



**THE 2009 INTERCHANGE FEE DECISION
OF THE HUNGARIAN COMPETITION AUTHORITY:
A COMPARATIVE CASE STUDY**

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ABSTRACT

EC Competition law and the competition law of each Member State are overlapping one another. The enforcement of competition law is divided between the Commission and the competition authority of each Member State, therefore, it is interesting and useful to compare decisions at the two levels dealing with the same or a similar topic. This paper compares the MasterCard Decision of the Commission and the 2009 decision of the Hungarian Competition Authority concerning multilateral interchange fees. It highlights the most important problems and critiques regarding the later decision.

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I would like to express my deep thanks to both professionals of the Hungarian Competition Authority and to all the professionals from the banks and law firms that were involved in the related proceedings who helped me in this work. With their suggestions and inspiring ideas, I believe, I was able to remain unbiased and also present a neutral summary of these much debated issues. Their contributions on the other hand helped me to form my own opinion regarding the topic for which I thank them all effusively.

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LIST OF ABBREVIATIONS

BCF or Forum	informal cooperation of banks in Hungary called the “Bank Card Forum”
BRC	British Retail Consortium
Commission	Commission of the European Union
EC, EU	European Community, European Union (although they are not the same these terms are used interchangeably in this paper)
ECJ	European Court of Justice
EEA	European Economic Area
EPC	European Payments Council
Final Report	Report on the retail banking sector inquiry, Commission Staff Working Document, accompanying the Communication from the Commission - Sector Inquiry under Art 17 of Regulation 1/2003 on retail banking [COM(2007) 33 final] SEC(2007) 106, 31 January, 2007
GVH	Hungarian Competition Authority [“Gazdasági Versenyhivatal”] (it stands for the proceeding Competition Board as well, which is the decision-making panel of the authority)
GVH Decision or GVH Case	Nr. Vj-18/2008/341 interchange fee decision of the GVH made on 24 September 2009
HACR	Honour All Cards Rule
Hungarian Competition Act or HCA	Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices
MasterCard or MC	MasterCard Incorporated (US), MasterCard International Incorporated (US) and MasterCard Europe s.p.r.l. (Belgium). MasterCard Incorporated acts as a holding company for MasterCard International Incorporated and MasterCard Europe s.p.r.l. Both latter companies are fully consolidated subsidiaries of MasterCard Incorporated.
MC Decision or MasterCard Decision or MasterCard Case	Commission Decision (19 December 2007) Cases COMP/34.579, COMP/36.518 EuroCommerce, and COMP/38.580 Commercial Cards
Member States	Member states of the European Union
MIF	Multilateral Interchange Fee (or Fees)
Notice or 1995 Notice	Commission Notice on the application of the EC competition rules to cross-border credit transfers. SEC (95) 1403 final, 13 September 1995, OJ 1995 C251/3.
Sector Inquiry or SI	Sector Inquiry of the Commission on the area of retail banking (2005-2007)
SEPA	Single Euro Payments Area

SCF	SEPA Cards Framework
Treaty	Consolidated version of the Treaty establishing the European Community (or the Treaty on the Functioning of the European Union) (although they are not the same 'Treaty' may stand for both of these documents in this paper)
Visa I Decision	Commission Decision VISA I (7 August 2001) OJ L 293/24 of 10 November 2001
Visa II Decision	Commission Decision VISA II (24 July 2002) OJ L 318/17 of 22 November 2002, Case No. COMP/29.373

INTRODUCTION

The question this paper will discuss is whether the 24 September 2009 interchange fee decision¹ of the Hungarian Competition Authority (“Gazdasági Versenyhivatal” or “GVH”) is in line (or whether it has to be in line) with the relevant decisions of the Commission of the European Union, especially with the 19 December 2007 MasterCard Decision² (“MC Decision”). This topic is important for several reasons. Firstly, the GVH makes several references in its decision to the MC Decision. Its decision is based in several points on the findings of the Commission in the MasterCard Case, although it is stated by the authority that “the European Commission has not yet imposed fines for similar kinds of agreements”³. Secondly, several scholars and experts have encouraged competition authorities to solve problems in connection with interchange fees slowly because it is a difficult issue. As it is a much debated issue too, it is worth making a comparative legal analysis to understand those points which are the most debated. Thirdly, this decision is relatively recent, and there is currently no paper or publication specifically analyzing this decision of the GVH in either English or Hungarian.

The History of interchange fees goes back to 1971.⁴ In general, this fee is charged to the acquiring bank (which deals with merchants) by the issuing bank (which deals with cardholders) in the payment card business if the two banks in a transaction are different. In other words, an interchange fee is a reimbursement for the usage of the other bank’s system. Four-player payment card systems are characterized as two-sided markets. According to some

¹ Hungarian Competition Authority [Gazdasági Versenyhivatal] Decision No. Vj-18/2008/341, available at <http://www.gvh.hu/domain2/files/modules/module25/114114B5D1D514D37.pdf> (English summary of the decision available at <http://www.gvh.hu/domain2/files/modules/module25/117041AFE38173C19.pdf>).

² European Commission Decision COMP/34.579 Mastercard, COMP/36.518 EuroCommerce, and COMP/38.580 Commercial Cards (19 Dec. 2007), available at <http://ec.europa.eu/competition/antitrust/cases/decisions/34579/en.pdf>.

³ Press Release, Hungarian Competition Authority, Anticompetitive Uniform Interchange Fees (24 Sept. 2009), available at http://www.gvh.hu/gvh/alpha?do=2&m5_doc=6071&pg=72&m5_lang=en&p4j1i=5; see also Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 223(d).

⁴ David S. Evans & Richard Schmalensee, The Economics of Interchange Fees and Their Regulation: An Overview (MIT Sloan Sch. of Mgmt., Working Paper No. 4548-05, May 2005), available at <http://ssrn.com/abstract=286535>.

scholars,⁵ there is no universal definition for two-sided markets and “aren’t all markets two-sided?”

From a competition law perspective in the payment card business it means that there are on the one hand consumers holding payment cards, and on the other hand, merchants accepting payment cards. These two segments of the market are interconnected; therefore, it is misleading to look only at one side of the market and disregard the other side. Events on one side of the market affect the other side and *vice versa*. In this type of market on one hand effective monopolies might exist and furthermore, competition can lead to inefficient outcomes (Katz, 2010).⁶ From the point of view of the researcher much information and economic analysis is required (e.g. what is the ‘right’ or ‘fair’ price, especially given dynamic considerations; how to distinguish predatory pricing from competitive pricing etc). These are hard issues which are difficult to regulate, but this is not a new challenge.

Interchange fees have been debated parallelly in the USA and in Europe in the last couple of decades. In the USA in 1986 a court held that “the interchange fee had potential efficiency benefits for a two-sided system (...) the cardholder cannot use his card unless the merchant accepts it and merchant cannot accept the card unless the cardholder uses one. Hence, the [interchange fee] accompanies “the coordination of other productive or distributive efforts of the parties” that is “capable of increasing the integration’s efficiency and no broader than required for that purpose””.⁷ As Evans and Schmalensee remarks, the court also found that in systems with many banks it is not a practical solution to make bilateral agreements because of two reasons: firstly, it leads to increased transaction costs and secondly, issuing banks have substantial leverage over acquirers because of the honor-all-cards rule. As to the later reason, Evans and Schmalensee further states: “A recent analysis (Small and Wright, 2000) concludes that (...) banks’ strategic behavior would undermine the system’s viability.”⁸

⁵ Michael Katz, Speech to the 3d Lisbon Conference on Competition Law and Economics in Lisbon, Portugal (14 Jan. 2010).

⁶ *Id.*

⁷ Nat’l Bancard Corp. v. Visa U.S.A., 779 F.2d 592 (11th Cir. 1986).

⁸ Evans & Schmalensee, *supra* note 4, at 15 n. 33.

Evans and Schmalensee comment⁹ that related arguments regarding the Australian EFTPOS system – a PIN-based debit card system which is operated by bilateral agreements – are not conclusive because in Australia there are a relatively low number of banks on both sides of the market. Another frequently mentioned argument is Sweden’s system, but again, this is not a conclusive one because the banking system in Sweden is highly concentrated too (the top four banks held about 80% of the market in 2004). The size of these systems is not comparable with the size of the global or US-level Visa or MasterCard industry.

In this paper the 2009 interchange fee decision¹⁰ of the GVH (“GVH Decision”) is analyzed from the point of view of the Commission’s 2007 MasterCard Decision. The focus is on the provisions of the former Article 81 of the EC Treaty [now Article 101 of the Treaty on the Functioning of the European Union].¹¹ Some other relevant decisions of the Commission will be taken into consideration too, but special attention will be paid to the MC Decision. The reason for this is that the GVH made several references in its decision to this Commission decision. It has to be remarked that in case of both decisions the analysis is based on the non-confidential version of the authority decisions, only those ones were publicized, therefore, sometimes the authority only indicates its decision and the exact data and proofs behind that are missing for the reader.

David S. Evans and Richard Schmalensee characterize the understanding of determination and effect of interchange fees as “intellectually challenging”¹². I fully agree with that statement. One of the main reasons for that is that it is very difficult to define what the “fair or competitive price” is in a two-sided market, even when possessing economic data about the costs of the market players. Competition law evaluation of interchange fees used among banks in the payment card industry is not only intellectually challenging, but also highly debated meaning that its judgment is not uniform. There is an agreement that the legal

⁹ *Id.*

¹⁰ Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1.

¹¹ Former Article 81 of the EC Treaty is now Article 101 of the Treaty on the Functioning of the European Union as the Lisbon Treaty renumbered the EC Treaty.

analysis has to go hand in hand with the economic analysis. Except for some authors¹³ it has not been debated that the questions raised by the Commission are considered to be matters of competition law; in the last couple of years the Commission made several decisions regarding interchange fees and VISA or MasterCard have never claimed that the questions raised by the Commission are not to be examined through the magnifying glass of competition law.

As a result of the proceedings conducted by the Commission a number of competition authorities of Member States have conducted similar procedures (e.g. Poland, Hungary, Denmark). In Hungary the GVH decided to examine the interchange fees used by banks and card companies (VISA and MasterCard) in 2008. As a result of this proceeding, the authority imposed fines on both those banks the most involved in the agreement and card companies. Furthermore, in Hungary the Parliament recently amended the relevant act and set maximum caps regarding merchant's fees as of 1 May 2010.¹⁴ Originally the attempt of the legislator was to regulate the measure (percentage rate) of both merchants' fees and interchange fees by imposing maximum caps. The GVH Decision and the new developments in legislation further demonstrate the timeliness of this thesis.

Suggesting a solution for this problem is beyond the scope of this paper. There is no clear view regarding the competition law judgment of interchange fees. Competition is not necessarily the most efficient outcome in a market, as the main public policy goal is to avoid inefficiently high prices. A statutory ban on two-sided pricing can raise the prices paid by households therefore it is important for authorities to use caution in this area.¹⁵ Advantages for consumers exist too but there is a tendency in competition law to ignore customers who get services for free.¹⁶ Furthermore, there is a political-economic problem as well: it is easier

¹² Evans & Schmalensee, *supra* note 4, at 4.

¹³ C. Christian von Weizsäcker, *Comments Regarding "Reform of Credit Card schemes in Australia II" commissioned report by Professor Michael L. Katz (August 2001)*, March 14, 2002, available at: <http://www.rba.gov.au/payments-system/reforms/cc-schemes/consult-doc-responses/mastercard-0302-2.pdf>.

¹⁴ Article 51 (6)-(7) of Act XII of 2010 amended Article 35 (3) of Act LXXXV of 2009 on the Pursuit of the Business of Payment Services (passed on 15 February 2010).

¹⁵ Michael Katz, Speech to the 3d Lisbon Conference on Competition Law and Economics in Lisbon, Portugal (14 Jan. 2010).

¹⁶ *Id.*

for merchants to turn to authorities to claim the reduction of interchange fees than for banks or card companies to prove that they charge interchange fees on good grounds. Another key issue is the burden of proof in the authority procedures and in the following court proceedings.

In the course of tackling this topic, I have realized that there are numerous academic papers on competition law aspects of interchange fees and two-sided markets. Additionally, the United States has approached this debate differently than the European Union. This paper not taking into consideration some brief remarks focuses only on the European aspects of this issue. In the EU, interchange fees are considered to be anticompetitive based on the fact that it is not proven that prices would be effective in the payment card business (otherwise an exemption could be granted in individual cases). The literature makes it clear that the topic has been highly debated for more than two decades, which suggests that the solution may not be an easy one.

In Hungary the GVH Decision was followed by a legislative process. As a result of that process, as of 1 May 2010 the maximum level of interchange fees and merchants' fees will be set by law. This, however, does not resolve the questions relating to competition law because even if banks fulfill the requirements of the newly enacted statute, this does not mean that potential competition-law infringements could not occur. It is debatable whether consumers will benefit from the new rules and it is difficult to predict at this point whether the new statutory rules will have a positive effect on the bank card industry. What remains is that competition law requirements are partially unclear in this area and that neither the authorities nor the current laws indicate the proper behavior of the market players in this industry from competition law perspective.

