants\(^{102}\).

94. Last, at the time of Visa Inc’s acquisition of Visa Europe, Visa Inc explained the benefit of the transaction to its shareholders (and also to Visa Europe’s members) – through the transformation of Visa Europe from a “member association to a commercial enterprise” and the associated opportunity to “expand yields”, i.e. to raise prices, namely:

> “We announced the acquisition of Visa Europe. As you know, we have been clear that this was a transaction that we thought made tremendous sense for both our company but also for Visa Europe and its members. [...] On the pricing side, we believe there is an opportunity to expand yields in Europe as we align the economic model with the value we bring and genuinely evaluate pricing from the perspective of a commercial enterprise rather than a member-owned association.”\(^{103}\) (2015)

95. Shortly after the Visa Inc/Visa Europe acquisition, Mastercard boasted to investors of its higher pricing in Europe than Visa’s – i.e. acquirer scheme fees – and expectation that Visa would soon raise prices to similar levels as Mastercard’s, for example:

> “I always remind people that our [Mastercard] pricing overall in Europe is actually higher than Visa’s pricing, so what I would see is that they’re moving up the pricing. It’s not quite where our pricing is yet.”\(^{104}\) (2017)

96. Visa Inc has subsequently confirmed to investors its success in raising Visa Europe’s pricing since the acquisition of Visa Europe, and Visa’s intention to go on raising prices further:

> “Generally in Visa Europe, we are really happy with where we are. [...] We were able to take some pricing [rises] last year and some more pricing this year, which clearly, we want to be very prudent on. And we don’t really want to sort of -- we sort of take it one step at a time. We think there is

---

\(^{102}\) The schemes may also seek to raise their scheme fees even further than US levels, in order to achieve the same combined levels of interchange fees and scheme fees as in the US, i.e. offsetting the lower regulated interchange fees in Europe as compared to much greater US interchange fees. Namely, in the US, average credit card interchange fees are 2.0\% and average credit card scheme fees are 0.3\% (i.e. total 2.3\% combined fee) – and average debit card interchange fees are 0.5\% and average debit card scheme fees also 0.3\% (i.e. total 0.8\% combined fee). (Source: CMSPI)

\(^{103}\) Visa Inc CEO, Presentation to investors, Q4 2015.

\(^{104}\) Martina Hund-Mejean, Mastercard Chief Financial Officer, from Mastercard (MA) Presents at JPMorgan Technology, Media and Telecom Conference (Transcript), May 2017.
The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

some more opportunities in Europe, but we’ll have to watch and see how things play out and decide what we want to do next.”

“Financially speaking, [Visa Europe] has performed better than we expected. We have been able to take a couple of rounds of pricing [rises]. We will look at any future opportunities.”

“[Question:] Is there still room to increase yields in [Visa] pricing [in Europe]. One of the things I think surprised us was that MasterCard increase prices as well. So it feels like there’s still some room to grow there?

[Answer:] Yes, I mean we’ve been - I think we’ve acknowledged that there is still a pricing gap. And it’s a pricing gap that needs to be addressed. It is something we have to deal with overtime.”

“You’ve seen in the two plus years that we’ve owned the Europe business and we’ve helped them transition away from their bank-owned association structure. We’ve made quite a bit of pricing changes in Europe I think successfully.”

“Strong payments volume growth along with pricing benefits drove service revenues up 9% [in Visa Europe]. [...] In terms of pricing, through the first half of fiscal year 2020, we will continue to benefit from FY2019 pricing actions.”

Such comments are a confirmation of the card schemes’ pricing strategies, in particular:

- the continuing pricing gap between Mastercard and Visa;
- Visa’s apparent intention – under pressure from investors – to close its pricing gap with Mastercard;

---

109 Vasant Prabhu - Vice Chairman and Chief Financial Officer, Visa Inc, from Visa Inc. (V) CEO Al Kelly on Q4 2019 Results - Earnings Call Transcript, October 2019.
4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

- Visa’s apparent caution in closing its pricing gap with Mastercard – most likely in fear of regulatory consequences; and
- further large price increases from Mastercard in any event.

98. Overall, Mastercard’s and Visa’s transformation from member-owned associations to commercial enterprises has led to immense increases in their profitability, shareholder returns, and associated market capitalisation. For example, since Mastercard’s initial public offering in 2006, Mastercard has generated 37% annualised year-on-year returns to shareholders and current market capitalisation of US$302bn. In comparison, since Visa’s initial public offering in 2008, Visa has generated annualised returns on 24% and has a current market capitalisation of US$420bn. This compares to annualised returns for the S&P 500 US equity market index over the same period of 8%110.

99. Figure 6 shows Mastercard and Visa’s share prices, compared to the S&P 500 Index, illustrating how Mastercard and Visa have outperformed the US stock market by between 10 and 40 times since initial public offering in 2006 and 2008 respectively.

---

110 Source: Yahoo Finance (as at December 2019).
4. The Interchange Fee Regulation must regulate all fees that have equivalent object or effect as interchange fees. continued

Figure 6: Mastercard and Visa have outperformed the US stock market by 10-40 times since initial public offering.

Source: Yahoo Finance.

100. The Commission must therefore address the problem of acquirer scheme fees as a fundamental part of the review of the Regulation, especially in the light of previous Commission assurances, the previous Mastercard cancellation of scheme fee rises (following threat of Commission investigation), and previous Visa interchange fee Commitments that scheme fee increases would not be allowed in place of interchange fee reductions 111.

5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments.
5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments. continued

101. In addition to the problem of rising acquirer scheme fees, in EuroCommerce’s view, the regulated interchange fee caps have not achieved neutrality between card and non-card based payments, as intended by the Regulation (and the Commission’s wider policy objectives).

102. In particular, the Regulation sets caps for intra-EEA consumer debit card interchange fees at 0.2% of payment transaction value and for consumer credit cards at 0.3%. However, these levels appear inconsistent with the Commission’s stated basis for setting the caps described in the Regulation, namely, the “Merchant Indifference Test”.

103. The chief effect of the caps being too high is a continuing distortion of competition between payment cards and non-card payment methods. Namely, the Regulation continues to result in card schemes, banks, and other card issuers over-promoting card payments at the expense of lower cost or more efficient non-card based payment methods (including cash and alternative electronic payment methods).

104. This problem represents a continuation of the central problem that the Regulation was intended to solve, namely, that interchange fees promote whichever payment method generates the highest revenue to banks, paid for in higher charges to retailers and ultimately consumers, as described by former Vice President Joaquín Almunia at the launch of the Commission proposal for the Regulation:

“The interchange fees paid by retailers end up on consumers’ bills. Not only are consumers generally unaware of this, they are even encouraged through reward systems to use the cards that provide their banks with the highest revenues.”

105. The remainder of this section explains why the regulated interchange fee caps remain too high on the basis of the Merchant Indifference Test.

---

112 European Commission SPEECH/13/660: Introductory remarks on proposal for regulation on interchange fees for cards, Internet and mobile payments, Joaquín Almunia (Vice President of the European Commission responsible for Competition Policy), 24 July 2013.
5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments. continued

5.1 The regulated interchange fee caps appear inconsistent with the stated basis for setting the caps in the Regulation.

The Regulation explains that the levels of the interchange fee caps – of 0.2% for consumer debit cards and 0.3% for credit cards – are based on a methodology known as the “Merchant Indifference Test” (also known as the “Tourist Test”). Such interchange fee levels are defined as “the fee level a merchant would be willing to pay if the merchant were to compare the cost of the customer’s use of a payment card with those of non-card (cash) payments (taking into account the fee for service paid to acquiring banks, i.e. the merchant service charge and the interchange fee)”\(^{113}\).

The Commission has frequently restated the importance of the Merchant Indifference Test, for example:

“Failing to take account of the fact that many card transactions which incurred a MIF may nonetheless have been made had there been no MIF [...] underlines the importance of the Merchant Indifference Test, which is the basis for the fee caps in the Interchange Fee Regulation. Merchants are left worse off where the customer uses a more expensive payment instrument – which merchants are often unable to resist – in cases where a less expensive form of payment would have been available.”\(^{114}\)

Hence, the level of interchange fee that is compatible with the Merchant Indifference Test methodology must be the level that equalises the cost of the payee’s (i.e. the merchant’s) use of a payment card with those of a non-card payment method, i.e. primarily cash or credit transfers\(^{115}\).

In addition, the EU’s central payments regulation – the revised Payment Services Directive (PSD2) – expressly relies on the Interchange Fee Regulation to achieve its objective of removing the additional costs for merchants of accepting payment cards (over and above the cost of alternative payment methods), as the basis for PSD2’s prohibition of merchants from surcharging payment cards that are subject to the Regulation, namely:

“[...] a strong rationale for revising surcharging practices is supported by the fact that [the Interchange Fee Regulation] establishes rules for

\(^{113}\) Regulation Recital 20.
\(^{114}\) Commission Observations to the UK Court of Appeal, February 2019, para. 46-47.
\(^{115}\) Such as the recently launched SEPA Instant Credit Transfer (SCT Inst). (See www.europeanpaymentscouncil.eu/what-we-do/sepa-instant-credit-transfer.)
5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments. Interchange fees constitute the main component of merchant charges for cards and card-based payments. Surcharging is the steering practice sometimes used by merchants to compensate for the additional costs of card-based payments [over and above other payment methods, especially cash]. [The Interchange Fee Regulation] imposes limits on the level of interchange fees [intended to eliminate such additional costs of accepting card payments]. Those limits will apply before the prohibition [of surcharging of cards subject to the Interchange Fee Regulation] set out in this Directive [comes into force].”

Hence, the prohibition of surcharging under PSD2 expressly relies on the effectiveness of the Regulation in removing the additional costs for merchants of accepting card payments. Accordingly, unless the Regulation is effective at removing such additional costs of card payments, then the PSD2 prohibition of surcharging is likely to make merchants (and consumers) even worse off, by denying merchants a legitimate means of steering customers away from high-cost card payments.

It is nevertheless evident that the interchange fee caps in the Regulation have not sufficiently nor sustainably removed the additional costs for merchants of accepting payment cards. Various data points are available in support of this, in particular, from the UK and also from the Commission’s 2015 cost of payments study.

First, from the UK, recent British Retail Consortium (BRC) Annual Payment Surveys show that the cost for merchants of accepting debit cards has actually increased since the Regulation came into force, as shown in Figure 7 and Figure 8 below. In comparison, although the cost of credit cards has fallen, it remains multiple times higher than the cost of accepting cash payments.

Namely, Figure 7 below shows the average costs for merchants of accepting alternative payment methods, per transaction, and Figure 8 shows the corresponding costs as a percentage of sales value, in particular that:

- the average cost of accepting debit cards remains at four times the cost of accepting cash (per transaction) and twice the cost of cash (as a percentage of sales value); and


117 As noted, these figures show average costs across all merchants and all transaction sizes. Note however that the cost of accepting low value debit card transactions will typically have fallen following the Regulation (as debit card interchange was formerly a fixed amount per transaction) whereas, in contrast, the cost of accepting
5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments. continued

- the average cost of accepting credit cards remains at 11 times the cost of accepting cash (per transaction) and four times (as a percentage of sales value).

Figure 7: Costs for UK merchants of accepting credit and debit cards, as a cost per transaction, remains much higher than cash.

Source: British Retail Consortium.118

---

118 “Payments Survey 2019”.

---

high value debit card transactions has increased dramatically following the Regulation (except in Member States that have applied a maximum debit card interchange fee cap per transaction).
5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments. continued

**Figure 8: Costs for UK merchants of accepting credit and debit cards, as percentage of sales value, also remains much higher than cash.**

Source: British Retail Consortium.

In our view, the BRC Survey evidence is consistent with the Commission’s own evidence completed just before the Regulation came into force, namely the Commission’s 2015 Costs of Payments Survey. In particular, the Commission Survey shows substantial differences between the costs of accepting cash and card payments, with the costs of accepting debit cards almost twice as great as cash, and credit cards almost three times greater than cash.

Once adjusting the Commission’s survey for the current regulated interchange fee caps of 0.2% and 0.3% for debit and credit cards respectively, and merchant acquirer margins of 0.06% of transaction value, as assumed by the

---

119 “Payments Survey 2019”.


121 See in particular Figure 10 of the Commission’s Payments Survey, which shows the costs of accepting alternative payment methods as marginal costs (i.e. the variable cost of accepting a given payment method). This is the most relevant cost to the application of the MIT methodology and also the basis for the BRC Survey.
5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments. continued

Commission\textsuperscript{122}, and excluding staff costs\textsuperscript{123}, then the BRC and Commission Survey show very similar results.

Hence, the Commission’s own evidence indicates that the regulated interchange fee caps should have been much lower, on the basis of the Merchant Indifference Test\textsuperscript{124}. Accordingly, and in the absence of corresponding new evidence for other Member States, EuroCommerce believes that the BRC Survey evidence is broadly representative of merchants’ payment costs across the EU.

In addition, Figure 9 reproduces a previous Commission figure explaining the application of the Merchant Indifference Test, namely that the Merchant Indifference Test (MIT) Multilateral Interchange Fee (MIF) – “MIT MIF” – must be set such that the “capped marginal cost of card” is equal to the “marginal cost of cash”. In particular:

- the first column of Figure 9 shows the marginal cost (for merchants) of accepting cash;
- the second column shows the marginal cost of accepting card payments, at the pre-existing level multilateral interchange fee (MIF), comprising the MIF, plus acquiring margin, plus other costs of accepting cards (such as acquirer scheme fees); and
- the third column shows the “capped” marginal cost of accepting cards, once the MIF has been reduced to the Merchant Indifference Test (MIT) MIT level, namely the level that equalises the marginal cost of accepting cards and cash payments.

\textsuperscript{122} The BRC Survey finds 0.07%.

\textsuperscript{123} Which the BRC Survey excludes but says are similar across payment types, as the Commission Survey also shows.

\textsuperscript{124} The Commission Survey understandably did not anticipate various other changes that have further increased the costs of accepting cards since the Regulation came into force, including the large and continuing increases in Mastercard and Visa acquirer scheme fees, and large increases in unregulated interchange fees, such as for commercial cards and inter-regional cards.
5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments. continued

Figure 9: The Merchant Indifference Test is central to the Interchange Fee Regulation.

Source: European Commission125.

First, Figure 10 below demonstrates the application of the same test to the UK BRC data for debit cards, namely that:

- the first column shows that the marginal cost of accepting cash in 2018 was 0.16% (as a percentage of sales value);
- the second column shows that the marginal cost of accepting debit cards was 0.27%, comprising the regulated debit interchange of 0.20%, plus other costs of 0.07%; and
- the third column shows that, assuming “other costs” of debit cards, of 0.07%, remain the same, then in order for the total cost of debit to equal the cost of cash, then the regulated debit interchange – i.e. MIT MIF – must be reduced to 0.09%.

5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments. continued

Figure 10: UK payments costs imply lower regulated debit card interchange cap.

Source: British Retail Consortium, Zephyre.

Second, Figure 11 shows the application of the same test to the UK BRC data for credit cards, namely that:

- as previously, the first column shows that the marginal cost of accepting cash in 2018 was 0.16% (as a percentage of sales value);
- the second column shows the marginal costs of accepting credit cards, of 0.61%, comprising the regulated credit interchange of 0.30%, plus other costs of 0.31%; and
- the final two columns in combination show that, in order for the total cost of accepting credit cards to become equal to the cost of cash, then the regulated credit interchange must be reduced to minus (i.e. negative) 0.15% – so that when “other costs” of credit cards, of 0.31%, are added back, then the total cost of accepting credit cards remains equal to the cost of cash.
5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments. continued

Figure 11: UK payments costs imply a negative interchange fee cap.

Source: British Retail Consortium, Zephyre.
5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments.

5.2 The Regulation creates a continuing distortion of competition between card and non-card payment methods.

120. One of the chief objectives of the Regulation was to remove significant distortions of competition and to contribute to fair competition. However, the effect of the interchange fee caps being set too high – namely, above the level implied by the Merchant Indifference Test, as specified in the Regulation – is likely to be a distortion of competition in favour of card-based payments and against lower-cost and/or more efficient alternative payment methods.

121. The Commission has previously explained in much detail how excessive card scheme interchange fees create substantial competitive distortions and associated harm to merchants and consumers, for example:

“[Multilateral interchange fees (MIFs)] have the potential of significantly increasing merchants’ costs of payment cards. This leads to increases in retail prices for all consumers, including those that do not use payment cards. Every card payment then imposes an invisible tax on others (the merchant and its customers) compared with non-card payments, which would most often be in cash.

This distortion can create substantial economic harm as it may induce final consumers to use high MIF payment instruments even if their benefits do not correspond to the economic costs created by their use. For instance, cardholders may perceive that using a premium credit card is ‘cheap’ because their cardholder fees are subsidized by the MIF income of issuing banks. But the use of such cards generates hidden costs for others (first merchants, but ultimately other final consumers as these costs feed into higher retail prices). Likewise, banks may perceive that issuing debit card brands with higher MIFs is ‘cheap’ compared to issuing debit cards with lower MIFs because they disregard the costs this brings about for the rest of society. Excessive MIFs may thereby distort competition between payment instruments, inefficiently promoting exactly those payment cards that induce the highest invisible tax on consumers relative to cash payments without necessarily generating equivalent benefits to payment users.”

---

126 See in particular the Regulation Recitals 9 and 13.
127 European Commission Cost of Payments Survey, para. 43-44.
5. **The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments.**

Accordingly, setting the regulated interchange fee caps too high is likely to result in a continuing distortion of competition between payment instruments, namely, inefficiently promoting payment cards compared with non-card payment methods. As the Commission describes, such high interchange fees lead to increases in retail prices for all consumers, including those that do not use payment cards. Moreover, excessive interchange fees create an indirect inducement for consumers to use cards (for example, owing to no or low fees or incentives such as rewards, cash rebates, and interest-free credit funded by interchange fees), and that such card use imposes an invisible tax – i.e. hidden costs – on other payment users.

In particular, excessive interchange fees create a distortion of competition against alternative electronic payment methods, including credit transfers, direct debits, and new regulated Payment Initiation Services, as enabled by the revised Payment Services Directive (PSD2). Excessive interchange fees also create a substantial distortion of competition against the use of cash.

Indeed, one of the specific objectives of PSD2 was to remove barriers to the launch of innovative new payment services and in particular to enable and promote new Payment Initiation Services as an alternative to payment cards:

“It has proven difficult for payment service providers to launch innovative, safe and easy-to-use digital payment services and to provide consumers and retailers with effective, convenient and secure payment methods in the Union. In that context, there is a large positive potential which needs to be more consistently explored. [...] Whilst today, most payments at the point of sale are card based, the current degree of innovation in the field of payments might lead to the rapid emergence of new payment channels in the forthcoming years.”