In the following sections the operation of payment card systems will be reviewed with a special focus on the role of interchange fees in this system. A core characteristic of these systems is that they operate in a so-called two-sided market, which will be briefly described as

well. Next, the legal background surrounding these issues will be summarized. Finally, the GVH Decision will be introduced in comparison with the MC Decision.

CHAPTER 1 – OPERATION OF PAYMENT CARD SYSTEMS

1.1 Operation of payment card systems: two-sided markets

The first payment card system was created in the United States in 1958. A payment card is a card which the card holder can use in order to make payments. Some of the most important forms of payment cards are credit cards, debit cards and prepaid cards. The evolution of payment card systems over the past sixty years¹⁷ has significantly contributed to the economic growth and feasibility of doing business worldwide – largely because, among others things, card payments are time-saving, secure and convenient. Initially card payment systems evolved separately in the United States and Europe, however in the late 1960s MasterCard¹⁸ and Visa¹⁹ began to work on globalizing the use of payment cards.

Based on the analysis of the Commission in the MC Case two primary services and an intermediary service can be identified regarding payment cards: issuing cards to customers, acquiring merchants for card acceptance²⁰ and the service offered by card companies. Card companies like Visa or MasterCard operate payment card system networks but do not issue cards; this it is done by their members (e.g. banks). Instead, card companies manage trade marks, set rules and provide authorization and clearing services “via a worldwide computer and telecommunication network.”²¹ Card companies divide the territory in which they operate into regions. The EU is a separate region both in MasterCard’s and Visa’s systems. Decision-making is, in general, delegated to regional boards that consist of representatives of member banks from that region. A detailed review of all of the network rules of card companies is

¹⁷ The first bank card was introduced in 1946. History of the Card Payments System (MasterCard), available at <http://www.mastercard.com/us/company/en/docs/history%20of%20payments.pdf>.

¹⁸ ICA (now MasterCard Worldwide) formed an association with Banco Nacional Mexico, Eurocard and also partner institutions from Japan in 1968.

¹⁹ Visa was originally named Ibanco Ltd, but since 1979 has carried the name “Visa International.” [Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001., pt. I. 1. (1)].

²⁰ Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. 4 (22).

²¹ Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. 2. 2.1. (3).

beyond the scope of this paper but the most important ones are the followings: the no-discrimination rule, the principle of territorial licensing, the no acquiring without issuing rule and the honour all cards rule. According to Visa “the no-discrimination rule (...) prohibits merchants from adding charges to cardholders who pay with their (...) card”, and “prohibits merchants from giving consumers discounts for paying with other means of payment, such as for example cash”.²² The honour all cards rule means that a “merchant must accept all valid cards with (...) the symbol [of the card company] which are properly presented for payment”.²³ There are some banks which both issue cards and acquire merchants, meanwhile, other banks only issue cards.

The type of card (e.g. debit or credit) is not important from the point of view of the authority decisions in focus of this paper and how the system works. Similarly, the way in which the cards are used, such as to obtain cash either from a bank counter or from an automated teller machine (ATM), is irrelevant to the purposes of this paper. The following Figure 1 illustrates the four major players²⁴ and their cooperation in a payment card transaction:

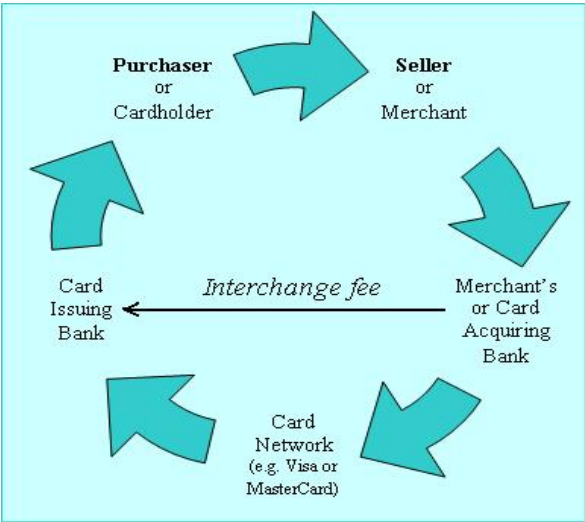


Figure 1: Cooperation of customer groups (cardholders and merchants), banks and card companies in a payment card transaction.

²² Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. 3.2. 3.2.1. (11).

²³ Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. 3.2. 3.2.6. (19).

²⁴ LYNN M. LOPUCKI ET AL, COMMERCIAL TRANSACTIONS: A SYSTEMS APPROACH, 413-528, (3d ed., 2006).

The diagram used by the Commission in the MasterCard Decision²⁵ and the charter used by the GVH²⁶ (see Figure 2 below) are the same in that card companies are not shown on them.

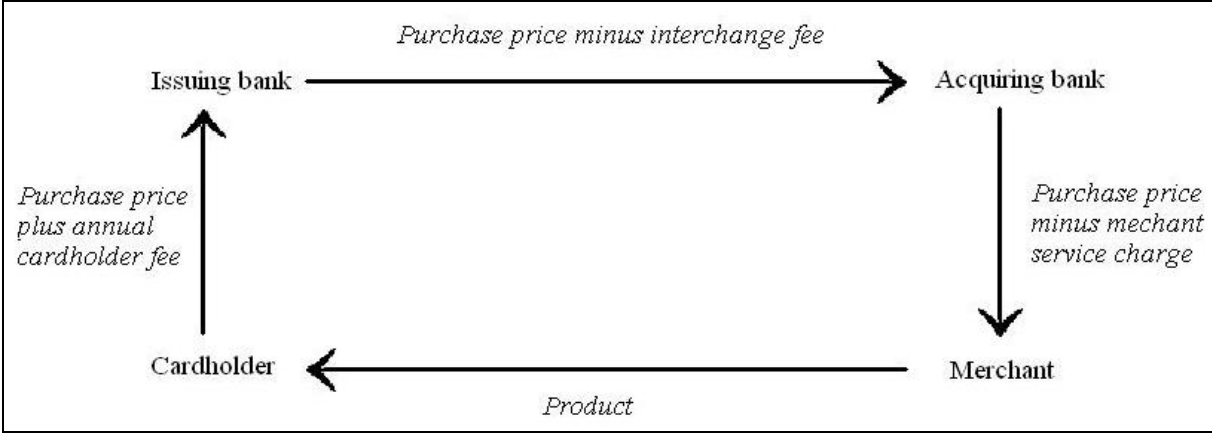


Figure 2: Charter used by the GVH illustrating the payment cars systems of Visa and MC

Now, firstly, there is a legal relationship between the cardholder and the bank who issues the card. In accordance with their agreement, the issuing bank undertakes to pay for transactions that the cardholder makes with the card and the cardholder undertakes to reimburse the issuing bank from time to time and pay an annual fee. In the case of a credit card, the merchant gets paid even if the cardholder fails to pay the bill. In the case of a debit card, the cardholder can purchase goods and services with his or her card only if there are sufficient funds in the cardholder’s account to cover the purchase. The profit for the card-issuing bank comes from the interest and late fees charged in the case of credit cards of through annual fees charged in the case of other types of cards. Secondly, there is a relationship between the issuing bank and the acquiring bank. The acquiring bank pays an interchange fee to the issuing bank. This topic is discovered in point 1.2 of this paper. Thirdly, there is a relationship between the acquiring bank and the merchant. The merchant can accept a payment card if it has an agreement with an acquiring bank that is a member of either of the

²⁵ European Commission Decision COMP/34.579, *supra* note 2, at ¶ 139.

Visa or the MasterCard network. (In the USA there are other networks as well, like American Express and Discover). The merchant pays the merchant's fee to the acquiring bank (more precisely it is deducted from the purchase price paid for the good or service). The fee usually consists of two components: a percentage of each transaction and a small per-item fee. The amount of the fee is negotiated between the acquirer bank and the merchant and is one of the most important terms of their agreement. The more transactions a merchant has and the greater the value of these transactions, the better position the merchant is in to negotiate a favorable arrangement with the bank. Lastly, the purchase agreement between the cardholder and the merchant has to be mentioned which is relevant from the point of view of consumer groups (merchants and cardholders) but it is not in the focus of the present paper.

It is important to note that there is also the network (e.g. Visa or MasterCard) under which the above mentioned four players act. These card companies do not participate in, but rather facilitate the transactions with their technology and networks. "The Visa and MasterCard entities are not themselves financial institutions. Rather, they are loosely organized not-for-profit cooperative organizations composed of banks that participate in the industry."²⁷

Some remarks on the peculiarities of the payment card industry in Hungary

A recent research report of the Central Bank of Hungary²⁸ gives a nice overview about some peculiarities of the operation of payment card industry in Hungary. Focusing on the relationships between high amounts of cash in hand and hidden economy the results of the research report show that cash favors hidden economy. This can be translated to the following statement: payment card industry can contribute to the fight against hidden economy too. Hidden economy, namely, adversely affects the economy of a country by reducing tax

²⁶ Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 11.

²⁷ LYNN M. LOPUCKI ET AL, COMMERCIAL TRANSACTIONS: A SYSTEMS APPROACH, 413-528, (3d ed., 2006).

²⁸ Anikó Bódi-Schubert, *A készpénz szerepe a rejtett gazdaságban - Kvalitatív eredmények és továbblépési lehetőségek [The role of cash in the hidden economy: Quantitative effects and further opportunities]*, February 2010, Hungarian National Bank, available in Hungarian at: http://www.mnb.hu/engine.aspx?page=mnbhu_kphasznalat_rejtett_gazdasag_Publikaciok.

incomes of the state, by adversely affecting the respect of laws on behalf of the society, and by narrowing the possibilities of getting credit mentioning only the most important negative effects.²⁹ It can be concluded that cash-sparing payment methods like payment cards indirectly reduce or make it more difficult for the players of hidden economy to make transactions therefore make it more difficult to make illegal transactions which have many favorable effects on the economy.

Now, as to the peculiarities of the operation of payment card industry in Hungary the research report paper shows that the number of POS terminals (point of sale terminals) which enables electronic payments is relatively low in Hungary in comparison with other EU countries and with the EU average.³⁰ The author refers to Helmeczi, I. (2010) in that the relatively low number of POS is obviously influenced by the interchange fees but the author also warns that the direct legislative regulation of these fees shall be made by increased carefulness because of the fact that the payment card system is a two-sided market which means that the adequate definition of the fees paid by cardholders and merchants influences the number of transactions.³¹ – The reason for that is that between the two sides of the market there are cross positive externalities working: on one hand a cardholder considers it useful to have a card if it is widely accepted by merchants, on the other hand a merchant is more willing to accept a card if more purchasers use cards for payments. In sum for both sides it is more attractive or advantageous to use/accept cards if there are more users/accepters on the other side. (This later is a general characteristic of payment card systems which is valid in Hungary too.)

Another peculiarity of the Hungarian system is that contrarily to other states the POS terminals are owned by banks and not by merchants which affects the fees paid by merchants

²⁹ *Id.* at 8.

³⁰ *Id.* at 20-21.

³¹ I. Helmeczi, *A magyarországi pénzforgalom térképe: MNB tanulmány [A Map of Hungarian Money Circulation: A research paper of the Central Bank of Hungary]*, 2010.

to banks. The paper – instead of the legislative regulation of MIF – suggests that inspiring merchants for example by tax allowances can be an effective way of increasing the number of POS terminals.

Finally, it is important to make real our knowledge that cash payment is not free of charge but in most of the cases its costs do not appear for the user in a direct explicit way. In connection with this the author of the research paper finally suggests that in order to promote a payment system which makes the life of hidden economy more difficult it is important to make cash payments more expensive and burdensome for the players of hidden economy.

1.2 The role of MIF in payment card transactions

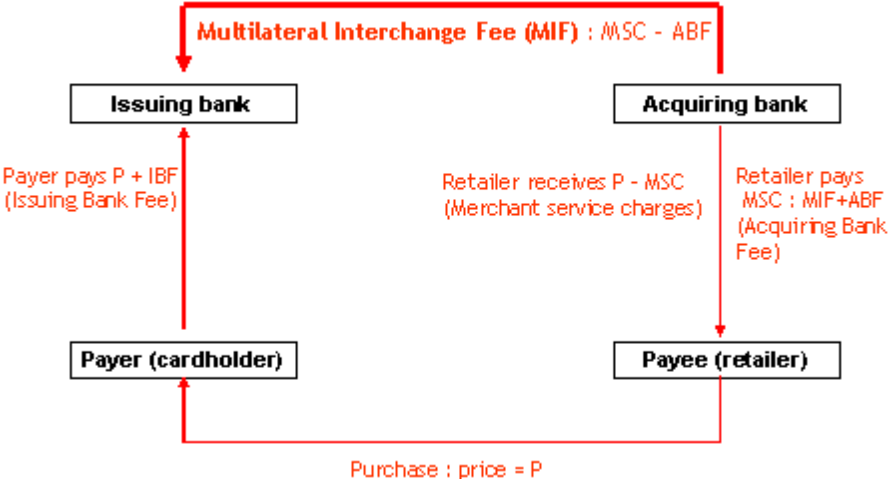


Figure 3 above illustrates the flow of MIF in a payment card system.³² There are different academic and industry views about the role of interchange fees, which were analyzed and summarized by the Commission in the frame of the Sector Inquiry on the retail banking sector (2005-2007).³³ One of the main views as to competition law concerns of interchange fees is that “privately optimal interchange fees may be too high” (...) “high

³² Report on the Retail Banking Sector Inquiry, Commission Staff Working Document, accompanying the Communication from the Commission - Sector Inquiry under Art 17 of Regulation 1/2003 on retail banking (“Final Report”) [COM(2007) 33 final] SEC(2007) 106, 31 January, 2007, European Commission, Directorate-General for Competition, pg. 109, available at http://ec.europa.eu/competition/sectors/financial_services/inquiries/retail.html.

interchange fees may have the effect of transferring profits to the side of the scheme where they are least likely to be competed away, resulting in a restriction on output.” Another view is that the effect of interchange fees is “neutral and provides efficient incentives for card issuers to expand output.”³⁴

As to the views regarding the economic function of interchange fees, the Commission also collected information from market players during the above mentioned Sector Inquiry and identified two main ideas. Firstly, it was argued that an interchange fee is a payment to the issuing bank in return for its services. Without interchange fees, issuers would have to recover their lost income from the cardholders, which would lead to a lower level of card issuance. Secondly, it was argued that the costs of the issuing and the acquiring side of the transaction are not equal, but can only be offered together; interchange fees, therefore, are a tool to balance that difference in costs.

Interchange fee can be considered a reimbursement for the usage of the system of the other bank too, when the issuing and acquiring banks are different. Regarding the issue of who pays this fee to whom, it is important to note that in the MC Decision the Commission referred to the structure of the Australian card payment industry where in some cases – as opposed to the Visa or MasterCard MIF – the interchange fee is paid by the issuing bank to the acquiring bank (see point 2.3.6. of this paper).

There are several different ideas regarding the role of MIF, authorities analyzed this question in their relevant decisions. The Visa I Decision did not cover explicitly the MIF so it does not provide information on this question.³⁵ In the Visa II Decision Visa argued that the role of MIF is “a transfer between undertakings that are cooperating in order to provide a joint service in a network characterized by externalities and joint demand.” [It is] „necessary as a financial adjustment to the imbalance between the costs associated with issuing and acquiring

³³ *Id.* at 114-115.

³⁴ *Id.* at 114.

and the revenues received from cardholders and merchants.”³⁶ This position though was not accepted by the Commission. The GVH examined the operation of the payment card system in the framework of analyzing the affected markets.

MasterCard first argued during the investigation by the Commission that MIF is a price or fee paid for services provided by issuers to acquirers and merchants. Later it defined the role of MIF as a tool which balances cardholder and merchant demand.³⁷ According to MasterCard’s view issuers and acquirers provide a joint service to cardholders and merchants and face joint demand. MIF is indispensable to the operation of the system. Additionally, it argued that issuers and acquirers do not take into account the effect of the prices they set on the other side: MIF corrects this problem.³⁸

In Bergman’s view (2005) if the competition is strong in a market, interchange fee cannot be a tool for creating market power because in the end banks make no profit of it. On the other hand, if competition is not strong enough banks may try to get extra profit of it or restrict competition (by making the entry to the market more difficult).³⁹

The Commission found in the MC Decision though that MasterCard would not collapse in the absence of MIF.⁴⁰ It concluded that an artificially created input cost such as MIF may reduce the number of banks on the acquiring side and leads to the entry of inefficient suppliers on the issuing side.⁴¹ It also referred to that statistics that show that payment card usage per capita is above European Community average, particularly in Member States where payment card schemes have been operating without MIF for a long

³⁵ Visa II Decision, (24 July 2002) COMP/D1/29.373, OJ L318, 22.11.2002. I. 1. (2)

³⁶ *Id.* at I. 3.2.2. (14) and pt. 7.4.1 (61)

³⁷ Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 668.

³⁸ *Id.* at ¶ 676.

³⁹ Mats A. Bergman, *A welfare ranking of two-sided market regimes*, (Sveriges Riksbank Working Paper Series, Paper No. 185) (1 Sept. 2005), available at http://www.riksbank.se/upload/Dokument_riksbank/Kat_publicerat/WorkingPapers/WP_185Revised.pdf.

⁴⁰ Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 692.

⁴¹ *Id.*

time.⁴² The GVH also shared the above mentioned view in its decision. It did not accept that the main role of interchange fee is to balance the interests of cardholders and merchants and it did not consider it important that MIF does not give revenues for the card company.

1.3 The relevance of economic analysis and the economic background of MIF

Economic analysis is relevant in the justification of the level or the existence of MIF, in the attempts to identifying the efficient level of MIF, in the justification of the “direction” of MIF and in understanding why global systems use MIF.

Economic analysis in general and those questions which demand theoretical or empirical economic analysis, like the effects of an agreement on the relevant market are beyond the scope of this paper, however, the relevant decisions of the Commission and the GVH depended so much on the outcome of the economic analysis and the evaluation thereof that it is inevitable to deal with those issues. Based on a remarkable paper by Evans and Schmalensee⁴³ it can be concluded that there is no univocal economic adjudication either in theory or in empiric research on interchange fees and their regulation. In spite of this fact, neither the Commission nor the GVH were hesitant to adjudge interchange fees and furthermore to incite legislative action. The burden of proof in the authorities’ investigations and the court procedures that followed under EU and Hungarian competition law is a key issue too, because MasterCard, Visa and also Hungarian banks argued that it is too burdensome for them to prove facts related to the whole bank card industry. In Philip Lowe’s (Director General, Competition, European Commission) opinion⁴⁴ competition law is and will be more economics-centered and effects-based than it has been.

⁴² *Id.* at ¶ 696.

⁴³ Schmalensee & Evans, *supra* note 4, at 2.

⁴⁴ Philip Lowe, Directorate-General for Competition, Speech to the 3d Lisbon Conference on Competition Law and Economics in Lisbon: Opening Remarks (14 Jan. 2010) (personal notes taken during speech on file with author).

The two most important questions here concern the existence and level of interchange fees. More concretely, whether it is possible and ‘socially optimal’ to operate global payment systems without MIF, and secondly, whether interchange fees set by market players are better or more just (in the US for the ‘society’, in the EU for ‘consumers’)⁴⁵ than interchange fees set by legislation/government; in other words, whether competitive prices are ‘socially optimal’. The central problem is that neither authorities nor market players can unambiguously demonstrate that the existence and level of interchange fees is justifiable. This is problematic because in both EU and Hungarian competition law the burden of proof regarding obtaining individual exemption is on the undertaking being investigated. MasterCard was unable to prove to the Commission that it is entitled to get exemption under Article 81 (3) and the same happened in the relevant procedure of the GVH regarding banks and card companies under investigation.

The Commission identified four different methods for setting interchange fees (it concluded this from the responses of payment card providers). First, payment card companies can set them, second, banks can bilaterally agree on interchange fees, third, banks can multilaterally agree on interchange fees, and finally, banks can “multilaterally agree on a fee paid by merchants to processors, who collect this fee and then transfer it to the appropriate issuing bank without the involvement of an acquiring bank” which is a system currently unique to Germany.⁴⁶

As to the existence of interchange fees there are two sources of revenues in payment card systems: cardholders/consumers and merchants (together customers).⁴⁷ These systems are two-sided markets (see point 1.1 of this paper), meaning that they operate only if there are

⁴⁵ Two leading theories form the layout of competition theory: in one hand, the Chicago School says that the aim of consumer protection is “total welfare” (governing view in the USA); on the other hand, in the policy of the EU Commission the aim of consumer protection is “consumer welfare” (governing view in the EU). This is expressed in the EC Treaty, too.

⁴⁶ Report on the retail banking sector inquiry, Commission Staff Working Document, accompanying the Communication from the Commission - Sector Inquiry under Art 17 of Regulation 1/2003 on retail banking (“Final Report”) [COM(2007) 33 final] SEC(2007) 106, 31 January, 2007, European Commission, Directorate-General for Competition. Pg 114-115. (source of quotation: pg. 114) available at http://ec.europa.eu/competition/sectors/financial_services/inquiries/retail.html.

cardholders who are willing to use their cards for transactions and there are merchants/retailers who are willing to accept payment cards. Banks and card companies must operate the payment card system in a way that both sides of the market will be motivated. The optimal (if there is such) price also depends on price sensitivities and externalities (not necessarily planned effects). According to Evans and Schmalensee, a “competitive (...) pricing structure for payment cards is (...) one in which merchants pay a relatively high transaction price and cardholders pay zero or possibly slightly negative transaction prices plus modest fixed fees, and in which the bulk of the profits (...) flows from the merchant side”.⁴⁸

Concerning the level of interchange fees it is important to note that competitive pricing is not necessarily socially optimal. There is a tendency among policy makers to believe that the level of interchange fee should be set or at least capped by legislation. The question of ‘socially optimal interchange fee’ is discovered by Evans and Schmalensee in a remarkable summarizing paper. According to their view “(...) there is a consensus among economists that, as a matter of theory, it is not possible to arrive, except by happenstance, at the socially optimal interchange fee through any regulatory system that considers only costs.”⁴⁹ Evans and Schmalensee are persuaded that (1) “(...) there is no reason to believe that bilateral negotiation would generally lead to lower average interchange fees or merchant discounts than multilateral action at the association level”⁵⁰ (2) “There is no empirical research that reliably addresses whether payment cards or any other payment mechanism is used too much or too little. Such research would need to consider the social costs and benefits of alternative payment systems and consider the effect of other market distortions”⁵¹; (3) “(...) the socially optimal interchange fee is not in general equal to any interchange fee based

⁴⁷ Nat’l Bancard Corp. v. Visa U.S.A., 779 F.2d 592 (11th Cir. 1986).

⁴⁸ Schmalensee & Evans, *supra* note 4, at 11.

⁴⁹ *Id.* at 5.

⁵⁰ *Id.* at 15-16.

⁵¹ *Id.* at 41.

on cost considerations alone”⁵²; and (4) “It is not clear that interchange fee regulation is the appropriate intervention for correcting distortions in payment systems.”⁵³

“There is no apparent basis in today’s economics – at a theoretical or empirical level – for concluding that it is generally possible to improve social welfare by a noticeable reduction in privately set interchange fees.”⁵⁴ This means that it is not certain that the reduction of interchange fees by authority measures or legislature would lead to more efficient pricing. This opinion is opposite to the position taken later by the Commission and GVH.

As to the direction of MIF (who pays it to whom) the Commission did not accept plain economic theory for proving that mutually agreed interchange fees are to be paid by the acquirer banks to the issuing banks. “Presumptions and conclusions of an acceptable proof must be based on market data” – as the Commission said.⁵⁵

⁵² *Id.* at 40.

⁵³ *Id.* at 41.

⁵⁴ *Id.* at 5.

⁵⁵ European Commission Decision COMP/34.579, *supra* note 2; Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 139.

CHAPTER 2: LEGAL BACKGROUND

2.1 EU Legislation

This portion of this paper presents only a very short summary regarding competition law provisions of the European Union from the point of view of the GVH Decision, the Visa I and II Decision and the MasterCard Decisions of the Commission. The basic prohibitory provision and the possibility of exemptions are regulated in Article 81 of the EC Treaty (now Article 101 of the Treaty on the Functioning of the European Union).⁵⁶ The full text of this Article can be found in Appendix I. It is important to note that the prohibition of Article 81 (1) has direct effect in the Member States⁵⁷. Though Article 81 and Article 82 may apply simultaneously⁵⁸, neither the Commission nor the GVH examined this in the Visa and MasterCard cases, therefore, Article 82 is beyond the scope of this paper.

As to the directly applicable legislation Council Regulation 1/2003⁵⁹ is mentioned by both the GVH and the Commission. The GVH refers to its provisions in the “General Legal Background” of the Decision.⁶⁰ Meanwhile, the Commission mentioned it in connection with remedies and fines.⁶¹ The Council Regulation has been amended twice at this time.⁶² In particular, Article 7 (1) thereof is relevant as to the remedies and Article 16 (2) is also

⁵⁶ All references to Article 81 of the Treaty Establishing the European Community should be understood as references to the current article 101 of the Treaty on the Functioning of the European Union (as renamed by the Treaty of Lisbon, which entered into force on 1 Dec. 2009).