The current level of interchange fees under the Regulation nevertheless creates a strong disincentive for payment service providers to support or promote such new Payment Initiation Services rather than card-based payments, as the Commission has itself highlighted, for example:

“Interchange fees [...] restrict market entry as their revenues for issuing payment service providers function as a minimum threshold to convince issuing payment service providers to issue payment cards or other

---

128 Also known as direct credits.
129 PSD2 Recitals 4 and 67.
5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments. continued

Payment card interchanges create a particular barrier to entry for new Payment Initiation Services, as Payment Initiation Services are generally precluded from setting interchange fees. This is because Payment Initiation Services are reliant on underlying credit transfer (or direct debit) payments, and Regulation (EU) No 260/2012 prohibits interchange fees on such payments.

Indeed, Regulation (EU) No 260/2012 was expressly intended to create neutral conditions of competition, i.e. to prevent such competitive distortions between alternative payment methods and alternative payment service providers:

“[…] no [multilateral interchange fee (MIF)] per direct debit transaction or other agreed remuneration with an equivalent object or effect shall apply to direct debit transactions [with the exception of rejected or reversed transactions]. [Article 8]

Regulation of multilateral interchange fees (MIFs) for direct debits is essential to create neutral conditions of competition between [payment service providers] and so to permit the development of a single market for direct debits. [Recital 20]"

This may therefore explain why there has been little or no development or take-up of Payment Initiation Services since the launch of PSD2 in 2018 (and associated initiatives such as Open Banking in the UK), especially in markets with a high penetration of card use, for example the UK. It may also explain why there have been widespread complaints among prospective Payment Initiation Service Providers about the refusal of banks to meet necessary technical standards, as mandated by PSD2, to support such Payment Initiation Services.

The incentive to promote card payments over-and-above new and alternative payment methods also applies equally to new challenger banks as to incumbent banks. Indeed, challenger banks can be even more dependent on interchange fees than incumbent banks. For example, almost 100% of leading UK challenger bank Monzo’s net operating income is accounted for by debit card interchange fees. Overall, interchange fees continue to represent a substantial – and non-
5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments. continued

transparent – source of revenue source to banks, for example, as reported by the UK Financial Conduct Authority:

“Many customers stay with their main [personal current account (PCA)] provider for years despite better deals often being available from other providers. So called ‘Free-if-in-credit’ (FIIC) banking is paid for by many consumers receiving low or no interest on PCA deposits; by high overdraft charges; and by interchange and other fees and charges such as foreign exchange that may not be transparent to consumers.134 (our emphasis)

According to the Financial Conduct Authority, debit card interchange fee revenue continues to represent banks’ largest source of transactional revenue for personal and business accounts, at £1.1bn per year in the UK135.

In addition to creating barriers to entry and expansion against Payment Initiation Services, the Regulation also creates a distortion of competition in favour of existing credit transfer or direct debit services. For example, the Regulation creates a strong incentive for banks to promote card-based “Continuous Payment Authorities”136 as a payment method for recurring payments (such as bill payments, subscriptions, or repeat online purchases), rather than direct debits. This explains why few if any online subscription or shopping services accept direct debits. Recent and forecast growth in credit transfer and direct debit payments is correspondingly much slower than growth in card payments137.

National competition authorities have also recognised that payment cards compete directly with credit transfers and direct credits for online, point of sale, and recurring payment types138. Hence, allowing interchange fees for some competing payment methods – while prohibiting interchange fees for others – will inevitably distort competition across the European payments market.

In addition to other electronic payment methods, excessive payment card interchange fees in particular creates a large distortion of competition against use

---

135 See “Strategic Review of Retail Banking Business Models: Final report”, Financial Conduct Authority, 2018, Figure 39.
137 For example, see Payments Market Report 2019, UK Finance.
138 For example: “[...] the [Competition & Markets Authority (CMA)] considers, for the purpose of assessment of this Merger, that card payments compete to some extent with online, [retail point of sale] and recurring payment methods relying on [direct credits and/or direct debits]” in the “Anticipated acquisition by Mastercard UK Holdeo Limited of Vocalink Holdings Limited: Decision on relevant merger situation and substantial lessening of competition”, UK Competition & Markets Authority ME/6638/16, 2017.
5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments. continued

of cash. Cash currently remains the most common alternative to card payments. The importance of cash as a comparator is of course central to the application of the Commission’s Merchant Indifference Test methodology, as explained by the Commission:

“[The costs and] benefits of card payments need to be measured relative to another means of payment. At least as far as face-to-face payments are concerned, cash appears to be a natural comparator as it is legal tender and it is the most used alternative to cards (it makes up the largest proportion of non-card retail payments). Furthermore, cash has no [interchange fee] attached to its use – an important criterion when selecting a comparator for cards in the context of the [Merchant Indifference Test], to avoid [circularity] problems.”

Hence, the Merchant Indifference Test is a direct measure of the potential distortion of competition between payment cards and cash. Any level of interchange fee materially different from the level implied by the Merchant Indifference Test is likely to result in an appreciable distortion of competition.

A central example of the distortion of competition between payment cards and cash – caused by excessive payment card interchange fees – is Mastercard and Visa’s widely proclaimed “war on cash”:

“We’re focused on putting cash out of business. [...] The rise in digital devices and technology will continue to be a great catalyst for the war on cash.”

While it is legitimate for payment card schemes and banks to promote one method of payment over another – it is not legitimate if such promotion relies on collectively-set interchange fees and/or other anti-competitive card scheme business rules or practices. Indeed, the Commission’s 2007 Prohibition Decision against Mastercard found that Mastercard’s multilateral interchange fees restricted competition within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) and that Mastercard had not demonstrated that its interchange fee fulfilled the conditions for exemption under Article 101(3) of the Treaty, i.e. that Mastercard’s interchange fees were unlawful.

139 Commission Cost of Payments Survey, para. 75.
140 Al Kelly, Chief Executive Officer and Oliver Jenkyn, Group Executive, North America, at Visa Inc Investor Day 2017.
141 See Commission 2007 Prohibition Decision, para. 2, 3, 752.
5. The Interchange Fee Regulation must ensure neutrality between card-based and non-card-based payments. continued

137. The Commission’s 2018 Observations to the UK Court of Appeal similarly highlighted that the Commission and EU courts have consistently found that default multilateral interchange fees restrict competition contrary to Article 101(1) TFEU. The Commission noted that the Merchant Indifference Test (MIT) only provides a potential upper limit on the level of interchange fee that might be compatible with EU competition law. It does not determine that such of interchange fee is lawful.

138. Moreover, the Commission says that there must be a presumption that no level of interchange fee is compatible with competition law, unless proven that any such interchange fee leads to net benefits for merchants and consumers, namely:

“The Commission regards the MIT or ‘tourist test’ as ‘a reasonable benchmark for assessing a MIF level that generates benefits to merchants and final consumers.’ In other words, it is a useful proxy for identifying the level of MIF which is indispensable for producing the net efficiencies [to consumers].

The MIT test does not, however, displace the need for rigorous scrutiny [...] In particular, whether a MIF is capable of giving rise to net efficiencies will depend on the concrete facts relating to the particular card market at issue. [...] For example [...], a MIF on an Always-Card transaction [for example, in a mature card market such as the UK] simply imposes a cost on the merchant which it would not otherwise have borne, whether or not it is set at the level suggested by the MIT.”

139. Hence, for the purpose of the Regulation, there must be greater transparency that the level of allowed interchange fees (and scheme fees) is compatible with the Merchant Indifference Test and that such interchange fees give rise to demonstrable benefits to merchants and consumers.

---

142 Commission Observations to the UK Court of Appeal, April 2018, para. 30, 31.
6. The Interchange Fee Regulation must regulate all payment card interchange fees.
6. The Interchange Fee Regulation must regulate all payment card interchange fees. continued

140. The Regulation exempts and/or excludes certain payment card transactions from the regulated interchange fee caps (and/or business rule prohibitions), as illustrated by Figure 12 below, namely:

i. commercial card transactions;
ii. inter-regional card transactions;
iii. three-party card scheme transactions;
iv. virtual card transactions using mobile or online wallets;
v. ATM cash withdrawal transactions.

Figure 12: There are five main exemptions and/or exclusions from the regulated interchange fee caps and prohibited business rules.

Source: Zephyre.

141. In EuroCommerce’s view, such exemptions have nevertheless led to continuing or increasing costs associated with such transactions, ultimately paid for by consumers. Such exemptions have also led to major distortions of competition between regulated and unregulated card transactions. The review of the Regulation must therefore reconsider fully the grounds for any such exemptions or exclusions.
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

Article 1 of the Regulation (Scope) specifies that the regulated interchange fee caps (as specified in Chapter II of the Regulation) do not apply to certain types of payment card transactions, namely:

- transactions with commercial cards;
- cash withdrawals at ATMs or at the counter of a payment service provider; and
- transactions with payment cards issued by three-party payment card schemes.

The Regulation also implicitly exempts payment card transactions where either the payer’s payment service provider (PSP) or the payee’s PSP are located outside of Europe, known as “inter-regional” payment card transactions, for example, where a card issuer is located outside the EEA, but card acquirer (and merchant) are within the EEA, and vice versa. A further form of apparent exemption from the Regulation are the fees and rules associated with virtual cards, e.g. when a payment card is used in a mobile or online payment wallet, such as Apple Pay or PayPal.

The Commission’s chief stated grounds for making such exemptions was that the “transparency and steering measures [in the Regulation] would remain key to prevent heavy promotion of cards with unregulated interchange fees”\(^{144}\), namely, that the Regulation Chapter III transparency and steering measures (which prohibit various payment card scheme business rules and practices) would act as a sufficient competitive constraint on unregulated interchange fees, making direct regulation unnecessary. The Commission nevertheless specifically highlighted that “the impact [of the Regulation] on the variability/level of interchange fees for [unregulated] cards would be highly dependent on the efficiency of transparency and steering measures”\(^{145}\).

For reference, the Chapter III transparency and steering measures comprise:

- Article 6 – territorial restrictions on licensing;
- Article 7 – mandated separation of payment card scheme and payment card processing entities;
- Article 8 – prohibition of restrictions on co-badging of payment brands;
- Article 9 – requirement to “unblend” fees to payees;
- Article 10 – prohibition of certain “honour all cards” rules;
- Article 11 – prohibition of “anti-steering” rules; and

---

\(^{143}\) See Regulation Article 1(1), which defines the scope of the Regulation as only including transactions where both the payer and payee’s PSPs are within Europe.

\(^{144}\) Proposal for the Regulation, page 12.

\(^{145}\) Regulation Impact Assessment, page 188.
6. The Interchange Fee Regulation must regulate all payment card interchange fees. continued

☐ Article 12 – requirement to provide information to payees.

Furthermore, the transparency and steering measures in the Regulation originated in the Commission’s prior antitrust finding that “restrictive payment card scheme business rules and practices lead to a situation of ineffective competition”\(^{146}\), for example, because “the ability of merchants to resist high interchange fees is hindered by a number of business rules that [...] limit their ability to differentiate their prices according to the cost of a given means of payment ([such as the] no surcharge [and] non-discrimination rule), or force them to accept all cards of a given brand ([namely the] honour all cards/products [rules])\(^{147}\) and that such rules “reduce transparency [and] limit the ability of retailers to steer their customers towards more efficient means of payment [...including] the ability of retailers to choose an acquirer in another Member State”\(^{148}\).

The Commission particularly highlighted the problem of “Honour All Cards Rules” and “Non-Discrimination Rules”:

“The Honour All Cards Rule (HACR) requires merchants to accept all products issued under the same brand, even if the fees for these cards can vary by a factor of 3-4 within the same card category (i.e. credit / debit cards in Belgium) or by a factor of up to 25 between card categories, such as premium credit card and low-cost debit cards in the UK. These costs, initially borne by the merchant are usually passed to the consumer through the price of the goods and services. Some of the business rules of card schemes, in addition to MIFs, have been addressed through the MasterCard Undertakings and the Visa Commitments, the applicability of which is however by nature limited in time.

In addition to the HACR, card schemes impose a Non-Discrimination Rule (NDR). Under the Non-Discrimination Rule merchants are prohibited from directing consumers towards the use of the payment instrument they prefer through surcharging, offering rebates or other forms of steering. Consequently, merchants are unable to charge consumers more for high-cost payment cards such as the premium cards and therefore have different costs but a single price and pass on these costs to all consumers through higher prices for the goods and/or services they offer.”\(^{149}\)

\(^{146}\) Regulation Impact Assessment, page 19.
\(^{147}\) Regulation Impact Assessment, page 24.
\(^{149}\) Regulation Impact Assessment, page 24.
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

The Commission therefore proposed to abolish such rules permanently as part of the Regulation.

However, abolition of such rules and practices, alone, was insufficient to justify the exemptions from the regulated interchange fee caps. This is chiefly because – as the Commission itself found – the restrictive rules and practices principally operate to “reinforce” the negative effects of interchange fees, rather than being the underlying cause of the negative effects of interchange fees, for example:

“[The negative effects of interchange fees] are reinforced by a number of business rules, which impact transparency, the ability of retailers to choose an acquirer in another Member State (‘cross-border acquiring’), and the ability of retailers to steer their customers towards more efficient means of payment or to refuse expensive cards (the HACR).”\(^{150}\) (our emphasis)

Hence, the abolition of such rules and practices is not in itself likely to remove the negative effects of anti-competitive interchange fees. Moreover, the Regulation has not ended the negative effects of interchange fees (and associated scheme fees) for commercial cards, cash withdrawals at ATMs, three-party payment card schemes, inter-regional cards, or virtual cards. In addition, the exemption of these payment type transactions from the Regulation has led to new distortions of competition between regulated and non-regulated payment cards.

The is chiefly because, as described extensively at Section 4 above, prior to the Regulation, consumer debit and credit card interchange was the chief means by which payment card schemes competed for card issuers. Accordingly, one of the chief effects of the Regulation has been that such competition for issuers has now shifted from regulated to unregulated payment card transactions, in particular, commercial cards and ATM cash withdrawals. Moreover, the caps on EEA consumer debit and credit card interchange fees, under the Regulation, have greatly magnified the upward pressure on commercial card and inter-regional interchange fees – and downward pressure on ATM interchange fees – as these interchange fees have now become the main means for the card schemes to compete for issuers. In addition, such focus on commercial card and ATM interchange fees, we believe, itself represents net compensation paid to card issuers, i.e. a circumvention of the Regulation contrary to Article 5.

The remainder of this section addresses each of these payment card exemption categories.

---

\(^{150}\) Proposal for the Regulation, page 8.
6. The Interchange Fee Regulation must regulate all payment card interchange fees. continued

6.1 The exemption of commercial cards from the Regulation has resulted in a large growth of commercial card costs for merchants.

6.1.1 A commercial card is defined as a payment instrument used only for business expenses.\(^{151}\)

6.1.2 The Regulation exempts commercial cards from the regulated interchange fee caps. This is on the express assumption in the Regulation that the removal of the “Honour all Products” element of the Honour all Cards Rule will allow payees to limit the choice of payment cards they offer to low(er) cost payment cards only, for example, so that merchants accepting debit cards or credit cards would not also be forced to accept commercial cards, and that this will be effective at preventing high interchange fees on such cards.\(^{152}\) The Regulation specifies that such payee choice must depend on there being a clear brand distinction between consumer and commercial cards, including the means for payees and payers to unequivocally identify such different categories of cards.\(^{153}\)

6.1.3 The Commission’s further reasons for exempting commercial cards from the regulated interchange fee caps were that:\(^{154}\):

- such cards have “very limited market shares in the EU and are not expected to expand significantly as a result of possible [interchange fee] regulation”;
- such cards “cannot be regarded as substitutes for credit cards or debit cards, as they cater for a specific clientele”;
- that payees “would be able to surcharge such cards that continue to generate high costs for merchant (or use other effective steering measures)”;
- that payees “would be able to reasonably refuse such cards”.

6.1.4 However, regrettably, most or all of these reasons have turned out to be contrary to experience, in particular:

---

\(^{151}\) See Regulation Article 2(6).

\(^{152}\) See Regulation, Recital 37, and Article 10.

\(^{153}\) See Regulation, Recital 38 and 39, and Article 10.

\(^{154}\) See Commission’s Regulation Impact Assessment pages 56, 61, 75, and 194.
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

- The market share of commercial cards has increased markedly following the Regulation\textsuperscript{155}, especially in certain sectors such as travel, reflecting the strong incentives for banks to promote high-interchange commercial cards over lower-interchange consumer cards, for example, as highlighted in the Commission’s 2007 Prohibition Decision against Mastercard\textsuperscript{156};

- Commercial cards are a substitute to some extent for consumer credit and debit cards, especially in certain sectors such as travel and entertainment, for example, where business travel expenses previously paid on consumer cards have now rapidly migrated onto commercial cards\textsuperscript{157};

- Surcharging of commercial cards is prohibited in a majority of Member States, and, in any event, is not a practical option for most merchants even where commercial card surcharging is permitted, especially for point of sale/face-to-face merchants, given the lack of clear brand distinction (or any clear distinction) between consumer and commercial cards, and thereby the difficulty for merchants informing customers of such surcharging practices in a clear and unequivocal manner, as required by Article 10 of the Regulation; and

- Similarly, most merchants cannot “reasonably refuse” to accept commercial cards, given the combination of the difficulty of informing customers of such card acceptance practices in a clear and unequivocal manner, plus the fact that commercial cards have become effectively “must take” cards in many sectors, especially travel and entertainment.

\textsuperscript{157} For example, Figure 13 below illustrates the large variation and proliferation of Mastercard and Visa terminology for commercial card products. Such profusion of terminology means that the large majority of cardholders and merchants have no awareness of any distinction between consumer and commercial cards, including:

- Awareness of the existence of commercial cards at all, as distinct from consumer cards;
- Awareness that all of the terms in Figure 13 are just different names for commercial cards; and
- Awareness that there is any relevant difference between commercial cards and consumer cards.

\textsuperscript{155} For example, in the UK, commercial cards issued have increased by 30% since the Regulation came into force, in particular driven by Mastercard commercial credit cards, which have increased by 500%. (See latest UK Payment Statistics from UK Finance.)

\textsuperscript{156} See para. 462.

\textsuperscript{157} We also understand that employers in various Member States are issuing commercial cards to their employees for purchase of restaurant meals and other food that would have previously been paid as salary and purchased on consumer cards.
6. The Interchange Fee Regulation must regulate all payment card interchange fees. continued

![Figure 13: Wide variation and proliferation of Mastercard and Visa terminology for commercial cards.](image)

Such lack of cardholder awareness of commercial cards itself makes it very difficult for most merchants to reasonably refuse such cards.

These conclusions on commercial cards are also strongly consistent with the results of EuroCommerce’s 2018 member survey, which found that:

- fewer than 5% of the EuroCommerce survey respondents differentiated between commercial and consumer cards at point of sale;
- more respondents to the survey were in Member States that prohibited surcharging of commercial cards than allowed surcharging;
- fewer than 1% of respondents had already stopped accepting or planned to stop accepting commercial cards;
- only 10% of respondents said that they already surcharged or planned to surcharge commercial cards;
- 85% of respondents said that they planned to continue accepting commercial cards without surcharging;
- whereas commercial cards represented less than 5% of sales volume for half of respondents, a quarter faced commercial card volume of between

Source: Lloyds Bank Cardnet, Mastercard, Visa.
The Interchange Fee Regulation must regulate all payment card interchange fees.