⁵⁷ See, for example, the judgment in Case C-127/73 BRT v SABAM [1974] ECR-313 in which the Court of Justice said that “as the prohibitions of Articles 85 (1) and 86 tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard.”

⁵⁸ Case 85/76, Hoffmann-La Roche & Co. AG v. Commission, 1979 E.C.R. 461, [1979] 3 C.M.L.R. 211, 299 (1979).

⁵⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Official Journal L 1, 04.01.2003, p.1-25).

⁶⁰ GVH Decision pt. 159.

⁶¹ European Commission Decision COMP/34.579, *supra* note 2, at ¶¶ 756-776.

⁶² First, by Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries (Official Journal L 68, 06.03.2004, p. 1-2) and second, by Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services (Text with EEA relevance) (Official Journal L 269, 28.9.2006, p. 1-3).

relevant as to the connection between competition authorities of the Member States and the Commission:⁶³ “When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.” In the GVH Decision the authority found this provision applicable. As part of the procedural rules Commission Regulation 773/2004 (2004) is relevant, relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.⁶⁴

The Directive⁶⁵ and Regulation (EC) No 2560/2001⁶⁶ regarding cross border transactions do not form the basic legal background of the cases which are the focus of this paper, but because of the subject matter of the Visa II and MasterCard Decisions it is relevant that there is an intensifying legislation on cross-border transactions. The Directive deals with cross-border credit transfers. The Regulation has strengthened legislation on this field regarding cross-border transfers, cross-border electronic payment transactions and cross-border cheques. The aim of the legislation is to reduce the costs of cross-border transactions and facilitate them. There are several relevant consumer protection provisions of the Regulation such as prior notification of consumers.

There are also Guidelines and Notices⁶⁷ of the Commission regarding the application of Article 81 and 82 of the EC Treaty [now Article 101-102 of the Treaty on the Functioning

⁶³ Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 159.

⁶⁴ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Official Journal L 123, 27.04.2004, p. 18-24)

⁶⁵ European Parliament and Council Directive 97/5/EC of 27 January 1997 on cross-border credit transfers [Official Journal L 43 of 14.02.1997], *available at* http://europa.eu/legislation_summaries/consumers/protection_of_consumers/124023_en.htm.

⁶⁶ Regulation (EC) No 2560/2001 of the European Parliament and of the Council of 19 December 2001 on cross-border payments in euro, *available at* http://europa.eu/legislation_summaries/consumers/protection_of_consumers/133223_en.htm.

⁶⁷ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. (OJ C 210, 1.09.2006, p. 2-5); Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (OJ C 101, 27.04.2004, p. 65-77); Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (OJ C 101, 27.04.2004, p. 78-80); Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.04.2004, p. 81-96); Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.04.2004, p. 97-118).

of the European Union]. These are not mandatory, but they help the market players to foresee how the Commission applies EC competition law. Furthermore, the Guidelines for the assessment of horizontal cooperation agreements⁶⁸ are mentioned. Although it is not a legally binding document, it provides “an analytical framework for the most common types of horizontal cooperation.”⁶⁹ Visa referred to paragraph 24 of this Guideline in the Visa II proceedings arguing that “horizontal cooperation ‘between competing companies that cannot carry out the project or activity covered by the cooperation’ will not fall within Article 81(1) ‘because of its very nature’”.⁷⁰ Visa argued that its MIF is covered by this paragraph, however, the Commission disagreed.⁷¹ It referred to Citigroup and its system, Diner’s Club when questioning that none of Visa’s members can “carry out the project or activity covered by the cooperation”.⁷² This argument was not used on behalf of the parties in the GVH proceeding.

This section aimed only to highlight the most relevant elements of the EU legislation. Block exemptions and others like agreements of minor importance which are not prohibited are beyond the scope of this paper. Furthermore, reference to the relevant case law⁷³ regarding interchange fees is made in point 2.3 of this paper.

2.2 Hungarian legislation

EC and national competition laws are characterized by parallel application and overlapping provisions. This gives a special characteristic to comparative analysis. Hungary

⁶⁸ Commission Notice - Guidelines on the applicability of Article 81 to horizontal co-operation agreements, Official Journal C 3 of 06.01.2001, p. 2 Available at: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001Y0106\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001Y0106(01):EN:NOT).

⁶⁹ *Id.* at ¶ 1.1. 7.

⁷⁰ Visa II Decision, (24 July 2002) COMP/D1/29.373, OJ L318, 22.11.2002. pt. 7.3.1 (56)

⁷¹ *Id.* at ¶ 7.3.1 (58)

⁷² *Id.* at ¶ 7.3.1 (58)

⁷³ VALENTIN CORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE, (9th ed., 2009).

entered in the European Union on 1 May 2004. As of that date the relevant, directly applicable provisions of EC competition law became effective and applicable in Hungary. Furthermore, EC competition law directly influenced Hungarian competition law (competition law enacted by the Hungarian legislator, the Parliament or the Government).⁷⁴ Because of space limitations in this paper only those provisions which are directly relevant from the point of view of the GVH Decision will be summarized in this section.

On 25 June 1996, the Hungarian Parliament passed the Hungarian Competition Act (HCA).⁷⁵ Since then it has been amended several times. Article 11 of the HCA contains the provisions regarding the “prohibition of agreements restricting economic competition”. The entire text of Article 11 can be found in Appendix II. There are no significant differences between Article 81 of the EC Treaty (now Article 101 on the Functioning of the European Union) and Article 11 of the HCA. The elements of the general prohibition are also the same.

Article 17 includes the possibility for, and conditions of individual exemption to Article 11 of the HCA. Basically there is no significant difference between the regulation of individual exemptions under Article 81 of the EC Treaty (now Article 101 of the Treaty on the Functioning of the European Union) and Article 11 of the HCA. Under Hungarian law the statutory conditions are worded as follows: “The prohibition defined in Article 11 shall not apply to an agreement if: a) it contains facilities to improve the efficiency of production or distribution, or to promote technical or economic development, or the improvement of means of environmental protection or competitiveness; b) a fair part of the benefits arising from the agreement is conveyed to the consumer or the business partner; c) the concomitant restriction or exclusion of economic competition does not exceed the extent required for attaining the

⁷⁴ For example Article 98 of the HCA says the “The following provisions of this Act contain regulations for the implementation of the Community legislation indicated below: *a)* Sub-article (2) of Article 1, Sub-article (3) of Article 33, Paragraph *e)* of Sub-article (1) of Article 36, Sub-article (1) of Article 91/A, Article 91/B-91/D, Sub-article (1)-(4) of Article 91/E, and Article 91/F-91/H for Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty; (...)”

economically justified common goals; d) it does not contain facilities for the exclusion of competition in connection with a considerable part of the goods concerned.”⁷⁶ Similar to EC competition law, under Hungarian law “the burden of proof to evidence that an agreement is exempted from the prohibition on the basis of Article 16 or Article 17 shall lie with the party who relies on the exemption.”⁷⁷ The GVH rejected the claim of the undertakings regarding the individual exception. Instead of “original reasoning” it summarized the reasons of the similarly rejecting decision of the Commission.⁷⁸

A reference is made to the legal possibility of block exemptions under the HCA, but as it was not applicable to the GVH Decision, the authority did not address this issue in its Decision. According to Article 16 of the Hungarian Competition Act “Certain categories of agreements may be exempted from the prohibition of Article 11 by Government regulations. The Government may adopt regulations about the group exemption of agreements taking into account the provisions of Article 17 of this Act.” According to Article 96 of the HCA “The Government shall be empowered to lay down in regulations the rules of the exemption of certain groups of agreements from the prohibition declared by Article 11 of this Act.”

As to the enforcement of competition law in Hungary the GVH and the two-level supervisory court system (Budapest Metropolitan Court and Regional Court of Appeal, Budapest) has to be mentioned. Detailed provisions regarding the authority and specialties regarding court proceedings are laid down in the Hungarian Competition Act.

⁷⁵ Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, available in English at: http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=129&m5_doc=4323&m176_act=22.

⁷⁶ Article 17 of the HCA, Established by Article 2 of Act LXVIII of 2005, effective as of 14 July 2005. Point b) has been established: by sub-article (8) Article 29 of Act XLVII of 2008, effective as of 1 Sept. 2008.

⁷⁷ Article 20 of the HCA. Established by Article 3 of Act LXVIII of 2005, effective as of 14 July 2005.

⁷⁸ Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶¶ 138-142.

2.3 Competition issues raised earlier regarding interchange fees

2.3.1 Earliest Commission decisions (1980's)

The earliest related decisions of the Commission were made in the 1980's.⁷⁹ Summarizing these cases goes beyond the scope of this paper, but in the Dutch Banks Case⁸⁰ the Dutch Bankers Association withdrew or amended several provisions in its regulations, decisions and circulars and, in another case, Eurocheque: Helsinki Agreement⁸¹ “French banks agreed to charge French traders a commission on purchases paid for by Eurocheques drawn on a foreign bank. In addition the agreement limited the freedom of the banks to set the rate of the commission which could not be higher than that applicable to payments made by other means, such as credit cards.”⁸²

“The Commission’s case law (...) in these early cases indicates that inter-bank agreements that affect trade between Member States and that determine the commissions to be charged to customers do run counter to Article 81 (1) and are not eligible for an exemption pursuant to Article 81 (3).”⁸³ – This indicates that the view of the Commission was similar from the beginning, but as we will see in the latter cases, the consideration of MIF became ‘harsher’ in the course of time.

2.3.2 Commission Notice (1995)

In 1995 the Commission announced a Notice on the application of the EC competition rules to cross-border credit transfers.⁸⁴ In this document the Commission shortly summarized the relevant cases and experiences by that time. Regarding cross-border bilateral interchange

⁷⁹ Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 122.

⁸⁰ Dutch Banks I, OJ 1989 L253/I reference in Competition Law of the European Community, Ivo Van Bael, Van Bael & Bellis, 4th edition, Kluwer Law International, 2005 pg. 1418

⁸¹ Eurocheque: Helsinki Agreement, OJ No L 95 of 9.4.1992.

⁸² Competition Law of the European Community, Ivo Van Bael, Van Bael & Bellis 4th edition, Kluwer Law International, 2005 pg. 1419

⁸³ Competition Law of the European Community, Ivo Van Bael, Van Bael & Bellis 4th edition, Kluwer Law International, 2005 pg. 1418.

fees it said that these normally fall outside Article 81 (1) [then Article 85 (1), now Article 101 (1)] contrarily to multilateral interchange fee agreements which are in principle a restriction of competition, because “it narrows the freedom of banks to decide independently their own prices and it may effect the pricing of banks towards costumers or lead to that banks pass on the effect of the interchange fee in the prices paid by costumers”.⁸⁵

The Commission explained that its main policy objective on this field is that cross-border payment systems should be as transparent, stable and should perform as well as the best domestic systems. “The costs incurred by the setting up of a cross-border credit transfer system and those arising out of the operation of a central body (...) might be justifiable to pay for those costs by means of a collectively agreed interchange fee (...)”⁸⁶ “Banks must not make agreements fixing the type or level of pricing *vis-à-vis* customers.”⁸⁷ According to the Commission, a sufficiently strong inter-system competition “may restrain the effects of multilateral interchange fee on the prices paid by costumers which might mean that its restrictive effect is not appreciable provided that the competing systems do not themselves also contain similar multilateral interchange fees”.⁸⁸ The Commission said that exemption under Article 81 (3) [former Article 85 (3), now Article 101 (3)] is possible in theory if necessity of MIF is proved. The Commission also gave guidance regarding those factors the Commission examines when deciding about the exemption.⁸⁹

From the point of view of this paper it is furthermore important to note that “In certain circumstances, (...) multilateral interchange fee applying to cross-border credit transfers my be indispensable in order to avoid the practice of double charging (...) thus enabling banks to offer OUR [‘all charges to originator’] transfers”. According to the Commission Notice, in

⁸⁴ Commission Notice on the application of the EC competition rules to cross-border credit transfers. SEC (95) 1403 final, 13 September 1995, OJ 1995 C251/3.

⁸⁵ *Id.* at ¶ 40.

⁸⁶ *Id.* at ¶ 35.

⁸⁷ *Id.* at ¶ 39.

⁸⁸ *Id.* at ¶ 41.