5%-20%, and a quarter faced volume over 20%, including some respondents with over 50% commercial card sales volume;

- a majority of respondents reported large increases in commercial card volumes since the Regulation came into effect, with some reporting over 60% increases in volume; and
- a majority of respondents reported increases in fees for accepting commercial cards.

They are also consistent with the results of 2017 survey of retailers in France\textsuperscript{158}, carried out by AFTE\textsuperscript{159}, FCD\textsuperscript{160}, and Mercatel\textsuperscript{161}, which showed that:

- whereas 71.5% of survey respondents experienced a decrease in average interchange fees in 2016 (the year after the Regulation came into force), 28.5% experienced an increase in average interchange fees, owing to large increases in commercial card interchange fees\textsuperscript{162};
- whereas for most survey respondents, commercial cards represented less than 10% of card sales value, for 27% of respondents, commercial cards represented more than 10%, and for 8% of respondents, commercial cards accounted for half of total sales value;
- commercial card interchange fees increased for 62% of respondents, of which 48% indicated at least a tripling and 20% at least a doubling; and
- commercial card interchange fees increased on average by 50 basis points, which offset the positive effects of interchange caps on consumer cards whenever a merchant’s share of commercial cards exceeded 10% of sales value.

Accordingly, the chief effect of exempting commercial cards from Chapter II of the Regulation has been significant increases in commercial card interchange fees, already multiple times greater than the regulated consumer card interchange fees, combined with heavy promotion of commercial card products and associated increases in commercial card volumes.

For example, since the Regulation came into force, Mastercard launched and has heavily promoted its “Global Wholesale Travel Program” commercial card, which has an interchange fee of 2.0\textsuperscript{163}. The direct effect of this has been higher prices to merchants, likely to be paid for by consumers – i.e. non-commercial cardholders – especially in certain sectors such as travel and entertainment. Such pricing and promotion of commercial cards also represents an appreciable

\textsuperscript{158} FCD presented the results of the survey to the Commission in February 2018.
\textsuperscript{159} Association Française des Trésoriers d’Entreprise (French Corporate Treasurers Association).
\textsuperscript{160} La Fédération du Commerce et de la Distribution (French Retail Association).
\textsuperscript{161} An association specialising in payment-related issues for the retail trade.
\textsuperscript{162} On Mastercard, Visa, and Cartes Bancaires cards.
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

distortion of competition, in which lower-cost regulated consumer credit or debit cards have been substituted by higher-cost unregulated commercial cards.  

163. Figure 14 illustrates how intra-EEA commercial card interchange fees are currently up to ten times greater than the corresponding intra-EEA consumer card interchange fees. The current highest intra-EEA commercial card interchange fee is Mastercard’s Global Wholesale Travel Program. Figure 14 also shows the close proximity of Mastercard and Visa’s commercial card interchange fees.

Figure 14: Commercial card interchange fees are up to ten times greater than regulated consumer card interchange.

Source: Lloyds Bank Cardnet (from October 2018).

164. Furthermore, Figure 15 below shows Visa’s large recent increases (as of October 2018) across almost all intra-EEA (including domestic) commercial card interchange fee categories. Such interchange fee increases reflect intensifying upward interchange fee competition between Mastercard and Visa, now on commercial cards. This is a demonstration of what the Commission refers to as “reverse competition”, i.e. of upward interchange fee competition, which the Commission defines as resulting in “welfare losses to merchants and consumers,

and associated restrictions on market entry”\textsuperscript{165}. Indeed, the Commission has repeatedly stated that the chief purpose of the Regulation is to end such reverse competition.

\textbf{Figure 15: Large recent interchange fee increases for Visa commercial cards.}

![Graph showing recent interchange fee increases for Visa commercial cards](source: Lloyds Bank Cardnet (October 2018)).

\textsuperscript{165} See for example Regulation Impact Assessment, page 19 and 86.

\textsuperscript{166} For example, as discussed in the Commission’s 2007 Prohibition Decision.

165. We understand that a further reason for exempting commercial cards from the regulated interchange fee caps was that such cards are perceived to compete for cardholders with three-party card schemes, such as American Express\textsuperscript{166}. Namely, such cards “compete” for cardholders by offering greater cardholders rewards for using such cards, paid for by higher fees to merchants. This is another example though of “reverse competition”, i.e. upward price competition between commercial cards and three-party card schemes.

Accordingly, such “reverse competition” between commercial cards and three-party schemes cannot, in our view, be a legitimate basis for exempting commercial cards – or three-party schemes – from the Regulation. In addition, we are aware that card scheme fees charged to acquirers for commercial cards are...
6. The Interchange Fee Regulation must regulate all payment card interchange fees. 

continued

typically much greater than for consumer cards\textsuperscript{167}, and therefore contribute to the problem of high merchant acceptance costs.

167. Commercial card interchange fees have also now been subject to investigation by the Commission since at least 2002\textsuperscript{168}, reflecting longstanding complaints and concern.

168. First, in 2007, the Commission’s Prohibition Decision reported that commercial cards had higher interchange fees than corresponding consumer cards (thereby creating an incentive for banks to promote commercial cards over consumer cards), that Mastercard set the level of the interchange fee without any objective benchmark, and that commercial cards represented a high proportion of sales in certain sectors, especially fuel retail and airlines.

169. Second, in 2010 and 2014, Visa’s successive commitments to reduce its interchange fees exempted commercial cards, subject to ensuring that commercial cards issued in Europe were “fully visibly and electronically identifiable to merchants”. The Commission nevertheless highlighted that the Visa commitments were “without prejudice to the right of the Commission to further investigate Visa’s [multilateral interchange fees (MIFs)] for commercial card transactions”.

170. Third, in 2012, the Commission’s Payments Green Paper found that: “The problems of high MIFs and a lack of transparency […] appear to be particularly relevant to merchants accepting commercial cards – i.e. payment cards issued to companies and their employees in order to allow them to pay for work-related expenses (e.g. business trips, office supplies) – under which card holders may be incentivised with bonuses and other advantages to make use of this means of payment.”\textsuperscript{169} (our emphasis) The Green Paper also specifically asked whether any regulatory distinction should be drawn between consumer and commercial cards. In response, merchants, consumers and public authorities argued that no such distinction should be made.

171. In addition to the high costs of commercial cards, EuroCommerce is also concerned about infringements of the Regulation in respect of commercial cards, in particular, where card schemes and/or card issuers appear to have intentionally misclassified consumer cards as commercial cards as a means to circumvent the regulated interchange fee caps on consumer payment cards. See further at Section 7.1 below.

\textsuperscript{167} For example, see Table 1 and Table 2 above.
\textsuperscript{168} European Commission case COMP/38,580 – Commercial Cards.
\textsuperscript{169} Page 8.
6. The Interchange Fee Regulation must regulate all payment card interchange fees. continued

172. The problem of commercial card interchange fees commercial card scheme fees, and circumvention of the Regulation in respect of commercial cards must therefore be addressed as part of the review of the Regulation.
6. The Interchange Fee Regulation must regulate all payment card interchange fees. 
continued

6.2 Exemption of inter-regional cards has caused large costs to European merchants and consumers.

173. Inter-regional card transactions are card transactions where the payer’s payment service provider (i.e. a card issuer) is based outside the European Economic Area (EEA), but the payee’s provider and payee (e.g. a merchant acquirer and merchant) are inside the EEA, and vice versa.

174. Inter-regional cards used at EEA merchants by non-EEA cardholders have similar features as commercial cards, namely, they typically have very high interchange fees – generally in the range 1.00%-2.25%\(^{170}\) – which are difficult or impossible for European merchants to avoid, and therefore likely to be paid for ultimately by European consumers in higher prices.

175. Correspondingly, inter-regional cards used by European cardholders at non-European merchants result in high interchange fees paid to European card issuers. Such interchange fees contribute to high payment costs borne by European (and non-European) cardholders while making payments outside of Europe.

176. Figure 16 illustrates how inter-regional card interchange fees are the highest of all interchange fees, showing both:

- consumer inter-regional cards (categorised by the card scheme as “Standard”, “Gold”, “Premium”, “Super premium”, “World”, and “World Elite”); and
- commercial inter-regional cards (distinguishing between “Commercial card”, “Business card”, “Corporate card”, and “Purchasing card”).

The Interchange Fee Regulation must regulate all payment card interchange fees.

Figure 16: Inter-regional card interchange fees are the highest of all interchange fees.

Source: “Cardnet transparency and disclosure items”, Lloyds Bank Cardnet (October 2018).

177. In developing the Regulation, the Commission acknowledged that inter-regional interchange fees were “considerably higher than for intra-regional EU transactions” and represented a large share of total EU interchange fees, despite a small share of volumes. The Commission nevertheless did not give reasons for excluding inter-regional cards from the Regulation, despite the likely impact on European consumers.

178. In comparison to the reasons given in the Regulation for exempting commercial cards, it is even more difficult for merchants to “reasonably refuse” inter-regional cards, given the absence of any visible brand distinction between EEA and non-EEA issued cards, nor of general cardholder or merchant knowledge of the existence of the EEA, or of which countries are in or outside the EEA. Figure 17 below illustrates the ease of confusing which countries are in the EEA, versus the EU and eurozone.

---

177 See Regulation Impact Assessment, page 20.
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

Continued

Figure 17: EEA member countries not generally known to cardholders or merchants.

Source: European Union.

The Commission has, however, recently accepted commitments from Mastercard and Visa to reduce their inter-regional interchange fees by approximately 40%, for a time-limited period, following a separate longstanding EU antitrust investigation. The proposed commitments followed the Commission’s stated concerns that inter-regional interchange fees have anti-competitively increased prices for European retailers accepting payments from cards issued outside the EEA, which have in turn led to higher prices for consumer goods and services in the EEA. The Commission has said that the commitments will lead to “lower prices for European retailers to do business, ultimately to the benefit of all consumers”.

The Commission’s statements concerning inter-regional cards therefore confirm that the exclusion of inter-regional interchange fees from the Regulation has led

---

6. The Interchange Fee Regulation must regulate all payment card interchange fees.

continued

to anti-competitive increases in prices for European retailers and consumers. Moreover, the substantial agreed reductions in inter-regional interchange fees largely reflects that such interchange fees were already very high (and rapidly increasing) before the proposed commitments came into effect.

Figure 18 shows the levels of interchange fees for inter-regional cards accepted in the recent Mastercard and Visa commitments, showing that inter-regional interchange fees for “card not present” remain at high levels relative to the regulated intra-EEA interchange fees.

**Figure 18: Mastercard and Visa inter-regional “card not present” interchange fees remain at high levels.**

![Graph showing interchange fees](source: European Commission)

Indeed, EuroCommerce was (and remains) greatly concerned that the Mastercard and Visa inter-regional fee commitments made a distinction between “card-present” and “card-not-present” interchange fees and that the Commission accepted a much higher interchange fee for card-not-present transactions\(^{173}\). In

6. The Interchange Fee Regulation must regulate all payment card interchange fees. continued

particular, EuroCommerce remains concerned at the Commission’s application of the Merchant Indifference Test methodology to determining the allowable interchange fee for such transactions, especially given that:

- first, the Commission’s statement to the England & Wales Court of Appeal in 2018 that the “multilateral interchange fee on an Always-Card transaction simply imposes a cost on the merchant which it would not otherwise have borne, whether or not it is set at the level suggested by the Merchant Indifference Test”174 – and thereby that no interchange fee is likely to be justifiable in the case of such “always cards” transactions; and
- second, that inter-regional card-not-present transactions (i.e. transactions made by a cardholder physically outside the EEA to a merchant inside the EEA) are almost entirely “always card” transactions, with generally no non-card means of payment being offered nor practically available.

Furthermore, in our view, the benefit to European merchants and consumers of the agreed reductions in inter-regional interchange fees is any event likely to be substantially or wholly nullified by corresponding recent and continuing large increases in Mastercard and Visa scheme fees imposed on acquirers, which are ultimately passed on to merchants and consumers for inter-regional transactions. For example, Figure 19 shows the very high levels and recent increases in scheme fees for inter-regional transactions reported by the EHI Retail Institute in Germany175. These are consistent with the same scheme fee levels as reported for the UK by Lloyds Bank Cardnet, as in Table 1 and Table 2 above.

---

175 Visa in particular has boasted of large increases in its inter-regional scheme fees in Visa’s regular conference call updates to investors.
6. The Interchange Fee Regulation must regulate all payment card interchange fees. continued

**Figure 19:** Inter-regional scheme fees now many multiples of regulated intra-regional interchange fees.

![Bar chart showing inter-regional scheme fees](image)

Source: EHI Retail Institute (Germany data).

184. Furthermore, a large supermarket member of EuroCommerce in Germany (as already reported at Figure 4 above) reports even higher levels still of inter-regional interchange fees, as shown in Figure 20 below.
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

Figure 20: Large EuroCommerce member reports even higher levels of inter-regional scheme fees.

Hence, a European merchant could now face merchant acceptance charges for consumer inter-regional transactions of up to 3.1% for card-not-present credit cards\(^{176}\) and 2.9% for card-not-present debit cards\(^{177}\) for interchange fees and scheme fees alone – that they could not reasonably refuse – and of 4.0% for corresponding inter-regional commercial card transactions\(^{178}\). As the recitals to the Regulation outline\(^{179}\), these levels of card acceptance costs are likely to represent an anti-competitive tying practice – of forcing merchants to accept such high-cost cards if they also accept lower-cost cards. They are also highly material for many merchants. For example, EuroCommerce’s merchant survey found that a large proportion of respondents had inter-regional card volume of between 10-30% of total sales volume, with some merchants having over 60% inter-regional sales volume, for example, merchants in the tourism and business travel sectors.

---

\(^{176}\) Equal to 1.50% interchange fee for inter-regional card not present credit cards plus corresponding reported 1.55% Mastercard inter-regional credit card scheme fee.

\(^{177}\) Equal to 1.15% interchange fee for inter-regional card not present debit cards plus corresponding reported 1.76% Mastercard inter-regional debit card scheme fee.

\(^{178}\) Equal to 2.25% interchange fee for Mastercard’s Corporate card or Purchasing card inter-regional commercial cards plus corresponding reported 1.74% Mastercard inter-regional commercial card scheme fee.

\(^{179}\) See Recital 37.
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

Accordingly, inter-regional payment card interchange fees – and moreover, inter-regional scheme fees – must be revisited and addressed as part of the Commission’s review of the Regulation.
6. The Interchange Fee Regulation must regulate all payment card interchange fees. 

6.3 Exemption of three-party card schemes causes further high costs to merchants and consumers, and associated distortion of competition.

Three-party payment card schemes (also known as “proprietary” or “closed loop” card schemes) are payment card schemes in which the scheme itself provides acquiring and issuing services directly to payers and payees. This means that three-party schemes do not have explicit interchange fees. They nevertheless still have “implicit” interchange fees that reflect the relative level of charges and/or incentives set by the scheme to payees (i.e. merchant service charges) and to payers (i.e. cardholder fees and/or cardholder reward programmes). Figure 21 illustrates how three-party card schemes comprise such implicit interchange fees (and implicit scheme fees), along with internal payment card scheme, card issuer, and merchant acquirer functions.

Figure 21: Three-party schemes also comprise “implicit” interchange fees (and scheme fees).

---

Source: Zephyre.

Three-party card schemes are exempt from the regulated interchange fee caps except when such “a three party payment card scheme licenses other payment service providers for the issuance of card-based payment instruments or the acquiring of card-based payment transactions, or both, or issues card-based payment instruments with a co-branding partner or through an agent” in which

---

180 See definition at Regulation Article 2(18).
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

continued

case “it is considered to be [(and regulated under the Regulation as)] a four party
payment card scheme”\(^{181}\).

189. Three-party schemes also have similar features as commercial cards and inter-
regional cards in that they charge high fees to merchants that are difficult for
merchants to avoid, especially for merchants in certain sectors. This means that
payers (i.e. cardholders) are also likely to pay higher prices, including payers that
do not actually use three-party payment cards.

190. The Commission said that it exempted three-party schemes from the regulated
interchange fee caps\(^{182}\) for essentially the same reasons as for exempting
commercial cards from the caps\(^{183}\), namely that:

- such cards have “very limited market shares in the EU and are not
  expected to expand significantly as a result of possible [interchange fee]
  regulation”;
- such cards “cannot be regarded as substitutes for credit cards or debit
  cards, as they cater for a specific clientele”;
- that payees “would be able to surcharge such cards that continue to
  generate high costs for merchant (or use other effective steering
  measures)”; and
- that payees “would be able to reasonably refuse such cards”.

191. However, in EuroCommerce’s view, these reasons have turned out to be no less
well supported than the corresponding reasons for commercial cards, in
particular:

- the market share of cards issued by three-party card schemes have
  increased substantially following the Regulation\(^{184}\), especially in certain
Member States, owing to the much greater cardholder incentives that
three-party card schemes are free to offer – at the expense of merchants –
in comparison to four-party schemes following the Regulation;
- cards issued by three-party card schemes are a substitute for both credit
  and debit cards for many cardholders, especially in Member States with a
  high merchant acceptance of three-party card schemes, as such cards offer

\(^{180}\) See Regulation Article 1(5).
\(^{181}\) When operating as three-party schemes.
\(^{182}\) See Commission’s Regulation Impact Assessment pages 56, 61, 75, and 194.
\(^{183}\) Once market shares of three-party schemes when operating with licensees or other partners as four-party
schemes are excluded. For example, American Express’s “proprietary” (i.e. three-party) business outside the US
(including consumer and commercial cards) grew by 13% and 17% in 2017 and 2018 respectively, led by growth
from the Europe, Middle East, and Africa region, compared to slow or negative growth in previous years, and
overall shrinkage in American Express’s “Global Network Services” (GNS) (i.e. four-party) business. (See
American Express, “2018 Annual Report”, Table 6: Billed business growth.)
6. The Interchange Fee Regulation must regulate all payment card interchange fees. continued

similar functionality and services as four-party payment cards, and are
targeted at similar cardholders;

☐ surcharging of cards issued by three-party card schemes is now prohibited
in many Member States and, in any event, surcharging is generally not an
attractive commercial option for merchants elsewhere; and

☐ merchants in certain sectors cannot “reasonably refuse” cards issued by
three-party card schemes, especially merchants in the travel and
entertainment sector, where such cards are considered to be “must take”
cards, owing to the strong preference and expectation of cardholders to
use cards issued by three-party card schemes in these sectors, especially
when used as a commercial card by business users.

192. Another reason that the Commission gave for exempting three-party card
schemes is the Commission’s suggestion that the only way to regulate three-party
schemes would be to regulate merchant service charges (MSCs) and that this
would be “very interventionist”, as regulating MSCs would185:

☐ “make it difficult for merchants to negotiate with their acquirers on the
acquiring margin”;

☐ “have adverse effects on competition on the acquiring side”;

☐ “raise the issue of the level at which the MSC should be fixed, under which
methodology and how this would be monitored at EU and national level”;

☐ “amount to regulating ‘retail prices’, whereas, in contrast, regulation of
interchange fees would only amount to regulating ‘wholesale prices’”; and

☐ likely require heavy resources in terms of public administration.

193. However, in our view, regulating MSCs is not the only way – nor most effective
way – to regulate three-party schemes.

194. Instead, a much more effective and less interventionist approach would be to
mandate that all designated three-party card schemes must license acquiring of
their schemes by independent third-party acquirers at a regulated wholesale price
– namely, on a similar basis as four-party card schemes license their services to
third-party acquirers and at the same regulated rate. Indeed, most three-party
schemes already contract with independent acquirers to offer their schemes to
merchants.

195. Such a regulated wholesale price would be the total wholesale price charged by
the three-party scheme to the acquirer for acquiring its scheme. Such a price
would correspond to the interchange fee plus the acquirer scheme fee charged by
four-party schemes to acquirers. Such a form of wholesale price regulation would
address the problem of payment card scheme fees in four-party card schemes, as

---

185 See Regulation Impact Assessment, page 195.
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

well as ensuring a level playing field and consistent treatment of three-party and four-party payment schemes\textsuperscript{186}.

In contrast, the effect of exempting three-party schemes from the regulated interchange fee caps is that such three-party schemes continue to set MSCs and corresponding cardholder incentives at much higher levels than for regulated four-party schemes. This implies the same negative effects of high interchange fees (and scheme fees) as in four-party schemes, resulting in higher charges to merchants, ultimately paid by all consumers\textsuperscript{187}. It also implies a substantial and unjustifiable competitive distortion in favour of three-party schemes versus four-party schemes, namely, leading to over-promotion of high-cost three-party card schemes at the expense of lower-cost four-party schemes. Indeed, this distortion of competition reflects again former Vice President Almunia’s speech at the launch of the Regulation, that: “[…] fees paid by retailers end up on consumers’ bills. Not only are consumers generally unaware of this, they are even encouraged through reward systems to use the cards that [set the highest fees to retailers].”\textsuperscript{188}

In addition, the Commission highlighted as early as its 2012 Payments Green Paper that three-party schemes involve an “implicit interchange fee” that may raise “similar issues of lack of competitive constraints” as four-party schemes. The European Parliament noted in its response that the business model for three-party payment schemes “may raise competition concerns similar to those for four party payment schemes” and therefore called for all card schemes “whether four party, three party or mixed schemes and any new market entrants” to be “treated equally in order to ensure a level playing field and to foster competition and transparency for consumers and merchants”.

In its proposal for the Regulation, the Commission asked whether “normally more expensive” three-party schemes should be exempted from the regulated interchange fee caps, again highlighting that “interchange fees are implicit in three party payment card schemes”. The Commission nevertheless decided to exempt three-party schemes from the interchange fee caps or any equivalent measure.

We note that the largest three-party payment card scheme in Europe is American Express (“Amex”). Amex offers both consumer and commercial payment cards. Many European merchants refuse to accept Amex owing to its higher merchant

\textsuperscript{186} Such a form of wholesale price regulation would be equivalent to wholesale access regulation that is very well established in other network industries, especially electronic communications (i.e. fixed and mobile telecoms/internet access) and energy distribution networks.

\textsuperscript{187} In particular in Member States where surcharging of three-party card schemes is prohibited.

\textsuperscript{188} European Commission SPEECH/13/660: Introductory remarks on proposal for regulation on interchange fees for cards, Internet and mobile payments, Joaquín Almunia (Vice President of the European Commission responsible for Competition Policy), 24 July 2013.
The Interchange Fee Regulation must regulate all payment card interchange fees. Nevertheless, Amex has a high merchant acceptance in many retail sectors, in particular in the travel and entertainment sectors. This reflects that Amex is considered to be a “must take” card in these sectors, namely, that Amex has a high degree of market power over merchants. Such market power is the result of expectation and desire among Amex cardholders to use their cards at such merchants (especially among business travellers and other business users), owing to the high rewards they receive in return from such use (compared to four-party cards) and also that many business users are only issued with an Amex card for business use (but not a corresponding four-party commercial card). Such cardholders may therefore choose to use other merchants if Amex were not accepted at such travel and entertainment sector merchants.

Amex is nevertheless not the only example of a three-party payment card scheme in Europe. There are also more specialist or localised three-party schemes, including commercial card only three-party schemes.

One example of a more specialist three-party scheme is the Fleetcor fuel card, present in over ten Member States. Fleetcor offers payment cards for vehicle fleet operators to purchase fuel. Fleetcor has almost 100% acceptance among fuel retailers in some Member States. Fleetcor is both a three-party card scheme and a commercial card-only scheme.

EuroCommerce is aware that Fleetcor charges substantially higher merchant service charges to fuel retailers than corresponding charges for consumer credit and debit cards. Fleetcor also offers associated financial incentives for payers to use such cards. Fleetcor therefore has a high implicit interchange fee, like other three-party schemes, resulting in much higher costs to fuel retailers and their customers. Such high implicit interchange fees represent a corresponding distortion of competition in favour of unregulated three-party fuel cards versus regulated four-party payment cards, and associated higher costs to fuel retailers and non-fuel card users.

Other examples of specialised three-party card schemes are meal voucher schemes, whereby meal vouchers are issued to payers (typically by employers) and are widely accepted in the restaurant and food grocery retail sectors in many Member States. Meal voucher schemes operate as both three-party schemes.

---

190 We note the UK Payment System Regulator’s Guidance that, according to Article 1 of the Regulation, that cards that can only be used to buy a limited range of goods/services are outside the scope of the Regulation “for example, fuel purchasing cards”. See “Guidance on the PSR’s approach as a competent authority for the EU Interchange Fee Regulation, October 2016, para. 2.21. However, we disagree with the PSR that Article 1 excludes fuel purchasing cards, given the size of the fuel retail sector in all Member States.
191 EuroCommerce is aware that meal voucher payment schemes are currently present in Austria, Belgium, Czech Republic, France, Finland, Germany, Hungary, Italy, Romania, Portugal, Sweden, and the UK. The main meal voucher issuers in Europe are Edenred, Sodexo, and Up Cheque Dejeuner.
6. The Interchange Fee Regulation must regulate all payment card interchange fees. continued

and four-party schemes. In general, meal vouchers are very expensive for merchants to accept, with MSCs of between 1% and 10% of the transaction sales value along with significant merchant implementation costs192. Meal vouchers have nevertheless become a “must take” payment method for many merchants in the restaurant and food retail sectors. Like other unregulated payment cards, such combination of high costs and must take status results in a distortion of competition between regulated and unregulated payment methods, and associated high costs for retailers and consumers.

204. EuroCommerce is concerned also at potential circumvention of the Regulation in respect of meal vouchers, in particular through issuance of four-party meal vouchers as unregulated commercial cards, rather than properly as regulated consumer cards. See further at Section 7.1 below.

205. The review of the Regulation must therefore address how to bring all such three-party payment card schemes within future scope of the Regulation.

---

192 For three-party meal voucher schemes.
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

6.4 Exemption of virtual card payment fees and business rules raises a wide range of antitrust concerns.

Virtual card payments – when a payment card is used via a mobile or online payment wallet – are a form of card-based payment instrument as defined in the Regulation, namely, “a card, mobile phone, computer or any other device which enables the payer to initiate a card-based payment transaction”\(^{193}\). In general, online and mobile wallets offer cardholders the convenience of initiating card-based payment transactions from one of many underlying cards without the need to carry the physical card or to enter card details for every transaction. Online and mobile wallet providers – and the associated fees and business rules applying to virtual card payments – are nevertheless not explicitly included in the Regulation.

Figure 22 below illustrates the current main virtual card wallets currently offered to cardholders and accepted by many merchants, including Amazon Pay, Apple Pay, Click to Pay\(^{194}\), Google Pay, Masterpass, PayPal, and Visa Checkout. All such virtual card wallets are either products of the major payment card schemes (i.e. Click to Pay, Masterpass, and Visa Checkout) or offered through close agreements with the major payment card schemes (especially Apple Pay and PayPal).

---

\(^{193}\) Regulation Article 2(20).

\(^{194}\) A new online wallet, also called Secure Remote Commerce, developed by EMVCo (a joint venture of American Express, China Union Pay, Discover, JCB, Mastercard, and Visa).
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

continued

Figure 22: All major virtual card payment options are products of the major payment card schemes or in close agreement with the major card schemes.

Source: Zephyre.

208. In EuroCommerce’s view, the business rules and underlying agreements associated with most virtual card payments operate in a way that is contrary to the Regulation and/or also contrary to European antitrust law.

209. For example, we highlight the Commission’s preliminary investigation into Apple Pay, which we understand seeks to address complaints as to how Apple blocks third-party access to the near-field communications (NFC) functionality on Apple mobile devices, thereby preventing third-party providers from offering rival contactless mobile payment methods on Apple mobile devices, except via Apple Pay. In particular, we understand that the complaints include that:

- Apple anti-competitively blocks third-party access to the NFC functionality on Apple mobile devices, thereby preventing third-party providers from offering rival contactless mobile payment methods on Apple devices, except via Apple Pay;
- Apple anti-competitively directs users to using Apple Pay for point of sale and in-app purchases over rival payment methods; and
- Apple charges substantial fees for use of Apple Pay, including fees to card issuers, app developers, and mobile content providers, especially when

---

such services are considered to be competitive with Apple’s own services (such as Apple Music or Apple Card).

210. EuroCommerce also has concerns about Apple Pay and its impact on merchants and consumers. In particular, in EuroCommerce’s view, Apple Pay represents an agreement between Apple and the major payment card schemes – Visa, Mastercard, and American Express – with the object or effect of preventing or restricting competition for mobile payments on Apple devices from using rival payment methods, including:

- rival payment card schemes, such as national card schemes196;
- credit transfers, including real-time/faster payments and Payment Initiation Service Providers (PISPs), as enabled by the recent revised Payment Services Directive (PSD2);
- PSPs’ own payment applications; and
- merchants’ own payment applications197.

211. For example, the restrictions associated with Apple Pay prevent merchants from developing their own payment applications to enable point of sale mobile payments for customers using Apple mobile devices. Hence, retailers have no option but to accept Apple Pay if they wish to accept mobile payments from Apple users via NFC based technology. Moreover, retailers have no choice but to accept Apple Pay if they accept payment cards at all.

212. Apple Pay also appears in direct violation of the objectives and requirements of PSD2, in particular, by creating an unnecessary and intentional barrier to the development of innovative, secure, and convenient non-card-based payment methods:

“It has proven difficult for payment service providers to launch innovative, safe and easy-to-use digital payment services and to provide consumers and retailers with effective, convenient and secure payment methods in the Union. In that context, there is a large positive potential which needs to be more consistently explored. [...] Whilst today, most payments at the point of sale are card based, the current degree of innovation in the field of payments might lead to the rapid emergence of new payment channels in the forthcoming years.”198

213. In addition, the operation of Apple Pay also appears to be in violation of Article 10 of the Regulation (“Honour All Cards” rule). Article 10 prohibits payment card schemes from applying any rule that obliges merchants accepting one card-based

---

196 Except to the extent that Apple has licensed Apple Pay to national card schemes, such as Cartes Bancaires.

197 EuroCommerce notes current legislative proposals in Germany that would mandate third party access to the NFC element in Apple mobile devices, which EuroCommerce supports as a remedy to some of these concerns.

198 PSD2 Recitals 4 and 67.
payment instrument (e.g. a card, mobile phone, computer or other device which enables the payer to initiate a card-based transaction) also to accept any other card-based payment instruments of the same payment card scheme. The only exception is when the payment instrument is of the same brand and interchange fee category.

214. In EuroCommerce’s view, a payment using Apple Pay (or any other mobile wallet) and a payment using a physical card are different types of card-based payment. Hence, any rule that obliges merchants accepting physical-card-based payments also to accept mobile-wallet-card-based payments is a violation of Article 10. The Regulation defines such obligations as anti-competitive tying practices, making the acceptance of one payment instrument conditional on the acceptance of another, thereby removing choice and creating barriers to entry and competition.

215. The restrictions associated with Apple Pay could is also a likely infringement of the Article 11 (Steering rules) prohibition of any rules preventing payees from steering consumers to the use of any payment instrument preferred by the payee, by denying payees (i.e. merchants) any opportunity to steer consumers to any alternative mobile payment instrument.

216. The effect of the Apple Pay agreements between Apple, Mastercard, Visa, and American Express is that Apple Pay has 100% (or near 100%) share of the markets for point of sale mobile payments and in-app payments on Apple devices, thereby using exclusively Mastercard, Visa, or American Express cards in most Member States. Apple benefits from Apple Pay through the leveraging of Apple’s position in the mobile operating systems and mobile devices markets into the payments market, in particular, through combination of fees\(^{199}\), benefits to other Apple Services, and benefits to the wider Apple ecosystem.

217. Correspondingly Mastercard, Visa, and American Express benefit considerably from Apple Pay through the creation of a major barrier to competition with rival payment schemes, PSPs, and PISPs, among others, which thereby protects and reinforces their existing market positions, in greater payments volumes and charges.

218. Moreover, Apple Pay has neutralised prospective competition between Apple – as a rival payment scheme provider – and Mastercard, Visa, and American Express. Indeed, prior to launching Apple Pay, Apple invested in launching a rival retail point of sale payment system in competition with Mastercard, Visa, and other existing payment schemes\(^{200}\). Apple nevertheless eventually decided in favour of

---

\(^{199}\) Namely, a component of interchange fees paid by merchants and ultimately consumers.

\(^{200}\) See extensive media reports.
Apple Pay operating as another way to pay by card payment, rather than opting to compete against the major payment card schemes.

219. The overall effect of Apple Pay on merchants, and ultimately on consumers, is thereby to deny competition and choice from alternative mobile payment services and providers201.

220. In EuroCommerce’s view, Apple Pay also represents a wider anti-competitive symptom of the European payments market, of a series of similar bilateral agreements between the major payment card schemes and other major technology firms – and that much of the alleged “disruption” of the global payments market is just another way to pay by card, for example, as recently commented by the Financial Times:

“These days, consumers have more ways than ever to pay for things. Companies from Apple and Starbucks to PayPal and Amazon have all devised new ways for [consumers] to make purchases. In theory, their rise is supposed to disrupt the lock that credit card companies have on the payment business. In practice, they simply offer different ways to connect a card to execute a transaction. As a result, credit card issuers and processors have seen their positions strengthened, not weakened, by the proliferation of payment options.

[...] All this is translating into good times for [the] credit card industry. Shares in sector leaders Visa, Mastercard and American Express have all set new highs this year.”202

221. Accordingly, the antitrust concerns with Apple Pay are also characteristic of other mobile and online providers that enable the use of a virtual card, such as PayPal. Like Apple, PayPal was formerly a prospective competitor to the major payment card schemes, through offering a highly credible alternative point of sale payment option, relying on low-cost bank transfers, rather than high-cost card payments. In response to this threat, Mastercard and Visa made bilateral agreements with PayPal – following a hostile public campaign against PayPal – to stop PayPal steering its customers away from high-cost card payments203. Hence, Mastercard and Visa have successfully imposed “anti-steering” rules on PayPal, which in EuroCommerce’s view, are also in violation of Article 11 of the Regulation.

201 Apple Pay may also forcibly extract valuable customer data from merchants.
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

continued

222. Unlike Apple Pay, PayPal is not subject to the Honour All Cards rules, i.e. that merchants that accept cards must also accept PayPal. PayPal has nevertheless become a “must take” product for many types of merchant.

223. In particular, for many medium and smaller online/e-commerce merchants, PayPal has become a “must take” payment wallet. This is because payers strongly value the convenience of not having to enter card details for every online purchase. Cardholders also are reluctant to enter (or save) card details with new or unknown online merchants and therefore value the security offered by PayPal. This means that PayPal has effectively become “must take” for such online merchants in order to compete with more established brands and larger online retailers, especially Amazon.

224. The “must take” status of PayPal, and associated market power over many merchants, is demonstrated by its very high fees charged to merchants, at almost three times the cost of accepting non-wallet based credit and charge cards, and according to previous BRC Annual Payments Surveys, over ten times the cost of accepting cash (on a percentage of transaction value basis). The market power of PayPal is further enhanced by prohibition of merchants surcharging PayPal in some Member States. The high costs of accepting PayPal are thereby likely to be paid for by all consumers in higher prices.

225. Along with Apple Pay and PayPal, EuroCommerce also has material concerns about Mastercard, Visa, and American Express’s recently launched “Click to Pay” Secure Remote Commerce platform, intended to replace the Mastercard Masterpass and Visa Checkout online wallets with a single card scheme wallet, and specifically targeted at Apple Pay and PayPal. EuroCommerce is concerned that Secure Remote Commerce will itself become a “must take” product for many online merchants, attracting higher fees and restrictive rules, and creating further barriers to competition from non-card-based payment products, by encouraging cardholders to use Click to Pay in replacement of any alternative online wallet, and by denying national card schemes (i.e. non-EMVCo card schemes) and non-card-based payment methods from participating in Click to Pay.

226. EuroCommerce highlights the findings of the recent US Secure Payments Partnership report on how “EMVCo is a vehicle for collusion among the card companies on payment standards […] that further their already entrenched market dominance” in particular:

---

204 See “Payments Survey 2018”, British Retail Consortium.
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

- “that Visa and MasterCard own and control EMVCo and ensure it sets standards that Visa and MasterCard can use to beat competitors […]”;
- how EMVCo adopted expensive, complex and difficult-to-implement technology such as NFC [mobile payments] because it prevents other competitors from entering the mobile payments market;
- how EMVCo adopted an anticompetitive tokenization standard that discriminates against [independent] debit networks and non-card forms of payment;
- how EMVCo ignored the work of other standards-setting organizations such as the Fast Identity Online (FIDO) Alliance and World Wide Web Consortium (W3C) that were developing open standards for authentication that would have allowed other competitors into the system; and
- that EMVCo has introduced the Secure Remote Commerce standard, which purports to become a new integrated checkout platform for online payments that has the potential to make it difficult to route transactions through [independent] debit networks, create higher dependence on the card companies and increase merchants’ payment processing costs.”

Such findings echo previous serious concerns raised by US legislators about EMVCo’s governance, operation, and the impact of its specifications on competition and choice between electronic payment networks, observing that:

“It appears that EMVCo is currently run by the big card networks for the big card networks”.

EuroCommerce shares the same concerns as Senator Durbin and the recent Secure Payments Partnership report.

EuroCommerce is therefore concerned that the Commission’s preliminary investigation of Apple Pay must also address the wider context of the review of the Regulation, including:

- the impact of Apple Pay on retailers;
- the extent that Apple Pay may infringe the Regulation;
- the impact of other major mobile and online wallets on merchants and extent that they may also infringe the Regulation and EU antitrust law; and
- the role of EMVCo in setting technology standards and its role as a possible vehicle for collusion between the major payment card schemes.


208 See letters from Richard J. Durbin, United States Senator, to EMVCo, of March 2016 and May 2016, at www.durbin.senate.gov.
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

6.5 Exemption of ATM cash withdrawals creates a further large distortion of competition, and additional costs to merchants and consumers.