⁸⁹ *Id.* at ¶ 43.

order to get exempted under Article 81 (3) of the Treaty [former Article 85 (3), now Article 101 (3)] the level of multilateral interchange fee should be set at the level of the average actual additional costs of participating banks acting as merchant's bank, and the fee should be a default fee (which is applicable only if the members of the system do not negotiate bilateral fees).⁹⁰

2.3.3 Visa I Decision (2001)

In 1977 Ibanco Ltd (now Visa International) applied for negative clearance or, in the alternative, an exemption under Article 81 (3) of the Treaty [former Article 85 (3), now Article 101 (3)] in relation to some of its internal rules governing the relationship between Visa and its member banks.⁹¹ The Commission reopened the proceeding in 1992. In 1999 it sent a statement of objections to the undertaking and made its Decision in 2001. Merchants and retailers, along with some other third parties made observations during the proceedings and argued that the abolition of multilateral interchange fees would restore competition in payment card markets.⁹²

As to the relevant market Visa argued that it includes all consumer payment instruments (cards, cheques, cash) on the global market for all consumer payment systems. The Commission found that there are two types of competitions – one among card companies and one among banks – and both are affected by the rules of the Visa scheme.⁹³ Furthermore the Commission said that there are various relevant markets. It did not accept “Visa’s view that the relevant market comprises all consumer means of payment”⁹⁴ but concluded that “since the effect of the no-discrimination rule is found not to be appreciable (...), there is no need to define each of these very numerous markets in any further detail.”⁹⁵ In the view of the

⁹⁰ *Id.* at ¶¶ 48, 56.

⁹¹ Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. I 1 (1)

⁹² Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. 6 (28)

⁹³ Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. 7.1.2.1 (34)-(35)

⁹⁴ Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. 7.1.2.1 (37)

⁹⁵ Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. 7.1.2.1 (43)

Commission the relevant geographical market was still national, but it saw a chance for that it was at least potentially a Community-wide geographical market.⁹⁶

In the end, the Commission adopted the decision⁹⁷ that Article 81 (1) was not infringed on by the relevant network rules of the Visa scheme because some of these rules were not restrictive and meanwhile others did not have appreciable effect on competition. The Visa I Decision “explicitly did not cover the interchange fee issue.”⁹⁸

It is relevant⁹⁹ furthermore, that in 2001 Visa decided to modify its MIF scheme and reducing the level of MIF. It carried out a MIF cost study including the related costs of issuing banks and adjusted the level of MIF to the level of these costs (as a cap) or lower. Furthermore, in order to promote transparency, member banks of Visa inform their merchants that at their request they can receive information regarding the cost-content of MIF and the level of Visa EU intra-regional MIF.¹⁰⁰

2.3.4 Visa II Decision (2002)

The Visa II Decision¹⁰¹ was the first decision in which the Commission explicitly covered the interchange issue. It examined Visa’s intra-regional MIF and granted an exemption in the European Union from Article 81 (1) of the Treaty [now Article 101 (1)] for a time period of five years subject to certain conditions. The most important condition of the exemption was that “the MIF be linked to, and capped at, certain costs.”¹⁰² The Commission, considered the MIF an agreement between competitors, “which restricts the freedom of banks individually to decide their own pricing policies, and distorts the conditions of competition on the Visa issuing and acquiring markets. (...) In particular, the agreement on a collective MIF

⁹⁶ Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. 7.1.2.2 (45) and (46).

⁹⁷ Commission Decision VISA I (7 August 2001) OJ L 293/24 of 10 November 2001.

⁹⁸ Visa II Decision, (24 July 2002) COMP/D1/29.373, OJ L318, 22.11.2002. pt. I. 1. (2).

⁹⁹ It is represented in the Visa II Decision, (24 July 2002) COMP/D1/29.373, OJ L318, 22.11.2002. in detail, see pt. 3.2.3. (16)-(26).

¹⁰⁰ Visa II Decision, (24 July 2002) COMP/D1/29.373, OJ L318, 22.11.2002. pt. 3.2.3.3. (25)

¹⁰¹ Commission Decision VISA II (24 July 2002) OJ L 318/17 of 22 November 2002, Case No. COMP/29.373.

¹⁰² European Commission Decision COMP/34.579, *supra* note 2, at ¶ 33.

between the banks involved is likely to have an effect on price competition at the acquiring and issuing level since the MIF agreement will fix a significant part of the parties' final costs and revenues.”¹⁰³ – The exemption expired on 31 December 2007, after the MC Decision was made.

As to the relevant market in this instance, the Commission took a similar view to that taken in the Visa I Decision (see point 2.3.3. second paragraph) and left open the question of relevant geographic market. In relation to the question of “whether all types of card [i.e. debit, deferred debit or credit] must be included on the relevant market”¹⁰⁴ the Commission added, however, that yes, the relevant market comprises all types of payments cards.¹⁰⁵ In terms of the restriction of competition, Visa argued that its MIF is a transfer of costs between undertakings “which are cooperating in order to provide a joint service in a network characterised by externalities and joint demand”.¹⁰⁶ This position was not accepted by the Commission and a restriction of competition was found; MIF “is likely to constitute a de facto floor for the fees charged to the merchants they acquire, since otherwise the acquiring bank would make a loss on its acquiring activity”¹⁰⁷

It is important to remark that later, in 2008, the Commission initiated formal proceedings against Visa Europe Limited¹⁰⁸ again. It explained that the exemption granted in 2002 had expired. “(...) In the proceedings leading to the Commission decision of 2002, Visa offered to progressively reduce the level of its MIF from an average of 1.1% to 0.7% until the end of 2007 and to maximize the MIF at the level of costs for specific services. Visa also enhanced the transparency of fees and allowed banks to reveal information about the MIF to businesses. (...) As Visa Europe Limited” [took] “responsibility from Visa International for

¹⁰³ Visa II Decision, (24 July 2002) COMP/D1/29.373, OJ L318, 22.11.2002. pt. (66)

¹⁰⁴ Visa II Decision, (24 July 2002) COMP/D1/29.373, OJ L318, 22.11.2002. pt. 7.1.3.1 (51)

¹⁰⁵ Ibid. pt. 7.1.3.1 (52)

¹⁰⁶ Ibid. pt. 7.4.1 (61)

¹⁰⁷ Ibid. pt. 7.4.3 (68)

¹⁰⁸ Case Nr. COMP/39.398.

the network rules applicable in the EEA,” (...) [it is] “responsible for ensuring that its system is in full compliance with EU competition rules.”¹⁰⁹ In these proceedings the Commission examined the cross-border, default MIF and its relation to the Visa network rules such as the “Honour-All-Cards-Rule.”

2.3.5 MasterCard Decision (2007)

The Commission decided that as of 22 May 1992 until 19 December 2007 MasterCard infringed Article 81 (1) of the Treaty [now Article 101 (1)] “by in effect setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the EEA by means of the Intra-EEA fallback interchange fees (...)”¹¹⁰ The Commission did not impose fines in this decision, but it did order MasterCard to bring an end to the infringement within 6 months. MasterCard appealed the decision but this did not suspend the execution thereof (the court proceedings are still going on). MasterCard had to modify the association’s network rules and repeal all decisions made by MasterCard’s European Board and/or by MasterCard’s Global Board on Intra-EEA fallback interchange fees, on SEPA fallback interchange fees, and on Intra-Eurozone fallback interchange fees.¹¹¹ This decision is explored in comparison with the GVH Decision in details in Chapter 3 of this paper.

MasterCard appealed¹¹² the MC Decision on 3 March 2008. The procedure of the European Court of First Instance is still under way. The court proceeding though has not suspended the implementation of the MC Decision, therefore parallelly MasterCard is in constant cooperation with the Commission. MC believes that the Commission failed to recognize that their system cannot operate without default MIF and that the Commission also failed to recognize the positive effects of the system and that the level of MIF is fair and

¹⁰⁹ Press Release MEMO/08/170 (26 March 2008) available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/170&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹¹⁰ European Commission Decision COMP/34.579, *supra* note 2, at ¶ 209.

¹¹¹ European Commission Decision COMP/34.579, *supra* note 2, at 209-210.

acceptable. MasterCard further claims that after the IPO it has not been any more an association of undertakings contrarily to what was found in the Decision by the Commission.

Some remarks on SEPA and the MC Decision

In the MC Decision the Commission mentions the Single Euro Payments Area (SEPA) project as part of the background for the case because SEPA covers payment cards as well. The SEPA Cards Framework (SCF) consists of principles the aim of which is to enable customers to use their payment cards throughout the SEPA easily and in the same way as they do in their home country. However the European Payments Council (EPC) decided “not to create a new pan-European scheme for payment cards, mostly because international schemes already exist and operate in Europe.”¹¹³ – This topic is beyond the scope of this paper but it is mentioned because of its importance. Some of those who commented on the MC Decision, namely, referred to its influence on SEPA. Javier Perez (President of MasterCard Europe) said for example, that „Forcing drastic reductions in interchange fees across Europe could delay implementation of SEPA, as well as reduce incentives for payment institutions to expand into new domestic European payments markets.”¹¹⁴ – The reason for that is that in the payment card industry there are two sources of revenue: merchants and cardholders. In case of reduction in revenues “issuers’ revenues would force cutbacks on the necessary investments in new services and technology.”¹¹⁵

Neelie Kroes (European Commissioner for Competition Policy) answered this critique on the other hand, that the MC Decision supports the SEPA because „it obliges MasterCard to refrain from implementing its new ”SEPA interchange fees” for the Euro-zone.

¹¹² Source: http://www.mastercard.com/us/company/en/newsroom/pr_EC_Decision_Press_Release_Statement_191207.html

¹¹³ European Commission Decision COMP/34.579, *supra* note 2, at ¶¶ 38-39.

¹¹⁴ Source: http://www.mastercard.com/us/company/en/newsroom/pr_EC_Decision_Press_Release_Statement_191207.html.

¹¹⁵ Source: <http://investorrelations.mastercardintl.com/phoenix.zhtml?c=148835&p=irol-newsArticle&ID=1088688&highlight>

This ban will ensure that SEPA does not lead to permanent price increases linked to payment cards.”¹¹⁶ – Could these opinions be more far away from each other?

2.3.6 The question of legislative regulation, an attempt to regulate MIF in Hungary

The question of legislative regulation

Regulation of interchange fee is a much debated issue not only in Europe but in the US too.¹¹⁷ Furthermore, Australia is referred to most frequently for examples of regulation of MIF outside of Europe. In the US there is an “indirect regulation” evolved by court decisions. Bergman (2005) identifies three possibilities as to the regulation of interchange fees.¹¹⁸ Legislature can prohibit it, maximize it or set its level (by estimation). The Commission decided that interchange fees must be based on the relevant costs. In the US the indirect “regulation” is somewhat the same but the question of state/federal regulation of MIF raised the attention of policy makers too¹¹⁹). In Australia, Katz¹²⁰ offered a proposal for future rate setting. The Hungarian legislature opted for setting maximums; there has been a hurried, recent amendment of legal regulations. At first, it was an attempt (which has never entered into force) to maximize the measure of interbank fees, but then it has turned out to be a maximization of merchants’ fees thanks to a second amendment which will be effective as of 1 May 2010 (see later in this point of the paper).

¹¹⁶ SPEECH/08/9, European Retail Round Table Conference in Brussels on 14 January 2008, *available at* www.europa.eu.int.

¹¹⁷ Interchange Fees and Payment Card Networks: Economics, Industry Developments, and Policy Issues, (Robin A. Prager, Mark D. Manuszak, Elizabeth K. Kiser, and Ron Borzekowski) 2009-23, Finance and Economics Discussion Series, Divisions of Research & Statistics and Monetary Affairs, Federal Reserve Board, Washington, D.C., May 13, 2009, *available at*: www.federalreserve.gov/PUBS/FEDS/2009/200923/200923pap.pdf.

¹¹⁸ Mats A. Bergman, *A welfare ranking of two-sided market regimes*, 26-27 (Sveriges Riksbank Working Paper Series, Paper No. 185) (1 Sept. 2005), *available at* http://www.riksbank.se/upload/Dokument_riksbank/Kat_publicerat/WorkingPapers/WP_185Revised.pdf.

¹¹⁹ The Economic Effects of Interchange Fees, Alan S. Frankel, Allan L. Shampine, *Antitrust Law Journal*, American Bar Association, Vol 73, 2006, *available at* c0462491.cdn.cloudfiles.rackspacecloud.com/Frankel.pdf.

¹²⁰ Pg. 1-2 and 33. Reform of Credit Card schemes in Australia II commissioned report by Professor Michael L. Katz (August 2001) Reserve Bank of Australia 2001

In Central Europe, besides Hungary, there is another jurisdiction where the state has decided to intervene in the level of interchange fees. The Polish Office of Consumer and Competition Protection fined several banks (but not the card companies) in December 2006, because of the level and common setting of MIF. Banks argued that the standardization of interchange fees is inevitable for the functioning of the systems. The decision of the authority has been appealed¹²¹ and the court of first instance ruled that the banks did not form an illegal agreement to fix the levels of interchange fees. No information was found as to the final court decision in this case but it is known that the authority appealed against the decision of the court first instance.