230. Article 1(3) of the Regulation exempts cash withdrawals at ATMs from the regulated interchange fee caps. The Recitals to the Regulation do not give specific reasons for this exemption (nor the Proposal for the Regulation or Regulation Impact Assessment). In our view, exemption of ATM cash withdrawals was an unfortunate but significant omission from the Regulation. In particular, it has led to a large distortion of competition between card payments and payments made in cash.

231. In EuroCommerce’s view, the exemption of ATM cash withdrawals from Chapter II of the Regulation has also greatly hastened the demise of cash in Europe. This has led to increased costs to merchants and consumers, and to other payment card scheme participants, such as independent ATM operators. It has also led to wider costs to society, including loss of payment choice and associated rights to privacy, rights of security and protection, and other citizens’ rights. This has especially impacted more vulnerable citizens and citizens in rural areas, who particularly rely on cash, as well as smaller and family-owned retailers, who also depend extensively on cash payments.

232. Use of cash versus non-cash payment methods varies considerably between Member States. Figure 23 below nevertheless illustrates the rapid decline of cash payments volume, in the UK, and rapid replacement of cash by card payments, especially debit cards as example of the potential trend across all European markets.

---

209 And also cash withdrawals at the counter of a payment service provider.
210 See for example: "The role of euro banknotes as legal tender" Speech by Yves Mersch, Member of the Executive Board of the ECB, at the 4th Bargeldsymposium of the Deutsche Bundesbank, Frankfurt am Main, 14 February 2018, European Central Bank.
211 For example, see: "Occasional Paper Series: The use of cash by households in the euro area", No 201 / November 2017, European Central Bank.
213 Some Member States have seen even faster decline in use of cash, such as Sweden and other Northern European markets.
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

Continued

Figure 23: Payment cards rapidly replacing payments by cash.

![Payment cards rapidly replacing payments by cash graph](chart.png)

Source: UK Finance214.

233. EuroCommerce believes that the Regulation has greatly hastened these trends, by creating strong incentives (and opportunities) for payment card schemes to set ATM interchange fees that suppress access to cash for European consumers and businesses.

234. First, we note that cash withdrawals at ATMs are an integral feature of almost all payment cards, along with the capability to make purchase transactions215. ATM cash withdrawals nevertheless usually operate as separate payment card schemes, either by Mastercard or Visa, or by national ATM card schemes, typically co-badged on a Mastercard or Visa debit or credit card.

235. Second, there are also large similarities, but also material differences, between payment card purchase transactions (i.e. debit or credit purchase transactions) and payment card ATM cash withdrawals.

---


215 ATM cash withdrawals also represent the most predominant means of accessing cash in Europe. See for example: “Occasional Paper Series No 201: The use of cash by households in the euro area”, ECB, 2017.
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

By way of reference, Figure 24 below shows the different participants and fees in European ATM card schemes (in comparison to debit and credit card schemes, as shown at Figure 2 above), namely:

- the payer is the cardholder;
- the payee is the ATM operator;
- the payer’s (cardholder’s) PSP is the card issuer;
- the payee’s (ATM operator’s) PSP is the ATM acquirer (and may also be part of the same organisation as the ATM operator\(^{216}\)); and
- the ATM card scheme is generally either Mastercard, Visa, or a national card scheme.

Figure 24: Participants and fees in ATM payment card schemes substantially overlapping with point of sale card schemes.

Hence, Figure 24 (and Figure 2) shows that there are large overlaps in the participants of credit/debit card schemes and ATM card schemes, in particular that:

- the payer (cardholder) and payer’s PSP (card issuer) are typically the same (as well as the payer’s account and the physical card being the same);

---

216 For example, the ATM acquirer/ATM operator will be part of different organisations in the case that a bank acts as a sponsor scheme member for a non-bank independent ATM operator or where a bank outsources to an independent ATM operator. Even where the ATM acquirer and ATM operator are part of the same organisation, they remain distinct functions, namely the ATM acquirer function acts as the scheme member (for potentially multiple schemes), whereas the ATM operator function operates the physical ATMs.
6. The Interchange Fee Regulation must regulate all payment card interchange fees. continued

- the card scheme operator and brand may be the same, i.e. Mastercard, Visa, and/or a national card scheme;
- the payee’s PSP may also be the same organisation (for example, where a bank is both a merchant acquirer and ATM acquirer);
- the payee may also be the same organisation (for example, where a merchant is also an ATM operator).

Figure 24 also shows the various fees between the participants, in particular that:

- the cardholder may pay a cardholder fee to the card issuer to make cash withdrawals;
- the cardholder may pay a surcharge (also known as a “direct access charge”) to the ATM operator to make cash withdrawals;
- in the event that the ATM acquirer and ATM operator are part of separate organisations, then the ATM acquirer will typically pay or receive a service fee from the ATM operator;
- card issuers generally pay interchange fees to ATM acquirers, which are typically set by the ATM card scheme; and
- card issuers and ATM acquirers generally pay scheme fees to ATM card schemes.

The most important similarity between cards used for purchase transactions and cards used for ATM withdrawals is that they are both payment systems, defined as:

“A system which is operated by one or more persons in the course of business for the purpose of enabling persons to make transfers of funds, and includes a system which is designed to facilitate the transfer of funds using another payment system.”

The chief economic feature of payment systems is that they are characterised by large network effects. This is because they bring together distinct groups of participants – in particular, a person seeking to transfer funds (i.e. payer) and intended recipient (i.e. payee) – where the demand from one group of participants depends on the demand from another group. Such interdependence of demand is known in economics as “cross-platform network effects” or “cross-

217 If the card scheme operator/brand are not the same, then the payer’s card will typically be co-badged, for example, between a national scheme for domestic purchase and/or ATM transactions, and Mastercard or Visa for international transactions, or other combination.

218 Moreover, an ATM operator could itself be classified as a specialist type of merchant, i.e. a type of vending machine operator that specialises in dispensing cash.

219 Depending whether the ATM is a “free-to-use” or “pay to use” ATM.

220 See The Financial Services (Banking Reform) Act 2013 (UK). The UK Government has designated LINK, the UK national ATM scheme as a payment system, under this Act, because the LINK system allows for inter-bank transfers and is used when a customer withdraws cash from an ATM that is not operated by their own card issuer.
platform demand externalities”, and such markets are known as “two-sided” (or “multi-sided” or “platform”) markets. For example:

- “[Platform markets are] different in nature from traditional markets, and particularly, there are important demand externalities from one side of the platform to the other ([known as] ‘cross-platform network effects’) which if ignored could lead to bad [antitrust] decision-making. [...] where these externalities are recognised, existing [antitrust] tools can be adjusted to account for them.”

- “[...] there is a general consensus that multi-sided markets share two defining features: distinct groups that interact with each other across the platform and cross-platform externalities or network effects among those distinct groups. [...] Distinct groups. Multi-sided markets have at least two distinct groups or sides that rely on the platform to connect them directly or indirectly to each other. [...] Cross-platform network effects. The different sides of a platform market are interdependent to the extent their decisions affect each other even indirectly.”

In the case of card schemes for purchase transactions, the platform is the debit or credit card scheme (for example, the Mastercard debit card scheme) and the relevant payers and payees are cardholders and merchants respectively. The relevant network effects are that the demand from cardholders to use a given debit or credit card scheme depends on the number, type, and location of merchants participating in the scheme. For example, the greater the number of merchants that accept a given type of card, the more useful it is likely to be to prospective cardholders. Correspondingly, the demand from merchants to use a given debit or credit card scheme depends on the number, type, and location of cardholders participating in the scheme.

In the case of card schemes for ATM cash withdrawal transactions, the platform is the relevant ATM card scheme (for example, the UK LINK ATM card scheme) and the relevant payers and payees are cardholders and ATM operators respectively. The corresponding network effects are that the demand from cardholders to use a given ATM scheme depends on the number, type, and location of ATM operators and ATMs participating in the scheme. Correspondingly, the demand from ATM operators to use a given ATM scheme depends on the number, type, and location of cardholders with cards using the scheme.
6. The Interchange Fee Regulation must regulate all payment card interchange fees. continued

243. The next most important common feature between credit/debit card schemes and ATM card schemes is that they are both characterised by multilateral interchange fees. Like credit/debit card multilateral interchange fees, EU and/or national competition authorities have also found that ATM card interchange fees represent decisions of associations of undertakings, within the meaning of Article 101 TFEU, and that such MIFs appreciably prevent, restrict, or distort competition.

244. However, the chief difference between ATM card schemes and credit/debit card schemes is the justification for – and normal direction of – interchange fees. Namely, whereas EU competition regulators have not found any level of credit/debit purchase card interchange fees that is compatible with EU competition law, regulators have found that ATM scheme multilateral interchange fees can be compatible with competition law and thereby in the interest of consumers.

245. In particular, ATM interchange fees are capable of meeting the Art 101(3) TFEU cumulative exemption conditions, that such fee arrangements:

- contribute to improving production or distribution, or promoting technical or economic progress;
- allow consumers a fair share of the resulting benefit;
- are indispensable to the attainment of such benefits; and
- do not eliminate competition.

246. The principal justification for ATM interchange fees – paid from card issuers to ATM acquirers – is that such interchange fees are necessary to enable ATM operators to offer “free-to-use” cash withdrawals, i.e. free at the point of use to the cardholders. In the absence of such interchange fees, non-bank ATM operators would need to charge cardholders directly in order to cover their costs. It is widely accepted among policy makers and other stakeholders that widespread geographic access to free-to-use ATMs is necessary to protect the interests of consumers and European citizens more widely.

---


225 In some cases, ATM interchange fees flow from ATM acquirer/operator to card issuer. In this case, the ATM operator must set an even higher direct surcharge, in order to cover the operator’s cost plus interchange fee.

226 For example, see “Considering the incentives to deploy free-to-use ATMs in the LINK network: Review of the structure of LINK interchange fees: Call for views”, UK Payment Systems Regulator, 2019; UK “ACCESS TO CASH REVIEW: Final Report”, 2019; CASH VERSUS CASHLESS: Consumers need a right to use cash, BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS (BEUC), October 2019; and various recent statements from the European Central Bank, European Parliament, and national parliaments, among others.
6. The Interchange Fee Regulation must regulate all payment card interchange fees. continued

247. In contrast, no such corresponding justification exists for debit or credit payment card interchange fees. ATM interchange fees are still nevertheless an example of what the Commission calls “a collective agreement between [card] issuers [...] designed to increase their own profits”\(^{227}\) if set by card issuers and/or payment card schemes without restraint. This is because, in the same way that debit card and credit card interchange fees create a floor on price paid by merchant acquirers and merchants to banks for accepting payment cards – ATM interchange fees create a ceiling on the revenue received by ATM acquirers and operators from banks for the provision of free-to-use cash withdrawals.

248. Hence, in the same way that banks and payment card schemes have a strong interest in high purchase card interchange fees (paid from merchants and merchant acquirers to card issuers, chiefly banks) – as a way of increasing banks’ profits – banks and payment card schemes have a corresponding strong interest in low ATM interchange fees (paid from banks to ATM acquirers and ATM operators). Moreover, banks and payment card schemes have an additional strong interest in low ATM interchange fees, as low ATM interchange fees are likely to discourage the availability of free-to-use ATMs, and thereby accelerate the demise of cash in favour of card payments.

249. Accordingly, excessively low ATM interchange fees anti-competitively benefit banks through a combination of:

- directly reducing the cost for banks of providing cash for their customers;
- reducing the ability of ATM operators to offer free-to-use ATMs, resulting in fewer free-to-use ATMs and associated reduction in the availability and use of cash; and
- indirectly increasing use of card payments as a substitute for use of cash, and the associated increase in payment card interchange fee income to banks.

250. Such reasons explain Mastercard and Visa’s underlying motives for their “war on cash” strategy. Moreover, EuroCommerce is aware that Mastercard and Visa have driven such reductions in ATM interchange fees in Europe through a combination of:

- direct reductions in Mastercard and Visa ATM interchange fees (where Mastercard and/or Visa are the main national ATM scheme providers); and
- imposition of ATM scheme anti-steering/non-discrimination rules, which have the effect of limiting competition between Mastercard, Visa, and any

\(^{227}\) European Commission observations (Amicus curiae observations to national courts) in Visa and MasterCard MIFs (several cases under appeal) in the UK Court of Appeal, of April 2018, para. 9.
6. The Interchange Fee Regulation must regulate all payment card interchange fees. continued

other ATM card schemes (albeit the Regulation prohibits such anti-steering rules).\footnote{Regulation Article 11 (Steering rules), which prohibits “any rule in licensing agreements, in scheme rules applied by payment card schemes and in agreements entered into between card acquirers and payees preventing payees from steering consumers to the use of any payment instrument preferred by the payee”.}

For example, in the UK, since 2018, a combination of large recent reductions in Mastercard and Visa’s ATM interchange fees paid to ATM acquirers and operators, together with Mastercard and Visa’s longstanding ATM card scheme anti-steering rules, plus intense pressure from the major card issuing banks, has had the effect of forcing the UK national ATM scheme (LINK) to reduce its own interchange fees to match Mastercard and Visa’s. This is because Mastercard and Visa’s ATM card scheme rules prohibit ATM operators from discriminating against Mastercard or Visa, for example, by offering free-to-use cash withdrawals to card issuers that use one network (e.g. LINK, on the basis of LINK’s interchange fee), but surcharging cash withdrawals to card issuers that use Mastercard or Visa (on the basis of Mastercard and Visa’s much lower ATM interchange fees). As a result, card issuers have credibly threatened to switch from LINK to Mastercard or Visa without reduction of service. Hence, LINK has had no choice but to reduce its ATM interchange fee, as it has stated openly. In doing so, LINK was also forced to abandon its long-established competition authority-approved interchange fee methodology.

The effect of LINK’s ATM interchange fee reduction, at the start of 2018 – combined with threats of even larger reductions plus future reductions to come – has been an almost 20% reduction in the availability of free-to-use ATMs in the UK during the following 24 months, as illustrated in Figure 25 below (a reduction of 10,000 out of 50,000 free-to-use ATMs in the UK in less than two years). In the absence of any effective regulatory intervention, many commentators predict further significant closures of free-to-use ATMs.

\footnote{See CONSULTATION BY THE BOARD OF LINK SCHEME HOLDINGS LTD LINK’S INTERCHANGE RATE: Final Decision and Impact Assessment, January 2018.}
EuroCommerce is aware that Mastercard and Visa have reduced ATM interchange fees substantially in other Member States since the Regulation came into force, especially where there is high penetration of independent ATM operators. Hence, such reductions in ATM interchange fees will directly benefit banks, through low costs and promotion of card payments, at the expense of independent ATM operators, merchants, consumers, and other cash users.

EuroCommerce is also aware of considerable differences in ATM interchange fees between Member States, of between approximately €0.20 and €1.25 per cash withdrawal transactions. Such differences between Member States, and lack of transparency of ATM interchange fees, is itself likely to contrary to the operation of the European Single Market.

This situation in the EU ATM market has direct parallels with antitrust complaints brought by US consumer representatives and ATM operators against Mastercard’s and Visa’s global ATM scheme rules. Such complaints have also
been strongly supported by the US antitrust authorities (the Department of Justice and Federal Trade Commission) in the US Supreme Court, namely:

“Given the dominant position of Visa and MasterCard, ATM operators essentially have no choice but to maintain access to [those] networks, or they will have to turn away an increasing percentage of customers. During the 1990s, after [the US] repealed prohibitions on ATM access fees and independent operators entered the market to compete with bank-owned ATMs, Visa and MasterCard adopted rules barring ATM operators from charging higher fees for transactions on the Visa and MasterCard networks than for transactions on rival networks.

These Access Fee Rules prevent ATM operators from using differential pricing to encourage consumers to use cards that can access lower-cost networks. Operators cannot, for example, say to cardholders: ‘We will charge you $2.00 for a MasterCard or Visa transaction, but if your card has a Star or Credit Union 24 [ATM scheme brand mark] on it, we will charge you only $1.75.’

[The consumer and independent ATM operator class actions] allege that the [Mastercard and Visa Access Fee] rules violate [US antitrust law] because they are horizontal agreements among Visa’s and MasterCard’s member banks that unreasonably restrain competition in the markets for ATM services and ATM network services.

[The class actions] allege that the Access Fee Rules restrain competition in the market for ATM services by preventing operators from offering ‘discounted access fees for cards linked to lower-cost ATM networks’—a form of competition that would allegedly create ‘downward pressure on access fees generally.’

[The complaints] further allege that the rules ‘protect banks from competition with each other over the types of [ATM networks] offered on bank cards’ because the absence of differential access fees means that consumers have no reason to demand cards linked to lower-cost networks [and] that the lack of incentives for consumers to request or use those cards insulates Visa and MasterCard from competition with other networks, allowing them to charge supra-competitive network services fees with impunity.

[The Supreme Court of the United States] has long treated such rules as agreements among an association’s members. […] Such rules are subject to antitrust scrutiny because they ‘deprive the market-place of
6. The Interchange Fee Regulation must regulate all payment card interchange fees.

continued

independent centers of decision making,’ and ‘thus of actual or potential competition.’”231

256. We agree with this position and would strongly welcome antitrust scrutiny of the same rules in Europe.

257. We are also aware that the major payment card schemes and banks have imposed other measures to suppress availability and use of cash, such as:

 not enabling cash deposit functionality as part of ATM card schemes (which would make it much easier for merchants, particularly smaller merchants who cannot afford or justify cash-in-transit collection, to continue accepting cash following the widespread closure of bank branches across many Member States);
 dis-incentivising cashback at retail point of sale as an alternative way for consumers to access cash (by treating cashback as part of purchase transactions, and thereby subject to interchange fees payable by merchants)232; and
 not enabling contactless card functionality as part of ATM card schemes (which would make it more convenient for consumers to continue using ATMs).

258. In summary, banks and payment card schemes have a strong interest in ensuring and maintaining low ATM interchange fees – and other ways to suppress the use of cash – achieved through collectively set interchange fees and other anti-competitive payment card scheme rules.

259. It is therefore of much concern that the Regulation exempted ATM interchange fees from regulation and, moreover, that the Commission gave no apparent reasons or explanation for such exemption233. The exemption of ATM interchange fees has direct negative effects on consumers, namely of reduced access to cash and of greater costs of card payments. The exemption of ATM interchange fees also results in an associated distortion of competition between card payments and cash, by promoting card-based payments at the expense of cash.

260. As noted at the start of this main section, the regulation of interchange fees for certain card transactions – but not others – magnifies the anti-competitive effect of interchange fees for those transactions that remain unregulated. Namely, the caps for intra-EEA consumer debit and credit card interchange fees has itself greatly magnified the upward pressure on commercial card and inter-regional

232 EuroCommerce are also aware that, following intense scrutiny and customer complaints, card schemes are now considering offering incentives to merchants to make cashback more widely available
233 In the Recitals to the Regulation, Proposal for the Regulation, or Regulation Impact Assessment.
card interchange fees – and downward pressure on ATM interchange fees paid to ATM acquirers and operators – as such interchange fees have now become the chief means for the card schemes to compete for card issuers.