EuroCommerce argued in the Visa II procedure that there is a debit card scheme in Australia (the EFTPOS) in which there is no MIF but there are bilaterally-agreed fees and that those are paid – as opposed to the Visa MIF – by the issuing bank to the acquiring bank. Later the Australian system was referred to several times in Europe. Commenting on the MC Decision, Javier Perez, President of MasterCard Europe, referred to the legislative actions in Australia too. He said that it is the only jurisdiction (besides Europe) which regulates interchange fees. He said that “regulators forced down interchange fees, resulting in higher cardholder charges, reduced card features and benefits, less competition, and diminished investment and innovation.” (...) “Australian payment card business has seen slower growth since regulation was introduced.”¹²²

In Neelie Kroes’ view (European Commissioner for Competition Policy), on the other hand, “one of the arguments made by banks in Australia was the reduction of interchange fees would not deliver strong benefits for cardholders, since merchants would simply increase their

¹²¹ [www.ksplegal.pl/userfiles/Poland%20loses%20interchange%20appeal\(1\).pdf](http://www.ksplegal.pl/userfiles/Poland%20loses%20interchange%20appeal(1).pdf).

¹²² http://www.mastercard.com/us/company/en/newsroom/pr_EC_Decision_Press_Release_Statement_191207.html.

profit margins. The Reserve Bank's assessment was that such behavior was very unlikely – because of the fierce competition between retailers.”¹²³

Evans and Schmalensee analyze the Australian experience too and find that although there is a possibility of surcharging in Australia, only a small percentage of merchants charge their consumers.¹²⁴ In their view there are two main reasons for this. Firstly, imposing different prices depending on the different types of payment methods would generate extra (e.g. administrative) costs for the merchants, and secondly, this would lead to a competitive disadvantage for those merchants which do charge their consumers.¹²⁵ Evans and Schmalensee also mention that as a result of legislative reduction of interchange fees issuing banks “(...) recovered between a third and half of the fall in interchange revenue through increased fees to consumers.”¹²⁶ In the end, issuing banks lost some part of their revenues and consumers ended up with having to pay more for their cards than before, but transaction prices did not increase. According to Evans and Schmalensee this is because “there is only a loose connection between interchange fees and transaction prices to cardholders.”¹²⁷ It can be concluded that the findings of Evans, Schmalensee confirm the above mentioned view of Javier Perez.

Julian Wright (National University of Singapore) believes that the Australian experience of regulating MIF illustrates the “fallacies that can arise from using conventional wisdom from one-sided markets in two-sided market settings”.¹²⁸ For example it is a fallacy that “efficient price structure should be set to reflect relative costs,”¹²⁹ and it is also a fallacy that “where one side of a two-sided market receives services below marginal cost, it must be

¹²³ Speech held at the European Retail Round Table Conference in Brussels, on 14 January 2008. Source: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/9&format=HTML&aged=0&language=EN&guiLanguage=en>

¹²⁴ Schmalensee & Evans, *supra* note 4, at 27.

¹²⁵ *Id.*

¹²⁶ *Id.* at 35.

¹²⁷ *Id.* at 36.

¹²⁸ Wright, Julian, *One-Sided Logic in Two-Sided Markets* (September 2003). AEI-Brookings Joint Center Working Paper No. 03-10 (abstract) available at SSRN: <http://ssrn.com/abstract=459362>.

receiving a cross-subsidy from users on the other side.”¹³⁰ He also refers to the paper by Rochet and Tirole¹³¹ ”who argue against the current policy intervention in payment schemes, point out the perverse implications of cost-based regulation of individual prices in a range of other two-sided markets.”¹³² Christian von Weizsäcker (2002) also criticizes¹³³ government regulation. He believes that even imperfect competition is better than intervention and price regulation.

Based on the above mentioned papers, it can be concluded that the view taken by authorities – that regulation or bilaterally agreed fees would lead to more efficient pricing – and the results of at least one part of the economic theory are in contrast to each other.

An attempt to regulate MIF in Hungary

The GVH Decision was made on 24 September 2009. Shortly afterwards, on 14 December 2009 the Parliament passed an amendment¹³⁴ which was to enter in force as of 1 March 2010. It was an attempt to regulate the measure (percentage rate) of both merchants fees and interchange fees by imposing maximum caps; according to its provisions – which have never entered in force – interbank fees paid by acquiring banks for issuing banks shall not exceed 0,3% (in case of non-credit cards), 0,75% (in case of credit cards), 0,3% (in case of using the card for payment of taxes, duties or other fees for public utilities like heating, water etc.) and 0,8% (in other cases different from the first three cases). The Motivation of the amending act explained that “the number of retail card payment transactions in Hungary is far less than in other EU Member States presumably, partly because of the permanent restriction

¹²⁹ *Id.* at 4.

¹³⁰ *Id.* at 7.

¹³¹ Rochet, Jean-Charles and Jean Tirole (2003) “An Economic Analysis of the Determination of Interchange Fees in Payment Card Systems,” *Review of Network Economics* 2 (2), 69-79. Available at: <http://ideas.repec.org/a/rne/rneart/v2y2003i2p69-79.html>.

¹³² Wright, *supra* note 128, at 2 (abstract).

¹³³ von Weizsäcker, *supra* note 13, at 2-18.

¹³⁴ Article 165 of Act CL of 2009 on the amendment of Article 34 (3)-(5) of Act LXXXV of 2009 on the Pursuit of the Business of Payment Services.

of competition. In order to increase the number of retailers who accept payment cards and decrease merchants' costs which comparing to other countries are relatively high in Hungary."¹³⁵ Both Visa and MasterCard announced in January 2010 that they plan to turn to the Constitutional Court of Hungary and challenge the constitutionality of the amendment.¹³⁶

The above mentioned act however did not enter in force on 1 March 2010, because the Parliament passed another act¹³⁷ on 15 February 2010 which repealed it and amends the operative provisions as from 1 May 2010. This later amendment was passed because the previous one had been heavily criticized by market players and professionals, plus, according to the motivation of the 15 February 2010 amendment the 14 December 2009 amendment was "not entirely in accordance with *international legal obligations* and went beyond the jurisdiction of Hungary". [Here is the original Hungarian text of the motivation: "A módosító javaslat a bankkártyás fizetésre vonatkozó szabályok vonatkozásában *a nemzetközi jogi kötelezettségekkel való koherencia* megteremtése érdekében a magyar joghatóság alá nem tartozó kérdések szabályozását elhagyni javasolja."]¹³⁸ This is quite an unclear and false reasoning.

On behalf of market players it has been stressed that the 14 December 2009 amendment does not serve the interests of consumers. Instead of interchange fee the 15 February 2010 amendment (effective from 1 May 2010) focuses on the regulation of merchant service charges which hopefully will have direct effect on the costs of merchants regarding payment card transactions. According to the new provision merchant service charges cannot exceed 2 % of the value of the payment card transaction. This rate again has been being criticized by banks and card companies and some of them plan to apply for constitutional

¹³⁵ Motivation of Article 165 of Act CL of 2009 which provision has never entered in force.

¹³⁶ Sources: <http://www.bbj.hu/?keyword=visa> and <http://www.fxstreet.com/news/forex-news/article.aspx?storyid=33d19f98-5fcb-486b-a77b-988eafb9908b>

¹³⁷ Article 51 (6)-(7) of Act XII of 2010 amended Article 35 (3) of Act LXXXV of 2009 on the Pursuit of the Business of Payment Services

¹³⁸ Motivation of Article 51 (6)-(7) of Act XII of 2010, available in Hungarian language at: http://www.parlament.hu/internet/plsql/ogy_irom.irom_madat?p_ckl=38&p_izon=11000&p_alsz=15

control of the Hungarian Constitutional Court based on that there was no constitutional basis for price regulation.

Professor C. Christian von Weizsäcker (2002) believes¹³⁹ that we must be “cautious as regards government intervention whenever there arises a presumed market imperfection. For a given market imperfection, the net social benefit of a regulated industry might be lower than the net social benefit of an unregulated industry it despite its imperfections. A review of the credit card industry should not stop with the analysis of the market imperfections but should continue with an analysis of the potential market outcome of regulation.” – In Hungary the above mentioned statutes were prepared in an extremely short period of time and without cautious measure of potential effects. This can lead to erroneous solutions especially taking into consideration the relatively rapidly changing adjudication of interchange fee.

¹³⁹ von Weizsäcker, *supra* note 13, at 17-18.

CHAPTER 3: COMPARATIVE LEGAL ANALYSIS OF THE GVH DECISION

This paper compares the GVH Decision specifically with the MC Decision¹⁴⁰ for several reasons. Firstly, because the latter is the most detailed analysis regarding the issue of MIF (the Decision is 241 pages long). Furthermore, it is the antecedent decision to the GVH Decision. It includes the most detailed and latest position of the Commission on interchange fees. Additionally, EU competition law and Hungarian competition law are inseparable and lastly, the GVH refers to the MC Decision in its own decision several times as point of reference as to the legal analysis.

3.1 Differences between antitrust legal and economic analysis

Legal and economic analyses differ in many ways. Economic analysis is beyond the scope of this paper, but as it is inseparable from the antitrust legal analysis in practice, it is worth paying attention to the differences between them.

“Antitrust analysis is both simpler and more complex [than economic analysis]. It is simpler in that it rests on a unitary assumption that competition among market participants will maximize consumer welfare.” [On the other hand], “legal analysis is more complex, however, because it operates not on a bounded set of assumptions but on the facts cognizable through a legal process.”¹⁴¹ This means that the outcome of the legal analysis also depends on the burden of proof, because, if the company under investigation is unable to prove the facts for which it bears the burden of proof [for example the presence of the conditions of exemption under Article 81 (3) of the Treaty] the authority will not further examine the question, but will record it as unproven.

¹⁴⁰ The entire, published text of the decision is available at: <http://ec.europa.eu/competition/antitrust/cases/decisions/34579/en.pdf> and a summary of the decision is available at: http://www.gvh.hu/gvh/alpha?vb&m5_doc=6071&pg=72&m5_lang=en

¹⁴¹ Semeraro, Steven, Credit Card Interchange Fees: Three Decades of Antitrust Uncertainty. *George Mason Law Review*, Vol. 14, 2007; TJSL Legal Studies Research Paper No. 970375. Pg. 53. Available at SSRN: http://ssrn.com/abstract_id=970375.

In contrast, economic analysis in competition law matters is based on several assumptions (e.g. perfect competition, balance of supply and demand). Economic analysis in antitrust matters focuses on the market effects of the investigated actions of market players. Its relevance has already been mentioned in point 1.3 of this paper.

3.2 Comparative legal analysis of the GVH Decision

A comparative table of the Visa I, Visa II, MC and GVH Decisions can be found in Appendix III of this paper which shows those conditions under which there is an infringement of Article 81 (1) of the Treaty. This part of the paper though focuses on the comparison of the later two cases.

3.2.1 Procedural history

As it is delineated in sections 15-39 of the MC Decision, the “antecedent” proceedings of the GVH Case started at the Commission when it received a complaint on behalf of the British Retail Consortium (a trade association representing retailers in the United Kingdom) in 1992. “(...) BRC alleged that Europay [now MasterCard Europe] and Visa both restricted competition due to their arrangements on cross-border interchange fees.”¹⁴² In 1999 the British Retail Consortium withdrew its complaint by reason of a similar complaint of EuroCommerce (a retail, wholesale and international trade representation in the European Union) lodged in 1997. EuroCommerce alleged that among other payment card systems Europay and Visa restricted competition among other practices by multilaterally agreed interchange fees, “price discrimination between merchants in levels of commissions charged by acquiring banks and anti-competitive concentrations in the field of card acquiring.”¹⁴³

¹⁴² European Commission Decision COMP/34.579, *supra* note 2, at ¶ 15.

¹⁴³ *Id.*

In 2002 “the Commission opened an *ex-officio* investigation regarding Visa’s and MasterCard’s respective Intra-EEA fallback interchange fees for commercial cards.”¹⁴⁴ The Commission carried on parallel proceedings and made two relevant decisions Visa I¹⁴⁵ and Visa II¹⁴⁶. (See details in points 2.3.3 and 2.3.4 of this paper) Later the Commission opened a Sector Inquiry (“SI”) in the area of retail banking in 2005, which also included the payment card industry. The Commission mentioned in the MC Decision that it kept the case and the material gathered during the SI completely separate.¹⁴⁷ The reason for this was not further explained in the decision; as the subject matter of the sector inquiry covered interchange fees as well as the retail payment card industry as a whole, it is important to note the most important findings of the Final Report.¹⁴⁸ Though there are huge differences among Member States in many respects, the retail banking sector in Europe, in general, it can be characterised by high levels of concentration and profitability. The Commission concluded that “interchange fees are not intrinsic to the operation of card payment systems.”¹⁴⁹ It recommended decreasing the level of interchange fees. It also said that bilaterally agreed interchange fees can also raise competition law concerns.¹⁵⁰

The GVH opened an *ex-officio* investigation regarding Visa’s, MasterCard’s and 23 banks’ respective practices on 31 January 2008. According to the required time-limits in Hungarian competition law,¹⁵¹ the proceeding should have been terminated no later than 24 July 2009, but in fact the decision was made about two months later (on 24 September 2009). The authority imposed heavy fines on those banks involved in the agreement in question from

¹⁴⁴ *Id.* at ¶ 19.

¹⁴⁵ Commission Decision VISA I (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001, pg. 24.

¹⁴⁶ Commission Decision VISA II (24 July 2002) COMP/D1/29.373, OJ L318, 22.11.2002, pg. 17.

¹⁴⁷ See European Commission Decision COMP/34.579, *supra* note 2, at ¶ 37.

¹⁴⁸ Report on the retail banking sector inquiry, Commission Staff Working Document, accompanying the Communication from the Commission - Sector Inquiry under Art 17 of Regulation 1/2003 on retail banking (“Final Report”) [COM(2007) 33 final] SEC(2007) 106, 31 January, 2007, European Commission, Directorate-General for Competition, http://ec.europa.eu/competition/sectors/financial_services/inquiries/retail.html

¹⁴⁹ *Id.* at 116.

¹⁵⁰ *Id.* at 93.

the beginning and on the card companies. (The decision is explored in detail in point 3.2.4 of this paper).

Some banks objected to overrunning the statutory time-frame during the proceedings (others probably will do so when applying (or having applied) for court supervision of the Decision). Their objections were based on statutory regulations and constitutional principles like legal certainty. (If there is a statutory time-frame, parties to a procedure should be able to rely on that the authority makes decision within that time-frame.) It was alleged that after the expiration of the time-limit GVH did not have authority to make decisions. The GVH addressed this question in the Decision¹⁵² and argued – as it had done frequently before – in its decisions that it is held by the Supreme Court of Hungary¹⁵³ that overrunning statutory time-limits does not in itself does not infer the nullity or invalidity of the decision. Here is a typical¹⁵⁴ reasoning of the authority: “it was objected by the parties that GVH did not made its decision within the statutory time-frame. (...) this occurred because further investigation was needed. It is well accepted and held by the Supreme Court of Hungary that overrunning the statutory time-frame stipulated in the Hungarian Competition Act does not infer the nullity or invalidity of the decision. Furthermore, it has to be remarked that even if GVH had decided to terminate the proceeding when the statutory time-frame expired it would have had right to start a new proceeding. In order to avoid this undesirable spinning out of the proceeding the GVH decided to undertake making a late decision.”¹⁵⁵ The court supervision of the GVH Decision will be another opportunity for the Supreme Court of Hungary – if the case reaches it – to address this question.

¹⁵¹ Hungarian Competition Act Article 63 (2) and (6), available in English at: http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=129&m5_doc=4323&m176_act=22.

¹⁵² Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶¶ 232-233.

¹⁵³ Decisions of the Supreme Court of Hungary: Kf.II.27.926/1996/3., Kf.II.28.246/1996/5. and Kf.IV.27.929/1998/4.

¹⁵⁴ Other decisions of the GVH which refer to the same reasoning: pt. 468 of the Decision No. Vj-162/2004/125 (2006); pt. 42 and 116 of the Decision Nr. Vj-47/2004/36 (2006); pt. 220-221 of the Decision Nr. Vj-17/2001/89 (2002).

¹⁵⁵ Pt. 468 of the Decision Nr. Vj-162/2004/125 (SAP Hungary, IBM and others), 15 June 2006: *available in Hungarian at* http://www.gvh.hu/gvh/alpha?do=2&pg=11&st=1&m5_doc=4111

As to the procedural history it also needs to be mentioned that other parties to the proceeding requested the suspension of the GVH proceeding by making reference to the ongoing court supervision of the MasterCard Decision at the European Court of First Instance and the new, ongoing proceeding against Visa. The GVH did not suspend the proceeding on the grounds that the subject matter of those proceedings is different from the subject matter of the GVH proceeding.¹⁵⁶

3.2.2 Short summary of the GVH Decision

Card issuing banks operating in Hungary and two card companies – Visa and MasterCard – concluded or later joined an agreement (“the Bank Card Forum”) regarding MIF between 1996 and 2008. This agreement violated both EC competition law (as of 1 May 2004, which is the date of Hungary’s accession to the EU) and Hungarian competition law (as of 1 January 1997, which is the date of entry in force of the HCA) because both its object and its effect was the prevention, restriction or distortion of competition. Banks violated competition law when they agreed on the same measures of MIFs regardless the differences between the two card companies, Visa and MasterCard. MIF served as lower threshold regarding merchants’ fees. As to the possibility of individual exemption under Article 81 (3), the GVH held that in theory it would be a possibility, but, that on the one hand, the undertakings did not manage to prove the conditions of that exemption and, on the other hand, joint treatment of Visa and MasterCard in case of the above mentioned agreement excludes even the possibility of granting an exemption (even if the undertakings had managed to prove the relevant conditions). GVH did not specify, however, the level of MIF which would be acceptable or legal. The authority imposed fines on the two card companies and the seven banks which signed the agreement. It did not fine the other banks who joined the agreement after its conclusion but it also established the infringement relating to them.

¹⁵⁶ Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, supra note 1, at ¶¶ 230-231.

During the procedure the GVH sent two preliminary provisions to the parties on 22 December 2008 and 12 July 2009 in which it set forth the facts of the case, the evidences and the assessment thereof.¹⁵⁷ On 22 October 2008 the banks under investigation submitted a proposition of commitment conditioned to the termination of the procedure but the GVH did not accept the commitment. The details thereof are discovered in point 3.2.14 of this paper.

3.2.3 Subject matter of the case

The subject of the MC Decision and the decision of the GVH are related but different. The MC Decision is about the “MasterCard MIF”. The Commission uses this term as a reference to the organization’s network rules and the decisions of MasterCard that determine the Intra-EEA and the SEPA/Intra-Eurozone multilateral fallback interchange fees.¹⁵⁸ These fees apply to all cross-border payment card transactions and also to some domestic payment card transactions in the EEA.¹⁵⁹ The Commission expressly stated in its decision that bilaterally agreed interchange fees and domestic fallback interchange fees are outside the scope of its decision.¹⁶⁰ Regarding cross-border bilateral interchange fees the 1995 Notice of the Commission has to be mentioned too, in which the Commission said that these are not anticompetitive *per se*, contrary to multilateral interchange fees which fall under the prohibition of Article 81 (1).¹⁶¹ It is important to note this because the GVH makes several references in its decision to the MC Decision.

In the view of the GVH¹⁶² the infringement which forms the subject matter for the GVH Decision is an agreement which existed among banks operating in Hungary and both Visa and MC between 1996 and 2008 regarding (non-fallback) domestic MIF. The bank card

¹⁵⁷ Article 73 (1) of the HCA

¹⁵⁸ See European Commission Decision COMP/34.579, *supra* note 2, at p. 9 (giving definition).

¹⁵⁹ European Commission Decision COMP/34.579, *supra* note 2, at ¶ 118.

¹⁶⁰ *Id.*

¹⁶¹ Commission Notice on the application of the EC competition rules to cross-border credit transfers. SEC (95) 1403 final, 13 September 1995, OJ 1995 C251/3.

¹⁶² Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 231.

industry was born in the middle of the 1990's in Hungary. The initial aim of the cooperation of banks (the informal cooperation was called the "Bank Card Forum" or "BCF") was the improvement of the bank card industry and to deal with those problems of the banks which arise in practice relating to the bank card industry. Initially, the network was based on bilateral agreements but later when more and more banks joined to the system and card usage increased too it became impossible to maintain the system that way. The issues regarding the change of the system were discussed and solved in cooperation with the Central Bank of Hungary and the Ministry of Finance. They not only knew about the structure but these authorities suggested and authorized the solutions implemented by banks. It is important to note that bank in Hungary did not have much choice than to join to one of the global payment card schemes if they wanted to issue cards which would be widely accepted in the world.

The system became multilateral around 1995/1996. The Bank Card Forum made decisions among others regarding MIF and notified Visa and MC from time to time about its decisions. Later banks intended to make the operation of the Forum more formal (to be able to make obligatory decisions as to the members), but they never succeeded. As of February 2005 the Forum hardly operated and later – mainly influenced by that both EC and Hungarian competition law concerns became known – the parties decided to terminate their agreement in February 2008. (The agreement was terminated on 30 July 2008 but it took effect as of 1 January 2009.) It is important to note that after the termination of the agreement, the level of MIF did not change.¹⁶³

In sum, the subject matter of the MC Decision and the ongoing, Visa proceeding which started in 2008 are not the same. The former address cross-border fallback MIF, the later focuses on domestic, non-fallback MIF.

¹⁶³ *Id.* at ¶ 121.

3.2.4 The decision

The MC Decision was made only regarding the card company (MC) under investigation, banks were not involved in the procedure as parties. The Commission found in its decision that “from 22 May 1992 until 19 December 2007 the MasterCard payment organisation and the legal entities representing it (MasterCard Incorporated, MasterCard International Incorporated and MasterCard Europe SPRL) have infringed Article 81 of the Treaty and, from 1 January 1994 until 19 December 2007, Article 53 of the EEA Agreement by in effect setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the European Economic Area, by means of the Intra-EEA fallback interchange fees for MasterCard branded consumer credit and charge cards and for MasterCard or Maestro branded debit cards.”¹⁶⁴

According to the view of the Commission (1) “in the absence of the multilateral interchange fee the merchant fees set by acquiring banks would be lower”¹⁶⁵ and (2) “an open payment card scheme such as MasterCard’s can operate without a MIF as is evidenced by the existence of comparable open payment card schemes without a MIF.”¹⁶⁶

The GVH found in its Decision¹⁶⁷ on 24 September 2009 that two different activities of 22 banks¹⁶⁸ operating in Hungary, plus VISA and MasterCard related to multilateral interchange fees were infringing on competition law. Firstly, the authority found that the relevant agreement of the banks and card companies distorted competition and infringed Article 81 (1) of the EC Treaty [now Article 101 (1) of the Treaty on the Functioning of the European Union]¹⁶⁹ from 1 May 2004¹⁷⁰ until 30 July 2008 by agreeing to a uniform MIF. At

¹⁶⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:264:0008:01:EN:HTML>

¹⁶⁵ European Commission Decision COMP/34.579, *supra* note 2, at ¶ 2.

¹⁶⁶ *Id.* at ¶ 4.

¹⁶⁷ Decision No. Vj-18/2008/341, *available in Hungarian at* http://www.gvh.hu/gvh/alpha?do=2&pg=72&st=1&m5_doc=6225&m120_propord_1590=0.

¹⁶⁸ The investigation started against 23 banks plus VISA and MasterCard but the authority ended the proceedings in connection with one bank (see later in this chapter).

¹⁶⁹ The full text of Article 81 of the EC Treaty (now Article 101 of the Treaty on the Functioning of the European Union) can be found in Appendix I.

the same time, the agreement infringed on Article 11 (1) of the Hungarian Competition Act¹⁷¹ from its conclusion¹⁷², 1 January 1997, until 30 July 2008. In particular, it was a price-fixing, although this is only mentioned in the reasoning of the GVH Decision.¹⁷³

Secondly, Hungarian banks agreed on uniform MIF regarding VISA and MC without differentiating neither between the two card networks (although the members of these networks have included partially different banks), nor among the banks. Visa and MC also “infringed competition since it enabled the banks [by their internal regulations] to conclude agreements that hindered competition.”¹⁷⁴ The practice of the issuing banks and card companies resulted in the distortion of competition among card companies and among acquiring banks.

In sum, in both cases Article 81 was infringed, but the GVH Case was parallelly decided based on national law. In the MC Case cross-border fallback MIF, in the GVH Case domestic non-fallback MIF was investigated. An important difference among the two cases is the sanction which is discovered in point 3.2.12 of this paper.

3.2.5 Legal basis of the investigation

As to their wording and interpretation Article 81 and Article 11 of the HCA are similar in essence therefore the GVH evaluated the case in light of both provisions in accordance with EC competition law:¹⁷⁵ both Hungarian and EU legislation was mentioned as the legal background of the GVH Case.¹⁷⁶

The Visa and MasterCard cases were initiated on the basis of a complaint submitted by the British Retail Consortium, a trade association representing UK retailers. Contrarily, the

¹⁷⁰ Date of Hungary’s accession to the European Union. The *acquis communautaire* is in force in Hungary as of this date.

¹⁷¹ The text of the Act is available in English at:

http://www.gvh.hu/gvh/alpha?do=2&st=1&pg=84&m5_doc=4323&m57_act=22&m5_lang=en

¹⁷² The agreement was concluded by seven banks and the two card companies on 1 January 1997. The undertakings under investigation joined the agreement in different times between 1 January 1997 and 2006.

¹⁷³ Article 11 (2) a) of the HCA.

¹⁷⁴ (GVH 2009) Source: http://www.gvh.hu/gvh/alpha?do=2&m5_doc=6071&pg=72&m5_lang=en&p4jli=5

¹⁷⁵ Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 166.