261. Setting anti-competitive interchange fees for unregulated card transactions – which enables the card schemes to pay net compensation to card issuers – should itself be considered an infringement of the anti-circumvention provision of the Regulation which prohibits payment of net compensation to issuers. Alternatively, the exemptions in the Regulation provide a ready means for the card schemes to circumvent the regulated interchange fee caps. The card schemes nevertheless offer issuers “bundles” of regulated and unregulated card services, while strongly promoting unregulated interchange fees, i.e. high interchange fees for commercial and inter-regional cards, and low interchange fees for ATM transactions.

262. Alongside the other unregulated interchange fee categories, the review of the Regulation must therefore address ATM interchange fees, by setting and mandating a regulated floor on net ATM interchange fees234 for cash withdrawals and deposits, and potentially for cash back at retail point of sale locations.

263. Overall, there should be no material exemptions or exclusions from the Regulation, as any such exemptions or exclusions will inevitably create a competitive distortion between regulated and unregulated payment instruments, and/or a means of circumventing the Regulation.

264. By way of further example, EuroCommerce notes that Mastercard and Visa are both actively seeking to expand their shares of the overall payments market beyond their established consumer-to-business (“C2B”) card-based products, into business-to-business (B2B), person-to-person (P2P), and business-to-consumer (B2C) payments, namely:

“Growing [Mastercard’s] business includes supplementing our core network with enhanced payment capabilities to capture new payment flows, such as business to business (’B2B’), person to person (’P2P’), business to consumer (’B2C’) and government payments, through a combination of product offerings and expanded solutions for our customers.”235

“Visa Direct continues to be one of the most meaningful ways in which we are capturing new types of payments that were previously made by cash, check or Account Clearing House (ACH). Visa Direct, Visa’s real-time push payments service, reverses the traditional card payment flow by

234 Net of ATM card scheme fees charged to ATM acquirers.
6. The Interchange Fee Regulation must regulate all payment card interchange fees. 
continued

allowing payment originators, through their acquirer, to push funds directly to cards, better meeting consumer and business needs.”

236 Visa Inc Form 10-K (Annual Report), for the period 09/30/2019.

237 See Article 2.

We also note that while the Regulation applies only to “card-based payment instruments”, the Regulation defines “card-based payment instruments” as any payment transactions that is not a credit transfer or a direct debit. Hence, the Regulation should in any event apply to all such prospective transaction types. 

The revised Regulation must therefore apply to all prospective new transaction types as well as removing the various exemptions and exclusions associated with commercial cards, inter-regional cards, three-party card schemes, virtual cards, and ATM cash withdrawals. Namely, the Regulation must regulate all categories of payment card interchange fees.
7. Major infringements of the Interchange Fee Regulation appear to have gone unchallenged.
7. Major infringements of the Interchange Fee Regulation appear to have gone unchallenged. continued

267. Article 13 of the Regulation requires that Member States designate competent authorities that are empowered to ensure enforcement of the Regulation and that such authorities are granted the necessary investigation and enforcement powers. In particular, the Regulation requires that the authorities shall have adequate resources for the performance of their duties, including monitoring effective compliance with the Regulation, countering attempts to circumvent the Regulation, and taking all necessary measures to ensure such compliance. Member States shall also ensure and promote adequate and effective complaint and redress procedures.

268. Nevertheless, in EuroCommerce’s view, there have been successive substantial infringements of the Regulation that appear to have gone unchallenged and the Regulation therefore unenforced. This is despite successive complaints and detailed evidence submitted by consumer and merchant representatives to national competent authorities alleging infringements of the Regulation. Some of these complaints have gone unanswered and, in others, the response (when eventually received) has proved wholly unacceptable. In particular, such complaints have alleged infringement of:

- Article 5 (Prohibition of circumvention), for card schemes imposing net compensation to card issuers with an equivalent object or effect as the interchange fee;
- Article 6 (Licensing), for card schemes applying territorial restrictions in licensing agreements or payment card scheme rules;
- Article 9 (Unblending), for card schemes precluding acquirers from unblending the amount of the scheme fees applicable to each category of payment cards;
- Article 10 (“Honour All Cards” rule), for applying rules that obliges payees accepting one card-based payment instrument also to accept other card-based payment instruments; and
- Article 11 (Steering rules), for preventing payees from steering consumers to the use of any payment instrument preferred by the payee.

269. In EuroCommerce’s understanding, absence of investigation or response to complaints, enforcement action, and/or other redress is in itself an infringement of the Regulation.
7. Major infringements of the Interchange Fee Regulation appear to have gone unchallenged. continued

7.1 Article 5 prohibits circumvention of the interchange fee caps.

270. As described in Section 4 above, Article 5 of the Regulation specifies that – for the purpose of the application of the regulated interchange fee caps – “any agreed remuneration, including net compensation to card issuers, with an equivalent object or effect of the interchange fee, received by an issuer from the payment card scheme, acquirer or any other intermediary in relation to payment transactions or related activities shall be treated” as being part of the interchange fee.

Recital 31 of the Regulation further explains that:

“It is important to ensure that the provisions concerning the interchange fees to be paid or received by payment service providers are not circumvented by alternative flows of fees to issuers. To avoid this, the ‘net compensation’ of fees paid or received by the issuer [...] from or to a payment card scheme, an acquirer or any other intermediary should be considered as the interchange fee. When calculating the interchange fee, for the purpose of checking whether circumvention is taking place the total amount of payments or incentives received by an issuer from a payment card scheme with respect to the regulated transactions less the fees paid by the issuer to the payment card scheme should be taken into account. Payments, incentives and fees considered could be direct (i.e. volume-based or transaction-specific) or indirect (including marketing incentives, bonuses, rebates for meeting certain transaction volumes). In checking whether circumvention of the provisions of this Regulation is taking place, issuers’ profits resulting from special programmes carried out jointly by issuers and payment card schemes and revenue from processing, licensing and other fees providing revenue to payment card schemes should, in particular, be taken into account.”

272. EuroCommerce believes that various significant forms of agreed remuneration received by issuers from payment card schemes, acquirers, or other intermediaries in relation to payment transactions or related activities – including direct payments, incentives or fees, or indirect marketing incentives, bonuses, or rebates, and including special programmes carried out jointly by issuers and payment card schemes – have occurred since the Regulation came into force and which have not properly been treated as being part of the interchange fee for the purpose of application of the interchange fee caps. Hence, such agreed remuneration to issuers represents a likely infringement of the Regulation.
7. Major infringements of the Interchange Fee Regulation appear to have gone unchallenged. continued

273. First, a hypothetical alternative flow of fees with equivalent object or effect as interchange fees would be a flow of fees from acquirers to a payment card scheme and then from the payment card scheme to issuers. See Figure 2 for reference showing the participants and fees in four-party payment schemes. The fee from acquirers to the payment card scheme would be a form of acquirer scheme fee. The corresponding fee from the payment card scheme fee to the issuer would effectively be a negative issuer scheme fee. As described in the Regulation, such fees could take various forms, including direct or indirect payments, incentives, fees, or any other flow of fees from the payment card scheme to issuers. For example, a dividend payment from a payment card scheme to its payment card scheme issuer owners would count as such a flow of fees, and would represent a clear remuneration to issuers as defined at Article 5.

274. Furthermore, there is no requirement in the Regulation that any such flow of fees from acquirers to card issuers via a payment card scheme or any other intermediary must be simultaneous with each other, i.e. that the flow of fees from the acquirer to the intermediary must be immediately simultaneous with the flow of fees from the intermediary to the issuer. For example, the flow of fees from the intermediary to the card issuer could follow or precede the flow of fees from the acquirer to the intermediary. Hence, a fee, or flow of fees, from a payment card scheme to issuers in anticipation of a future flow of fees from acquirers to the card scheme would also represent remuneration to issuers as defined in Article 5. It would therefore represent circumvention of the Regulation if, in combination with the interchange fees, it exceeded the regulated interchange fee caps.

275. On this basis, the most substantial infringement of Article 5 to date has been the net consideration paid to Visa Europe card issuers as part of Visa Inc’s acquisition of Visa Europe in 2016, of €17.7bn\textsuperscript{238}, i.e. the amount paid by Visa Inc to former shareholders of Visa Europe for the purchase of their shares of €19.4bn, from Visa Europe card issuers, over and above Visa Europe’s fair value, of approximately €1.7bn\textsuperscript{239}.

276. Such an amount paid to Visa Europe issuers – over and above the fair value of shares in Visa Europe – represented an upfront flow of fees from Visa Inc to Visa Europe card issuers in anticipation of future flows of fees from card acquirers to Visa, i.e. through the introduction of new or increased Visa scheme fees charged to acquirers.

277. Hence, the substantial amount paid in this transaction was a “disguised” interchange fee, i.e. net compensation to issuers with the equivalent object or

\textsuperscript{238} See Visa press releases: Visa Inc. to acquire Visa Europe Visa Inc. (November 2015); Visa Inc. Reaches Preliminary Agreement to Amend Transaction with Visa Europe (April 2016); and Visa Inc. Completes Acquisition of Visa Europe (June 2016).

\textsuperscript{239} Equal Visa Europe’s reported net asset value. See Visa Europe Annual Report 2015.
effect as interchange fees, of €17.7bn\textsuperscript{240}. In EuroCommerce’s view, such an amount should be considered as remuneration received by card issuers with the equivalent object or effect as future interchange fees, defined under Article 5 as being part of the interchange fee, as there is no other plausible explanation for such an over-payment.

Figure 26 illustrates how the net compensation paid by Visa Inc to Visa Europe card issuers of €17.7bn in 2016 for shares in Visa Europe represents, in our view, a one-off interchange fee in anticipation of future scheme fee rises charged to merchant acquirers (and then on to merchants and consumers).

\textbf{Figure 26: Visa Inc net consideration paid for Visa Europe shares represented a disguised interchange fee.}

\begin{center}
\includegraphics[width=\textwidth]{figure26.png}
\end{center}

Source: Visa Inc, Zephyre.

Moreover, Visa Inc’s stated rationale for the acquisition of Visa Europe was to “expand yields” in Europe, i.e. to increase Visa’s future scheme fees charged to acquirers, following from Visa Europe’s conversion from a formerly member-owned organisation to a fully commercial enterprise, namely:

“We announced the acquisition of Visa Europe. As you know, we have been clear that this was a transaction that we thought made tremendous sense for both our company but also for Visa Europe and its members. [...] On the pricing side, we believe there is an opportunity to expand yields in Europe as we align the economic model with the value we bring and

\textsuperscript{240} Namely, equal to the consideration paid to Visa issuers less the net book value of Visa Europe.
7. Major infringements of the Interchange Fee Regulation appear to have gone unchallenged. continued

genuinely evaluate pricing from the perspective of a commercial enterprise rather than a member-owned association.”

280. Hence, in our view, the consideration paid to former Visa Europe shareholders was in effect a one-off lump sum interchange fee payment to Visa Europe card issuers, ultimately paid for through intended future scheme fee increases to Visa Europe acquirers (and in turn by merchants and consumers). Indeed, the large increase in Visa Europe’s scheme fees since the Regulation came into force, as described in Section 4 above, appears to be confirmation of Visa’s intended strategy.

281. We note here that EuroCommerce’s concern is not with the merger itself between Visa Inc and Visa Europe, but with the amount paid by Visa Inc to Visa issuers as part of the merger transaction. The merger itself was of course subject to the EU Merger Regulation. Merger regulation however is not normally concerned with the amount paid for an acquisition (except to the extent that it provides an indicator of anti-competitive effects of a merger and/or potential efficiencies).

282. Nevertheless, as well as assessment under the EU Merger Regulation, the acquisition should also have been subject to assessment and approval under the Interchange Fee Regulation, to determine whether it was compatible with the prohibition of circumvention of the Regulation, as defined in Article 5. In addition, we note that this alleged infringement of the Regulation has been brought to the attention of the UK Payment Systems Regulator, the UK national competent authority for enforcing the Regulation, on various occasions, without formal response.

283. Second, as explained in detail at Section 6.1 and Section 6.5 above, EuroCommerce considers that card schemes setting of high commercial card multilateral interchange fees, paid to card issuers, and the setting of low ATM multilateral interchange fees, paid by card issuers, when bundled with regulated consumer credit or debit cards, represent a form of agreed remuneration/net compensation paid to card issuers in infringement of Article 5 of the Regulation.

284. Such practices have been particularly prevalent in the UK, where many UK card issuers have recently chosen Mastercard to issue consumer credit, debit, or prepaid cards, plus ATM cards and/or commercial cards, including Monese, Monzo Bank, N26 Bank, Revolut, Starling Bank, and Virgin Money, especially following large reported reductions in Mastercard and Visa’s ATM interchange fees.

---

241 Visa Inc CEO, Q4 2015.
242 In particular by the British Retail Consortium.
243 In the UK, Mastercard and Visa had reportedly set ATM interchange fees 30% below the level set by LINK, the UK national ATM scheme. In contrast, LINK’s ATM interchange fees were formerly set by methodology.
7. Major infringements of the Interchange Fee Regulation appear to have gone unchallenged. continued

285. It is also believed that certain payment card schemes have engaged in hidden “joint special programmes” with card issuers, whereby the card schemes have paid for or contributed to issuers’ costs as a way to win issuers’ business. Such hidden programmes and hidden payments would represent a further form of net compensation to card issuers, with an equivalent object or effect as interchange fees, as defined in Article 5 and as described in Recital 31.

286. It is disappointing therefore that national competent authorities have not used their powers as mandated in the Regulation (to investigate such programmes in order to monitor effective compliance with the Regulation, to counter attempts to circumvent the Regulation, and to take all necessary measures to ensure such compliance).

287. Third, in October 2015, immediately before the Regulation came into force, Mastercard introduced a revised interchange fee structure for refund transactions in the Europe region, such that, in the event that a cardholder returns or cancels goods or services and pays a refund to the cardholder, the merchant will not receive a full refund of the original interchange fee paid, but only up to a cap of €0.05 (or equivalent non-euro amount). For example, if a cardholder purchases goods using a consumer credit card for €100, then the merchant pays an interchange of €0.30. If the merchant then subsequently refunds the cardholder, then the merchant will only receive €0.05 in return, leaving the card issuer €0.25 better off.

288. This appears a self-evident circumvention of the Regulation, by increasing the effective interchange fee paid from acquirers to issuers for Mastercard transactions. This has particularly impacted European merchants with high average transaction values and high refund rates. For example, a merchant with a €100 average transaction value and 10% refund rate would pay an effective credit card interchange fee of 0.33% (rather than the 0.30% regulated cap). In contrast, Visa refunds interchange fees in full in the event of such refund transactions.244

289. Figure 27 illustrates how Mastercard interchange refunds capped at €0.05 per transaction represents an indirect remuneration to card issuers.

---

specifically exempted under Article 101(3) TFEU, as set out in Section 7 above. See also CONSULTATION BY THE BOARD OF LINK SCHEME HOLDINGS LTD LINK’S INTERCHANGE RATE: Final Decision and Impact Assessment, January 2018.

244 For example, see Mastercard and Visa Interchange Rates, Lloyds Bank Cardnet, as at June 2018.
7. Major infringements of the Interchange Fee Regulation appear to have gone unchallenged. continued

Figure 27: Mastercard interchange fee refund caps represent an indirect remuneration to card issuers.

Source: Mastercard, Zephyre.

290. EuroCommerce raised this alleged infringement of the Regulation with the UK Payment Systems Regulator in 2015 and repeatedly since then. It nevertheless took the Payment Systems Regulator four years to respond formally, ultimately finding that “it did not consider the issues raised identified concerns that would indicate that further action is merited at this time”, without further explanation. In EuroCommerce’s view, this is an unsatisfactory response, especially in the light of the Payment System Regulator’s stated guidance that it would follow a “mainly complaints-led” approach to monitoring and enforcement of the Regulation in the UK245.

291. Fourth, as noted in Section 6.1 there has been various reports of card schemes and/or card issuers abusing the definition of commercial cards in the Regulation in order to circumvent the regulated interchange caps for consumer cards, i.e. by intentionally misclassifying consumer cards as commercial cards. Such reports include card issuers offering commercial cards to self-employed customers without explaining that they are strictly for business expenses only246.

292. Another example is of card schemes setting interchange fees for “meal voucher” cards at unregulated (i.e. commercial card) rates. For example, at the time of this report, Mastercard’s published domestic interchange fees for the Czech Republic include a new classification called “meal voucher interchange fees”, of up to

245 See “Guidance on the PSR’s approach as a competent authority for the EU Interchange Fee Regulation”, Payment Systems Regulator, October 2016.
246 For example, see “Curve Hit With Criticism Over Commercial Cards For Self-Employed”, PYMTS.com, December 2019.
2.50%, and reported as “valid from 1 December 2017”, and also applies similar “meal voucher” in other Member States. EuroCommerce understands that meal vouchers are defined in law (in most Member States) as employee benefits, not as business expenses, and therefore do not qualify to be paid using commercial cards, as required in the Regulation. EuroCommerce has asked Mastercard for an explanation of such interchange fees.
7. Major infringements of the Interchange Fee Regulation appear to have gone unchallenged. continued

7.2 Article 6 prohibits territorial restrictions in licensing agreements or payment card scheme rules.

293. Article 6 of the Regulation prohibits:

   i. “any territorial restrictions within the Union or rules with an equivalent effect in licensing agreements or in payment card scheme rules for issuing payment cards or acquiring card-based payment transactions”; and

   ii. “any requirement or obligation to obtain a country specific licence or authorisation to operate on a cross-border basis or rule with an equivalent effect in licensing agreements or in payment card scheme rules for issuing payment cards or acquiring card-based payment transactions”.

294. However, EuroCommerce is concerned that such territorial restrictions remain present in licensing agreements and/or payment card schemes rules in Europe.

295. As background to Article 6, the Recitals to the Regulation explain that:

   “Fragmentation of the internal market is detrimental to competitiveness, growth and job creation within the Union. Eliminating direct and indirect obstacles to the proper functioning and completion of an integrated market for electronic payments, with no distinction between national and cross-border payments, is necessary for the proper functioning of the internal market.” (Recital 1)

   “As a result [of wide variety of interchange fees between Member States], consumers and merchants face restricted choice, higher prices and lower quality of payment services, while their ability to use pan-Union payment solutions is also restricted. In addition, merchants cannot overcome the fee differences by making use of card acceptance services offered by banks in other Member States. Specific rules applied by the payment card schemes require the application of the interchange fee of the ‘point of sale’ (country of the merchant) for each payment transaction, on the basis of their territorial licensing policies.” (Recital 11)

296. As further background, we note the Commission’s 2019 decision concerning Mastercard’s former cross-border acquiring rules247, that:

   “Before [the Interchange Fee Regulation came into effect], under Mastercard’s cross-border acquiring rules, unless the acquirer had agreed

---

bilaterally with the issuer on the interchange fee, a cross-border acquirer was obliged to apply the applicable domestic [multilateral interchange fees (MIFs)] of the country of the merchant.” [54]

“[This] restriction of cross-border acquiring locked in merchants and forced them to accept the domestic MIFs applicable in their ‘home’ Member State. Even very large merchants were unable to negotiate a [merchant service charge (MSC)] below the MIFs.” [46]

“Mastercard’s cross-border acquiring rules meant that acquirers offering card payment transaction acquiring services in Member States where the domestic MIFs were lower were prevented from seeking to offer cheaper services based on the MIFs in their ‘home’ countries in Member States where the domestic MIFs were higher. The merchants were also prevented from taking advantage of the internal market and benefiting from less expensive services from card acquirers established in low-MIF Member States.” [62]

“Therefore, the Commission [concluded] that Mastercard’s cross-border acquiring rules created an obstacle to cross-border trade in the market for acquiring card payment transactions in the EEA. The rules shielded national markets from cross-border competition from acquirers established in other Member States. The rules reveal in themselves, and by their very nature, a sufficient degree of harm to competition to be considered a restriction of competition ‘by object’ [contrary to EU competition law].” [63]

“The cross-border acquiring rules allowed Mastercard and the banks to maintain different domestic MIFs in different Member States.” [86]

However, it is difficult to see how this situation has been resolved following the Regulation coming into effect, as acquirers report that they remain unable to offer cheaper services – based on the interchange fees and/or scheme fees in their “home” countries – in Member States where fees are higher.

First, the option at Chapter II of the Regulation for Member States to define lower percentage interchange fee caps for consumer credit and debit card transactions (than defined in the Regulation) and to define a fixed maximum debit card cap, has led to several Member States setting such lower and/or fixed maximum caps. Nevertheless, acquirers have not apparently been able to offer cheaper services based on the lower MIFs in their “home” countries in Member States where the domestic MIFs remain higher – which thereby restricts merchants from taking advantage of the internal market and benefiting from less expensive services from card acquirers established in lower-MIF Member States.
7. Major infringements of the Interchange Fee Regulation appear to have gone unchallenged. continued

299. Second, on the basis of reports from EuroCommerce members and major acquirers, among various other sources, there have been growing and substantial, differences in payment card scheme fees between Member States for the same category and brand of payment card248. EuroCommerce members say that they are told by their acquirers that the applicable scheme fees are based on the country where the merchant (or merchant’s store) is located, not on the location of the acquirer.

300. Accordingly, European card acquirers appear unable to offer cheaper services to merchants, based on the payment card scheme fees in their “home” countries, in Member States where the “domestic” scheme fees are higher, and are thereby depriving merchants from being able to take advantage of the internal market.

301. EuroCommerce therefore concludes that the inability of card acquirers established in lower-MIF and/or lower-scheme fee Members States to offer less expensive services to merchants in other Member States is the result of continuing or new territorial restrictions in payment card scheme licensing agreements or payment card scheme rules, either of which are an infringement of Article 6 of the Regulation.

---

248 Among other things due to the existence of “market development fees” charged to acquirers, which only apply in some Member States.
7. Major infringements of the Interchange Fee Regulation appear to have gone unchallenged. continued

7.3 **Article 9 requires card schemes to “unblend” the amount of interchange fees and scheme fees applicable to each category and brand of payment cards.**

302. Article 9 of the Regulation – *Unblending* – requires, among other things, that acquirers must provide information to merchants as to the level of scheme fees (and interchange fees) applicable to each category and brand of payment cards:

   “Acquirers shall include in their agreements with payees individually specified information on the amount of the merchant service charges, interchange fees and scheme fees applicable with respect to each category and brand of payment cards, unless the payee subsequently makes a different request in writing.”

303. The objective of this requirement is to provide greater transparency about fee differences between cards, thereby enabling merchants to choose a cheaper brand on co-badged cards or to steer consumers to the use of such cheaper cards, as outlined at Recital 34:

   “Scheme rules applied by payment card schemes and practices applied by payment service providers tend to keep merchants and consumers ignorant about fee differences and reduce market transparency, for instance by ‘blending’ fees or prohibiting merchants from choosing a cheaper card brand on co-badged cards or steering consumers to the use of such cheaper cards.”

304. By way of guidance, for example, the UK Payment System Regulator advises that:

   “Acquirers should provide as much information to merchants on the interchange fees and scheme fees applicable to different brands and categories of cards as possible while ensuring that the information is understandable and meaningful.”249

305. By way of further background, the Commission’s 2007 Prohibition Decision against Mastercard and 2008 antitrust proceedings against Visa raised various concerns about the transparency of interchange fees and associated impact on competition.

306. In response, the card schemes specifically agreed – in the 2009 Mastercard Undertakings and 2010 Visa Commitments – to publish all of their interchange fee rates250. This would enable acquirers to offer “unblended” prices “by default” to merchants, defined by the Commission as “MIF+” pricing, namely of acquirers

---

249 See “Guidance on the PSR’s approach as a competent authority for the EU Interchange Fee Regulation”, Payment Systems Regulator, 2016, para. 5.40.
250 See the Commission’s Regulation Impact Assessment for summary, at page 108.
Major infringements of the Interchange Fee Regulation appear to have gone unchallenged, continued

providing merchant service charges disaggregated into the applicable multilateral interchange fee (MIF) rate and the other remaining merchant service charge element. Furthermore, the 2009 Mastercard Undertakings and 2010 Visa Commitments specifically committed that the card schemes would “ensure that the MIF rates are published in a way that identifies an applicable interchange rate for all types of transactions”.

Following the Commission’s subsequent 2012 supplementary objections to Visa, Visa committed to implement “further transparency measures”, which committed Visa to:

a. “introduce a rule which requires acquirers to offer to merchants merchant service charge pricing on a ‘MIF ++’ basis […], according to which acquirers must, if requested, clearly break down, in their contracts and invoices, the MSC into three components, namely the MIF, all the other applicable payment system fees and the acquirer’s fee; […and]

b. introduce a simplified MIF structure for MIFs set by Visa Europe to provide for a reduction of at least 25% in the number of fee categories to aid transparency and comparison between rates.”

However, in contrast to these transparency requirements on the card schemes — to publish interchange fees, to attribute interchange fees to specific transaction categories, and to simplify former interchange fee categories substantially — there are no such corresponding transparency requirements on payment card scheme fees.

On the contrary, scheme fees are not published (either by Mastercard or Visa), nor readily attributable to specific transaction categories, nor in any way simple. It is also widely reported that Mastercard and Visa have progressively introduced large numbers of new scheme fee categories, often undefined and unexplained, since the Regulation came into force.

Such proliferation and complexity, and otherwise lack of transparency, of Mastercard’s and Visa’s scheme fees has had the effect of precluding acquirers from meeting their obligation under Article 9 of the Regulation to provide payees with the required individually specified information on the comprehensive amount of scheme fees applicable with respect to each category and brand of payment card, in any understandable or meaningful way. This is illustrated by

---

251 See Commission’s Visa 2010 Commitments Decision, para. 33.
252 By EuroCommerce members, major acquirers, and other industry commentators. One major European acquirer operating in several Member States reported to EuroCommerce that Mastercard and Visa have introduced “thousands” of new scheme fees since the Regulation came into force.
253 Furthermore, such lack of transparency of scheme fees also makes it difficult for acquirers to comply with Article 12 of the Regulation (Information to the payee on individual card-based payment transactions).
the wide variation in reporting of scheme fees by acquirers to merchants, as required by Article 9, or absence of any reporting of scheme fees.

EuroCommerce therefore considers that Mastercard’s and Visa’s introduction of such large categories of new scheme fees, lack of clear definition or explanation of such fees, and otherwise lack of transparency of Mastercard’s and Visa’s scheme fees, represents a constructive infringement of Article 9 of the Regulation and obstacle to the transparency objectives of the Regulation and previous Mastercard and Visa undertakings and commitments, by precluding acquirers from providing an adequate level of transparency to payees.
Major infringements of the Interchange Fee Regulation appear to have gone unchallenged. continued

7.4 Article 10 prohibits the “Honour All Products” element of the “Honour All Cards Rule”.

Article 10 of the Regulation – “Honour All Cards” rule – prohibits payment card scheme rules that oblige payees accepting one card-based payment instrument also to accept other card-based payment instruments. In particular, Article 10 prohibits any rule that obliges payees accepting a card-based payment instrument with a lower interchange fee (for example, intra-EEA consumer debit cards) also to accept card-based payment instruments with a higher interchange fee (for example, intra-EEA consumer credit cards, commercial cards, or inter-regional cards).

EuroCommerce’s believes that various card scheme rules and practices are in infringement of Article 10. Infringement of Article 10 remains a particular problem given the growing prevalence of unregulated cards.

First, Recital 37 of the Regulation explains the reasoning for the Honour All Cards Rule prohibition:

“The ‘Honour all Cards’ rule is a twofold obligation imposed by issuers and payment card schemes for payees to accept all the cards of the same brand, irrespective of the different costs of these cards (the ‘Honour all Products’ element) and irrespective of the individual issuing bank which has issued the card (the ‘Honour all Issuers’ element). It is in the interest of the consumer that for the same category of cards the payees cannot discriminate between issuers or cardholders, and payment card schemes and payment service providers can impose such an obligation on them. Therefore the ‘Honour all Issuers’ element of the ‘Honour all Cards’ rule is a justifiable rule within a payment card scheme, since it prevents payees from discriminating between individual banks which have issued a card. The ‘Honour all Products’ element is essentially a tying practice that has the effect of tying acceptance of low fee cards to the acceptance of high fee cards. A removal of the ‘Honour all Products’ element of the ‘Honour all Cards’ rule would allow merchants to limit the choice of payment cards they offer to low(er) cost payment cards only, which would also benefit consumers through reduced merchants’ costs. Merchants accepting debit cards would then not be forced to accept credit cards, and those accepting credit cards would not be forced to accept commercial cards. However, to protect the consumer and the consumer’s ability to use the payment cards as often as possible, merchants should be obliged to accept cards that are

Correspondingly, if interchange fees for all card types were regulated, then Article 10 would unlikely to be of concern.
7. Major infringements of the Interchange Fee Regulation appear to have gone unchallenged. continued

subject to the same regulated interchange fee only if issued within the same brand and of the same category (prepaid card, debit card or credit card). Such a limitation would also result in a more competitive environment for cards with interchange fees not regulated under this Regulation, as merchants would gain more negotiating power as regards the conditions under which they accept such cards. Those restrictions should be limited and considered acceptable only to enhance consumers’ protection, giving to the consumers an adequate level of certainty about the fact that their payment cards will be accepted by the merchants.”

315. Accordingly, this explains why Article 10 also requires that:

- payees that decide not to accept all cards or other payment instruments of a payment card scheme shall inform consumers of this, in a clear and unequivocal manner, at the same time as they inform consumers of the acceptance of other cards and payment instruments of the payment card scheme; and
- card issuers shall ensure that their payment instruments are electronically identifiable and visibly identifiable, enabling payees and payers to unequivocally identify which brands and categories of prepaid cards, debit cards, credit cards or commercial cards are chosen by the payer.

316. Such obligations must therefore create a clear requirement on payment card schemes to enable payees (i.e. merchants) and card issuers to meet these obligations.

317. Hence, the Article 10 prohibition must extend to any card scheme rule or practice that has the object or effect of obliging payees accepting one card-based payment instrument also to accept other card-based payment instruments, including any practice that prevents payees that decide not to accept all cards or other payment instruments of a payment card scheme to be able to inform consumers of this in a clear and unequivocal manner, or any practice that prevents card issuers from ensuring that their cards are visibly identifiable, such that payees and payers are unable unequivocally to identify which brands and categories of cards are chosen by the payer. Namely, Article 10 must also include any payment card scheme rule or practice that prevents payees or card issuers from meeting their obligations under the Regulation.

318. However, Mastercard and Visa have engaged in various actions and practices that have substantially undermined payees’ and card issuers’ ability to meet their obligations under Article 10, in particular, the progressive removal of brand and/or other distinctions between different card types, combined with the increasing blurring and obscuring of such distinctions.
7. Major infringements of the Interchange Fee Regulation appear to have gone unchallenged. continued

319. In the case of credit versus debit cards, and EEA versus non-EEA issued cards, Mastercard and Visa have progressively removed former brand distinctions between credit card and debit cards\textsuperscript{255}, and between EEA-issued and non-EEA-issued cards\textsuperscript{256} respectively. In the case of EEA and non-EEA issued cards, there is now no visible distinction at all, contrary to the requirements of the Regulation\textsuperscript{257}. In the case of commercial cards, Mastercard and Visa have created a proliferation of different commercial card product names\textsuperscript{258}, as already illustrated at Figure 13 above. This has generally served to hinder and prevent any clear and unequivocal identity or identification of commercial cards, as well as to blur general understanding among cardholders and merchants of any distinction between commercial and consumer cards\textsuperscript{259}.

320. EuroCommerce also understands that the combination of contactless cards, mobile card payments, and card “tokenisation” creates a further obstacle to identification of the type of card used in a given transaction, owing to the lack of visibility of the physical card, card type, and usual card number\textsuperscript{260}.

321. Together, these effects have meant that, should European merchants decide not to accept a certain card type, such as consumer credit cards, commercial cards, or non-EEA cards, as they are entitled under the Regulation, then it is generally impossible for them to inform consumers of such a decision in a clear and unequivocal manner, as they are obliged to do under the Regulation. Hence, in practice, merchants are unable to “decide” not to refuse acceptance of certain card types. Mastercard’s and Visa’s Honour All Products rules therefore continue to have practical effect. Namely, such rules continue to serve as anti-competitive tying practices, which have the effect of tying acceptance of low fee cards to the acceptance of high fee cards and thereby increasing merchants’ costs and prices paid by consumers.

322. Accordingly, prohibition of the Honour All Products element of the Honour All Cards Rule under the Regulation has not resulted in a more competitive

\textsuperscript{255} Such as Maestro (now Mastercard debit) and Visa Delta (now Visa debit).
\textsuperscript{256} Such as Eurocard/Europay (now Mastercard).
\textsuperscript{257} Except for the identity of the card issuer, which does not unequivocally identify whether a card is issued inside or outside the EEA, nor is generally known whether a given issuer is inside or outside the EEA.
\textsuperscript{259} Furthermore, even if merchants were able to identify commercial cards unequivocally, this would still not assist merchants in identifying the applicable interchange fee or scheme fee levels, given the wide variation in commercial card interchange fees between different commercial card product categories.
environment for unregulated cards, as merchants have not gained any more negotiating power as regards the conditions under which they accept such cards. On the contrary, merchants have continued to have no effective negotiating power as regards the conditions under which they accept such cards. Such absence of “more competitive environment” thereby explains why interchange fees – and scheme fees – for commercial cards and inter-regional cards have increased substantially since the Regulation came into force.

Second, Mastercard and Visa have continued to apply the Honour All Products Rule as between domestic and intra-EEA payment card transactions, such that a merchant does not have the option to accept intra-EEA transactions only, but not domestic transactions. For example, merchants are unable to accept intra-EEA transactions on Mastercard and Visa but limit domestic transactions to lower cost national payment card schemes only. In our view, such restrictions are not necessary to enhance consumers’ protection, the test specified in the Regulation. On the contrary, such restrictions are another form of anti-competitive tying practice and anti-competitive distortion of competition, by tying acceptance of one card transaction type (i.e. Mastercard and Visa intra-EEA card transactions) to acceptance other high-fee card transactions (i.e. Mastercard and Visa domestic transactions), thereby restricting competition from low cost domestic card schemes, and further increasing merchants’ costs and likely prices paid by consumers.  

Third, as described in Section 6.4 above, Mastercard and Visa apply the Honour All Products Rule as between contactless, virtual, and non-contactless cards, such that a merchant that chooses to accept non-contactless consumer debit and/or credit cards is also forced to accept contactless and virtual cards (e.g. mobile and online wallet-enabled cards such as Apple Pay). In our view, such card scheme mandates are not necessary to enhance consumer protection, and therefore of Article 10 of the Regulation. On the contrary, such card scheme rules are a further form of anti-competitive tying practice, that leverages Mastercard’s and Visa’s dominance in non-contactless cards into contactless and virtual cards, thereby creating considerable barriers to entry for alternative contactless or virtual payment product providers.

We also agree with and support the governance concerns set out in the recent US Secure Payments Partnership report that EMVCo – which governs Mastercard, Visa, and American Express contactless card standards – has declined generally

---

262 And bear the structural and hardware costs of upgrading all their point of sale terminals.
to licence or otherwise make available its contactless or virtual card technologies to non-EMVCo members264, such as to national payment card or ATM card schemes, or non-card based payment providers, thereby putting such schemes at a further competitive disadvantage compared to Mastercard, Visa, and other EMVCo members.

327. Fourth, we understand that Mastercard and/or Visa imposes the Honour All Products Rule on their respective ATM card schemes across the EEA, such that payees (i.e. ATM operators) accepting one card-based payment instrument (such as payment cards paying a high ATM interchange fee or intra-EEA ATM transactions only) are also obliged to accept other card-based payment instruments (such as payment cards paying a low interchange fee or domestic ATM transactions) from the same scheme.

328. We consider that this is an infringement of Article 10 of the Regulation, on the basis that Article 10 (and Chapter III of the Regulation more generally) applies to cash withdrawal transactions at ATMs. We note the UK Payment System Regulator’s (PSR) Guidance that the Regulation “does not apply to ATM cash withdrawal transactions”265. We nevertheless respectfully disagree with this interpretation of the Regulation, for the reasons as explained at Section 9 (Annex) below.

329. On this basis, EuroCommerce considers that Article 10 of the Regulation applies to ATM cash withdrawals and thereby prohibits any Honour All Products element of ATM card scheme Honour All Cards Rules and any other elements not strictly necessary to enhance consumer protection. Hence, the existence of such rules and/or practices represents, in EuroCommerce’s view, an infringement of the Regulation.

264 Or operate in an open and collaborative way with non-EMVCo members as called for by Senator Durbin and in Secure Payments Partnership report.
265 “Guidance on the PSR’s approach as a competent authority for the EU Interchange Fee Regulation”, Payment Systems Regulator, October 2016, para. 2.22.
7. Major infringements of the Interchange Fee Regulation appear to have gone unchallenged. continued

7.5 Article 11 prohibits steering rules restricting competition between payment card schemes.

330. Article 11 of the Regulation – Steering rules – prohibits any payment card scheme rules that prevent payees from steering consumers to the use of any payment instrument preferred by the payee, known as “anti-steering rules”.

331. In EuroCommerce’s view, Mastercard and Visa nevertheless continue to maintain a range of such rules and practices, in infringement of Article 11.

332. In particular, Mastercard’s and Visa’s Honour All Cards rules – as prohibited by Article 10 – are themselves an example of such anti-steering rules, namely rules that require payees to accept all categories of cards without discrimination. Likewise, any payment card scheme rule or practice that has the effect of preventing payees from steering consumers to the use of any payment instrument preferred by the payee is prohibited by Article 11.

333. For example, as described in Section 6 and Section 7.2 above, Mastercard and Visa’s removal and/or blurring of brand distinctions between debit cards, credit cards, commercial cards, and inter-regional cards has the effect of preventing payees from steering consumers to the use of payment instrument that may be preferred by the payee and therefore represents an infringement of Article 11 of the Regulation, as well as of Article 10.

334. We also understand that such anti-steering rules are prevalent in Mastercard and Visa’s European ATM payment card schemes. As set out in Section 7.2 above, EuroCommerce consider that Chapter III of the Regulation applies to cash withdrawals at ATMs. Hence, such ATM scheme anti-steering rules are an infringement of the Regulation.

335. As described in Section 6.4 above, Mastercard, Visa, and American Express have imposed anti-steering rules on mobile and online wallet providers Apple and PayPal (in the form of agreements between the payment cards schemes and Apple and PayPal respectively).

336. In the case of Apple, these agreements between Apple, Mastercard, Visa, and American Express do not merely prevent payees (i.e. merchants) from steering consumers to use any payment instrument preferred by the payee, they prevent consumers wanting to make a point of sale or in-app payment on an Apple device from using any alternative payment instrument other than a Mastercard, Visa, or American Express card.

337. In the case of PayPal, the corresponding agreements prevent payees (including PayPal and subsequent end-merchants) from steering consumers to use any payment instrument preferred by the payee, in particular, lower-cost non-card-
Major infringements of the Interchange Fee Regulation appear to have gone unchallenged. continued

based payments. Prior to the agreements, PayPal did seek to steer consumers to use a payment instrument preferred by the payee, namely bank transfers rather than card payments.
8. Major reforms of the Interchange Fee Regulation are now needed.
8. Major reforms of the Interchange Fee Regulation are now needed.

Article 17 of the Regulation (Review clause) requires that the Commission shall submit a report on the application of the Regulation to the European Parliament and to the Council by June 2019\(^{266}\). In particular, the Commission’s report shall look at the appropriateness of the levels of interchange fees and at steering mechanisms, such as charges, taking into account the use and cost of the various means of payments and the level of entry of new players, new technology, and innovative business models on the market.

The Commission’s assessment shall include a list of factors, as set out in the Regulation. EuroCommerce comments on each of these in turn, where we have a view:

a. The development of fees for payers. In our knowledge, the development of direct fees for payers (namely, fees charged by card issuers to cardholders) has been neutral or increasing since the Regulation came into force, especially for credit cards, owing to a reduction of issuer remuneration and the resulting reduction in credit card reward programmes and other cardholder incentives. In our view, such reduction in reward programmes and/or increases in cardholder fees has been a desirable and intended outcome, as it reduces the over-promotion of card use caused by interchange fees at the expense of lower cost and/or more efficient payment methods. The development of indirect fees for payers (namely, the impact of interchange fees and schemes fees on retail prices paid by cardholders) was initially falling but is now rapidly rising, owing to the effect of payment card scheme fees (and unregulated interchange fees) on merchants’ costs and thereby fees borne by payers. The net effect of the Regulation on all fees (direct and indirect) on payers is likely to increase, owing to the reduction in reward programmes combined with recent and ongoing increases in the cost to merchants of card acceptance (resulting from increasing payment card scheme fees), ultimately paid for by payers and all consumers generally. See in particular Section 4 above.

b. The level of competition among payment card providers and payment card schemes. In EuroCommerce’s view, the Regulation should have increased competition between payment card providers, i.e. between issuer PSPs and between acquirer PSPs, owing to the required removal of geographic restrictions on licensing such as former cross-border acquiring rules. However, the Regulation has substantially reduced competition between payment card schemes. In particular, the Regulation has reduced competition between payment card schemes on the payer-
side of the market, i.e. competition between payment card schemes for card issuers and ultimately cardholders. This is because the Regulation regulates the net compensation paid to card issuers. In comparison, the Regulation has had no apparent impact on improving competition between payment card schemes on the payee side of the market, i.e. competition for acquirers and correspondingly for merchants (and/or ATM operators). This is because there is no evidence since the Regulation came into force of payees steering consumers between card schemes, despite the Article 11 (Steering rules) and Article 8 (Co-badging and choice of payment brand or payment application), and therefore the major card schemes remain “must take” cards for almost all payees. See in particular Section 4 and Section 6 above.

c. **The effects on costs for the payer and the payee.** As in reply to a) above, the net effect on costs for payers (i.e. of direct and indirect fees to cardholders) is likely to be negative, especially given the continuing over-promotion of high-cost payment cards at the expense of lower cost alternative payment methods. The likely net effect on costs for payees (i.e. merchants and/or ATM operators) is also likely to be negative, as a result of the combined effect of interchange fee reductions, scheme fee increases, and continued over-promotion of high-cost payment cards at the expense of lower cost alternative payment methods. See in particular Section 4 above.

d. **The levels of merchant pass-through of the reduction in interchange fee levels.** In our view, the level of merchant pass-through of the reduction in interchange fees is likely to be very difficult to measure, owing to the relatively small component that the reductions in interchange fees changes represent in overall retail prices and the large number of other factors impacting merchants’ pricing decisions, such as the changing wholesale price of goods, exchange rate movements, and general price inflation, as well as the wide variation by merchant sector. In comparison, the level of acquirer pass-through is likely to be much more readily apparent, given the large component of merchant service charges that interchange fees represent. In particular, large merchants are likely to have seen a direct pass-through of interchange fee reductions, as contracts are typically structured as “interchange+”, i.e. interchange plus other acquirer’s costs. In any event, interchange reductions for all merchants have been substantially offset by significant scheme fee increases and the
8. Major reforms of the Interchange Fee Regulation are now needed. continued

introduction of new and previously unseen scheme fees since the Regulation came into force. See in particular Section 4 above.

e. The technical requirements and their implications for all the parties involved. In our view, implementation of the technical requirements of the Regulation – for example, by which we understand to mean payment card schemes ensuring that “a clear distinction between consumer and commercial cards should be ensured by the payment service providers both on a technical and on a commercial basis” (see Recital 38), among other things – has impeded the benefits of the Regulation, especially in enabling payees to distinguish different payment card types. See in particular Section 6 above.

f. The effects of co-badging on user-friendliness, in particular for the elderly and other vulnerable users. In our view, the Regulation has so far had no apparent impact on prevalence of co-badging, and accordingly on the competitive benefits or other benefits of user-friendliness that might arise from co-badging. This is because card issuers have little or no commercial incentive to offer co-badged cards in a way that enables competition between payment card schemes, in particular, co-badging between the international card schemes. In our view, payers’ PSPs should instead potentially be mandated to offer co-badged cards and for payees’ PSPs to elect which payment card scheme to apply to a given transaction, as required by card payment regulation in other jurisdictions, especially Australia and the US.

g. The effect on the market of the exclusion of commercial cards from Chapter II, comparing the situation in those Member States where surcharging is prohibited with those where it is permitted. In our view, the effect of the exclusion of commercial cards from the Regulation has been considerably harmful to both payers and payees (i.e. to cardholders and merchants, and especially to end-consumers in general), in particular when combined with prohibition of

---

267 Also known as “prohibition on network exclusivity”, “prohibition on routing restrictions”, and “least-cost routing”.
268 See “Least-cost Routing of Debit Card Transactions”, Reserve Bank of Australia. There is some early evidence that least-cost routing of debit card transactions is placing downward pressure on card acceptance costs in Australia.
269 See “Regulation II (Debit Card Interchange Fees and Routing)”, US Federal Reserve. There is evidence that the international card schemes have sought to undermine mandated co-badging of debit cards in the US and the card schemes’ practices currently subject to an inquiry by the US Federal Trade Commission.
surcharging of commercial cards. Even absent prohibition of surcharging, merchants have little opportunity either to surcharge or refuse to accept high-cost unregulated commercial cards, owing to the absence of any distinct branding or clear identity of Mastercard or Visa commercial cards, and therefore the associated difficulty for merchants of communicating to cardholders about the acceptance of such cards, as required by the Regulation. Moreover, commercial cards are a “must take” card for many types of merchants, especially in sectors such as travel (including fuel) and entertainment. Consumers in general have been significantly adversely impacted by the high costs of commercial cards being borne by all consumers, including both card users and non-card users. See in particular Section 6.1.

h. **The effect on the market of the special provisions for interchange fees for domestic debit card transactions.** The special provisions have had a beneficial effect where national competent authorities have elected to set the interchange fees below the regulated caps in the Regulation, namely, at a level closer to the level prescribed by the Merchant Indifference Test methodology. See in particular Section 5 above.

i. **The development of cross-border acquiring and its effect on the single market, comparing the situation for cards with capped fees and cards which are not capped, to consider the possibility of clarifying which interchange fee applies to cross-border acquiring.** Cross-border acquiring should have a positive impact on the Single Market, in removing national barriers and related obstacles to competition. However, there remains strong evidence of continuing obstacles to cross-border acquiring. See Section 7.2 above. The situation of cards with interchange fees which are unregulated is a separate problem, as highlighted in response to g) above (on the effect on the market of the exclusion of commercial cards from Chapter II of the Regulation). In particular, cross-border acquiring has had little if any impact on the situation for cards which are not capped, such as commercial cards. In any event, we note the Commission’s recent decision concerning Mastercard’s former cross-border acquiring rules, that “acquirers offering card payment transaction acquiring services in Member States where the domestic MIFs were lower were prevented from offering cheaper services based on the MIFs in their ‘home’ countries in Member States where the domestic MIFs were higher” was an appreciable restriction of “competition by
object”, contrary to Article 101 TFEU and that this meant that “merchants were prevented from taking advantage of the internal market and benefiting from less expensive services from card acquirers established in low-MIF Member States”\(^{270}\). Therefore, in order for merchants to take full advantage of the single market, acquirers must be able to offer cross-border acquiring services based on the domestic interchange fees in their home countries to merchants in any other Member State.

j. **The application in practice of the rules on separation of payment card scheme and processing, and the need to reconsider legal unbundling.** The impact of the rules on separation of payment card scheme and processing has been unclear, especially for payers and payees. In particular, it is not evident that separation of payment card scheme and processing has had any positive impact on constraining the multitude of new scheme fees charged to acquirers that have been introduced since the Regulation came into force.

k. **The possible need, depending on the effect of Article 3(1) on the actual value of interchange fees for medium and high value debit card transactions, to revise that paragraph by providing that the cap should be limited to the lower amount of EUR 0.07 or 0.2 % of the value of the transaction.** The effect of Article 3(1) of the Regulation has resulted in significant increases in interchange fees for merchants with medium and high value debit card transactions, while merchants with multiple low value transactions have generally benefited. At minimum, the cap should be revised such that the cap is limited to the lower of EUR 0.07 or 0.2% of the value of the transaction across all Member States. See in particular Section 5 above.

340. The Regulation specifies that the Commission’s report shall, if appropriate, be accompanied by a legislative proposal that may include a proposed amendment of the maximum cap for interchange fees.

In EuroCommerce’s view, the Commission’s report should include a legislative proposal for major reform of the Regulation, in particular to:

I. Regulate the total wholesale fees charged to payment card acquirers.

i. Instead of regulating net compensation paid to issuers (i.e. interchange fees net of issuer scheme fees), the Regulation should regulate the total wholesale fees charged to acquirers (i.e. interchange fees plus acquirer scheme fees), in particular, by replacing the text of Article 5 (Prohibition of circumvention) of the Regulation with the former text as contained in the anti-circumvention clauses of the Visa 2010 and 2014 Commitments271; and

ii. In addition, the Regulation should set a lower, revised, level of the Article 3 and 4 (Interchange fees for consumer debit and consumer credit card transactions) interchange fee caps, including acquirer scheme fees, as having equivalent object or effect as interchange fees, on the basis of the Merchant Indifference Test; or

iii. Alternatively, the Regulation should mandate that the total wholesale fees charged to acquirers (i.e. interchange fees plus acquirer scheme fees) must be no greater than the net wholesale fees charged to card issuers (namely, issuer scheme fees net of interchange fees)272.

II. Remove all appreciable exemptions and exclusions from the Regulation.

i. Remove the Article 1(3) (Scope) exemptions, where applicable, from both the Chapter II (Interchange fees) and Chapter III (Business rules) provisions, for transactions with commercial cards, cash withdrawals at ATMs, and transactions with payment cards issued by three party payment card schemes, plus transactions with inter-regional cards and transactions with mobile and/or online wallets, and other prospective new transaction types273; and

---

271 Which said that: “[for the purpose of the interchange fee caps, any agreed charges made to an acquirer, including] other fees that have the same object or effect as interchange fees, including but not limited to payment card scheme fees charged to acquirers, [shall be treated as part of the interchange fee]” (our emphasis).

272 Under either I.ii or I.iii, interchange fees would be subject to limit set at percentage of transaction value, or more generally, a fixed amount per transaction plus percentage of transaction of value.

273 At minimum, all payment card transactions on which payees are prohibited from surcharging (including ATM cash withdrawal transactions) – either in EU or national law, or by payment card scheme rules – must be subject to regulated interchange fees. Conversely, payees in any Member State must be able to surcharge any payment card transaction that is not subject to a regulated interchange fee (again including ATM cash withdrawal transactions).
8. Major reforms of the Interchange Fee Regulation are now needed. continued

ii. Ensure that agreements between payment card schemes (such as EMVCo) and agreements between payment card schemes and major technology firms (such as Apple) concerning card-based payments are within the scope the Regulation, as well as subject to antitrust investigation and enforcement.

III. Mandate independent acquiring of three-party payment card schemes.

i. In order to remove the exemption of three-party card schemes from the Regulation, the Regulation should mandate acquiring of designated three-party schemes by independent payment service providers (PSPs)\textsuperscript{274}.

IV. Mandate minimum interchange fees for cash withdrawals and cash deposits at ATMs.

i. In order to remove the exemption of ATM cash withdrawals from the Regulation, the Regulation should set minimum ATM cash withdrawal and cash deposit interchange fees sufficient to support widespread geographic access to free-to-use ATMs (and/or other means of widespread access to cash)\textsuperscript{275}.

V. Mandate strong and dissuasive penalties for non-compliance with the Regulation.

i. The Regulation should mandate timely and reasoned response to complaints of alleged infringement of the Regulation and due opportunity for complainants to appeal.

ii. The Regulation should mandate penalties for infringement of the Regulation equivalent to penalties for infringement of Article 101 TFEU, namely with reference to the value of sales of the infringing undertaking(s), the relevant duration, and the gravity and scope of the infringement.

\textsuperscript{274} See Section 6.3.
\textsuperscript{275} See Section 6.5.
8. Major reforms of the Interchange Fee Regulation are now needed. continued

342. Last, EuroCommerce wishes to thank the European Commission for this opportunity to submit evidence to the Commission’s review of the Interchange Fee Regulation.
EuroCommerce notes the UK Payment System Regulator’s (PSR) Guidance that “the IFR does not apply to ATM cash withdrawal transactions”\textsuperscript{276}. EuroCommerce nevertheless respectfully disagree with this interpretation the Regulation, for the reasons as follows.

First, we note that Article 1(1) defines the scope of the Regulation as applying to “card-based payment transactions”, where “both the payer’s payment service provider (PSP) and the payee’s PSP are located [in the EEA]”. Article 2(7) defines such a “card-based payment transaction” as “a service based on a payment card scheme’s infrastructure and business rules to make a payment transaction by means of any card, telecommunication, digital or IT device or software if this results in a debit or a credit card transaction” and Article 2(20) defines a “card-based payment instrument” as “any payment instrument […] which enables the payer to initiate a card-based payment transaction which is not a credit transfer or a direct debit”.

Article 2(13) and 2(14) define a “payee” as “a natural or legal person who is the intended recipient of funds which have been the subject of a payment transaction” and a “payer” as a “natural or legal person […] who gives a payment order”. Article 2(1) defines “acquirer” as a “PSP contracting with a payee to accept and process card-based payment transactions, which result in a transfer of funds to the payee”.

These definitions do not preclude card-based payment transactions or instruments from meaning a debit or credit card used for ATM cash withdrawals, nor payees from meaning merchants or ATM operators, nor acquirers from meaning merchant acquirers or ATM acquirers. Moreover, the Regulation does not define “merchant” nor preclude that an ATM operator can be considered to be a specialist type of merchant\textsuperscript{277}.

Second, Article 1(2) states that the Regulation “does not apply to services based on specific payment instruments that can be used only in a limited way”, which are then defined as meetings one of several conditions. The list of such conditions does not include or apply to ATM cash withdrawals.

Article 1(3) states that Chapter II of the Regulation (\textit{Interchange fees}) does not apply to commercial cards, ATM cash withdrawals, and three-party payment schemes. This itself implies that the other Chapters of the Regulation – in particular, Chapter III (\textit{Business rules}) – does apply to all of these transaction types. It is undisputed that Chapter III of the Regulation applies to commercial cards and three-party schemes. Moreover, as discussed at Section 6 above, the

\textsuperscript{276} Guidance on the PSR’s approach as a competent authority for the EU Interchange Fee Regulation, Payment Systems Regulator, October 2016, para. 2.22.

\textsuperscript{277} Namely, a vending machine operator that dispenses cash in notes.
Commission’s general reasoning for excluding certain card payment transaction types from Chapter II of the Regulation (Interchange fees) was the importance of the Chapter III (Business rules) in enabling such transactions to remain unregulated.

349. Third, Regulation (EU) 2019/518\textsuperscript{278} refers to “card-based transactions” as including services both at ATMs and at the point of sale\textsuperscript{279}.

350. Fourth, the PSR says that the Regulation (Recital 28) describes card payment schemes in terms of “the two main business models (three-party or four-party schemes) in terms that expressly include the involvement of both a cardholder and a merchant”. However, Recital 28 says only that card-based payment transactions are “generally” carried out on the basis of two main business models involving merchants. In EuroCommerce’s view, this does not imply the card-based payment transactions exclude business models comprising ATM cash withdrawals. ATM card schemes can also of course either be four-party schemes (such as Mastercard or Visa ATM schemes, where neither Mastercard or Visa are the card issuer nor ATM acquirer) or three-party schemes (such as American Express, where American Express is both the card issuer and ATM acquirer).

351. Fifth, the PSR is non-committal in its statement that the Regulation does not apply to ATM cash withdrawal transactions, saying only that the Regulation “appears” to be limited to purchase transactions. The PSR describes such purchase transactions as a payment involving the transfer of funds between a payer (the cardholder) and a payee (the merchant). ATM cash withdrawal transactions of course also involve the transfer of funds between a payer (i.e. the cardholder) and a payee (the ATM operator), as illustrated by Figure 24 above, and also the reason why ATM schemes are designated as regulated payment systems in the UK\textsuperscript{280}.

352. Last, the UK PSR notes that parties should treat the text of the Regulation as “paramount” and that in the event of any inconsistency between the Regulation and any part of the UK PSR’s guidance, then the Regulation takes precedence.

353. On this basis, EuroCommerce considers that Chapter III of the Regulation applies to ATM cash withdrawals and thereby all such Chapter III prohibitions apply equally ATM cash withdrawals transactions as point of sale transactions.


\textsuperscript{279} See Article 3a.

\textsuperscript{280} See “Designation of payment systems for regulation by the Payment Systems Regulator”, UK HM Treasury, 2015.