GVH initiated competition control proceeding based on the concerns that the undertakings under investigation presumably distorted competition and infringed Article 81 (1) and Article 11 (1) of the HCA.¹⁷⁷ The Commission initiated proceedings under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (the texts of these two provisions are identical but their geographical applicability is slightly different).¹⁷⁸

3.2.6 The parties of the procedure

In the proceedings of the Commission, the undertakings under investigation were the MasterCard payment organisation and the legal entities representing it, namely MasterCard Incorporated (US), MasterCard International Incorporated (US) and MasterCard Europe s.p.r.l. (Belgium). MasterCard Incorporated acts as a holding company for MasterCard International Incorporated and MasterCard Europe s.p.r.l. Both latter companies are fully consolidated subsidiaries of MasterCard Incorporated. (Visa was allowed to take part in these proceedings as a third party.)¹⁷⁹

The MasterCard payment organization is based on the membership of banks. By entering into the license agreement, the member banks became subject to the MC network rules (such as the setting of MIF and “Honour All Cards Rule” or “HACR”). The HACR establishes an obligation both on merchants and acquiring banks that: (1) the member bank is bound to oblige merchants it has acquired to honour all properly presented MasterCard cards without discrimination, and (2) merchants are obliged to accept all valid MasterCard and Maestro branded cards and transactions equally and without discrimination.¹⁸⁰ MasterCard

¹⁷⁶ *Id.* at ¶¶ 154-163.

¹⁷⁷ The text of the HCA is available in English at:

http://www.gvh.hu/gvh/alpha?do=2&st=1&pg=84&m5_doc=4323&m5_act=22&m5_lang=en

¹⁷⁸ The Agreement on the European Economic Area was concluded between the European Communities, all its Member States and all European Free-Trade Association members (with the exception of Switzerland). There are two authorities who share jurisdiction to apply the EEA agreement: the European Commission and the EFTA Surveillance Authority. The division of competence is laid down in the EEA agreement (Articles 56 and 57) and its Protocols. Cooperation between the European Commission and the EFTA Surveillance Authority in competition matters is governed by the terms of Protocols 23 (cooperation between European Commission and ESA in cartel and dominance cases).

¹⁷⁹ European Commission Decision COMP/34.579, *supra* note 2, at ¶ 22.

¹⁸⁰ *See* European Commission Decision COMP/34.579, *supra* note 2, at p. 8, ¶ 209.

alleged that the 2006 initial public offering (IPO) of MasterCard Incorporated changed the nature of the organization fundamentally. The “key reason for the IPO (...) was (...) to allow its member banks (...) to better address intensifying regulatory and legal scrutiny of the MasterCard MIF while ensuring that member banks in Europe continue to exercise an important influence on the organization’s every day business.”¹⁸¹ The governance of the payment organization is de-centralized. There are regional Boards – such as the European Board – which have the power to set domestic fallback interchange fees if the member banks did not agree on them bilaterally or multilaterally and also all Intra-EEA fallback interchange fees.¹⁸² After the IPO of the company the regional boards were abolished except for the European Board which still takes decisions independently, although (1) it does not have powers regarding interchange fee any more and (2) the Global Board may overrule the decision of the European Board for exceptional reasons.¹⁸³ Therefore, according to the Commission, banks in Europe still co-ordinate their behavior and the IPO of the company did not have such a fundamental effect.¹⁸⁴ The Commission concluded in its decision¹⁸⁵ that in the end, European banks maintained the MasterCard MIF as part of the business model.

Furthermore, MasterCard positively encouraged de-centralized horizontal decision making which exists, for example, in places such as the UK and Germany and is in the process of being launched in Hungary and Poland, among other places. It is also an important characteristic of the MasterCard payment organization that by replacing the global rules banks can agree upon national rules: “country by country local banks have set sometimes very extensive and detailed rules covering (...) the level and structure of domestic fallback interchange fees (...)”¹⁸⁶

¹⁸¹ *Id.* at ¶ 76.

¹⁸² European Commission Decision COMP/34.579, *supra* note 2, at ¶¶ 45-47.

¹⁸³ *Id.* at ¶¶ 49, 53-54.

¹⁸⁴ *Id.* at ¶¶ 41, 44.

¹⁸⁵ *Id.* at ¶ 99.

¹⁸⁶ *Id.* at ¶ 61.

The market position of the MasterCard payment organization was characterized in the MC Decision by saying that “both the number and value of MasterCard cross-border transactions in the Community are growing fairly steadily”.¹⁸⁷

Now in the proceedings of the GVH the undertakings under investigation were several card issuing banks (namely 23) operating within the territory of Hungary and two payment card companies, VISA Europe Ltd. (London, United Kingdom) and MasterCard Europe S.p.r.l. (Waterloo, Belgium). In its decision the authority terminated the proceedings in connection with one Hungarian bank, Merkantil Váltó és Vagyonbefektető Bank Zrt. (Hungary) in accordance with Article 70 of the HCA¹⁸⁸ because this bank did not issue or acquire bank cards through either of the two payment card companies under investigation during the period investigated in the procedure.¹⁸⁹

It can be concluded that in the Commission’s proceedings against Visa and MC banks were not involved as parties to the procedure. Contrarily it is clear from the GVH Decision GVH decided to investigate and fine both banks and card companies. It can be said that in the beginning of the procedure the authority focused on the alleged infringement of banks but later it decided to fine both the card issuing banks participating in the system and Visa plus MC as well.

3.2.7 Relevant market

The GVH did not consider it necessary to analyze the relevant market in details because the agreement affected prices and was concluded among competitors.¹⁹⁰ As to the relevant market, in accordance with EC law, Article 14 of the HCA says that “the relevant

¹⁸⁷ *Id.* at ¶ 100.

¹⁸⁸ Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition.

¹⁸⁹ See Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 172.

¹⁹⁰ *Id.* at ¶ 179.

market shall be defined with regard to the goods subject to the agreement (...).”¹⁹¹ In GVH’s view the agreement primarily affected the competition between card companies and among issuing and acquiring banks. The authority decided that cash and other means of payment like electronic money are not substitutes of payment cards in terms of use; therefore that market was not taken into account. Contrarily, according to the provisions of the Hungarian Competition Act „In addition to the goods for which the agreement is concluded, the goods considered as reasonable substitutes in terms of use, price, quality and the conditions of performance (substitution in demand) shall also be taken into account, as well as the factors involved in substitution in supply.”¹⁹² Additionally, as to the geographical market the GVH did not conduct analysis although the HCA orders that the relevant market shall be defined with regard to the geographical territory too.¹⁹³ Because of this the infringement of the Article 14 of the HCA arises, it is very probable that those undertakings which appeal against the GVH Decision will pay special attention to the question in their claims that the GVH missed to define the relevant market in accordance with the law.

For the shake of completeness it is remarked that the Commission defined national markets as the relevant markets in the Visa II decision (see details in point 2.3.4 of this paper). In the MC Decision the Commission used the same method.¹⁹⁴

3.2.8 The agreement

The analysis regarding the existence of an agreement or a decision by an association of undertakings or a concerted practice under Hungarian and EC competition law is basically the same.

¹⁹¹ Article 14 of the HCA. [Sub article (2) has been established by Article 3 of Act CXXXVIII of 2000, effective as of 1 February 2001, sub article (3) a) has been established: by paragraph (7) Article 29 of Act XLVII of 2008. In force: as of 01. 09. 2008.]

¹⁹² Article 14 (2) of the HCA.

¹⁹³ Article 14 (1) of the HCA.

¹⁹⁴ European Commission Decision COMP/34.579, *supra* note 2, at ¶ 329.

In the Visa I decision the Commission said that „the rules governing the Visa payment card systems can be regarded either as decisions of an association of undertakings or as agreements between undertakings”¹⁹⁵ and the same was held in the Visa II Decision¹⁹⁶ and also in the MasterCard Decision¹⁹⁷ before and after (the structural changes in) 2006 as well.

Contrarily in the GVH Decision the authority on one hand focused on and sanctioned the conclusion of the agreement regarding MIF (which was in force between 1996-2008) by seven banks¹⁹⁸ (banks which later joined the agreement were not fined but the infringement was found in their case as well). GVH believes that in case of banks which later joined the agreement it was an important element of the facts that they did not object the agreement.¹⁹⁹ This view has been criticized as many professionals believe that when willing to issue cards which are widely accepted and join an international payment card network the accessing party has not much possibility to negotiate, and rather the characteristics of the system can be characterized as given.

On the other hand regarding card companies it found that the regulations of Visa and MasterCard indirectly assisted the banks concluding the agreement. As to the proofs thereon the GVH said that by making it possible for banks to agree on MIF card companies were *quasi* participating in the agreement.²⁰⁰ It was advantageous for them because competition was weakened between them and it facilitated conserving their market position. Furthermore card companies oriented banks regarding the “minimum of agreed MIF” by the level of default MIF which was considered to be proven by minutes and other documents.²⁰¹ In the absence of prior cost study by banks – and known from the beginning by card companies – the agreement was not only restrictive by its effect but also by its object. As of 1 January

¹⁹⁵ Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. 7.4 (53)

¹⁹⁶ Visa II Decision, (24 July 2002) COMP/D1/29.373, OJ L318, 22.11.2002. pt. 7.2 (55)

¹⁹⁷ European Commission Decision COMP/34.579, *supra* note 2, at ¶ 362, 372-374

¹⁹⁸ Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 170 (listing the seven banks).

¹⁹⁹ *Id.* at ¶ 171.

²⁰⁰ *Id.* at ¶ 173.

2009 (after the termination of the agreement) the level of MIF has been being defined by Visa and MasterCard. The GVH believes that negotiations and changes regarding the level of MIF are irrelevant because the behavior is considered an infringement by the unity of minds regarding agreeing on the level of MIF in itself (the object).²⁰²

3.2.9 Restriction of competition (the object or effect of behaviour)

The GVH found that both the effect and the object of the agreement and the behavior of card companies was the prevention, restriction or distortion of competition. Competition among acquiring banks was indirectly distorted by the influence of MIF on merchant's fees. As MIFs were paid for the issuing banks, competition was distorted among them too.

The GVH prove the *object* mainly by the fact that the two card companies were treated in the same way which neutralized price competition and that some internal documents of the Bank Card Forum recorded that the banks treated the question of MIF and merchants' fees jointly.²⁰³ As to the establishment that the object of the parties was the distortion of competition the legality of the GVH Decision is questionable because according to both EC and Hungarian competition case law this cannot be based solely on the subjective intention of the undertaking.

The GVH prove the distortion of competition as an *effect* of the agreement by the fact that the two card companies were treated in the same way which influenced competition on a negative way or restricted competition by the prevention of the usage of different fee levels on the level of different card companies. According to the GVH another proof is that during the years card business heavily expanded in Hungary but the level of MIF did not decrease in the

²⁰¹ *Id.* at ¶ 174.

²⁰² *Id.* at ¶ 178.

²⁰³ *Id.* at ¶ 188.

same time-period.²⁰⁴ This reasoning seems to be insufficient and superficial, especially taking into consideration the economic arguments mentioned in point 1.2 of this paper.

It is important to note that according to the Commission MIF is not a restriction of competition by its object.²⁰⁵ It seems from the GVH Decision that the Hungarian authority missed to analyze this question in detail and was satisfied with making reference to the arguments of the Commission presented in the MC Decision. To illustrate this, the analysis of the Commission will be summarized in the following paragraphs.

In the MC Decision the Commission argued that MasterCard earlier increased its fees up to the level of the fees of visa. MasterCard's fees were not transparent for the costumers (consumers, merchants). Another evidence of restricted competition was that MasterCard maintained its average fees at 1,1% meanwhile Visa's fees were gradually reduced because of the Visa II Decision to 0,7% until 2007. Although the "no surcharge rule" was abolished in 2005, merchants cannot identify in connection with which cards they should charge fees for their consumers because they pay blended fees for the acquiring bank.²⁰⁶ The Commission proved by empiric analysis that MIF serves as a threshold in the determination of merchant's fees.²⁰⁷ It based on empiric analysis also concluded in the MC Decision that issuing banks prefer cards with higher MIF.²⁰⁸ Card companies are interested in reaching as high number of transactions made by cards which bear their logo as possible. They can reach this by agreeing with issuing banks. To reach that agreement card companies can offer higher MIF than other card companies.²⁰⁹

The Commission also concluded that cost of issuing cards is not sufficient justification in itself for MIF. First, most of these costs are affected by MIF. MIF is an important reason

²⁰⁴ *Id.* at ¶ 204.

²⁰⁵ European Commission Decision COMP/34.579, *supra* note 2, at ¶ 69.

²⁰⁶ *Id.* at ¶¶ 108-109; Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 132.

²⁰⁷ European Commission Decision COMP/34.579, *supra* note 2, at ¶ 7.3.2.1.3.

²⁰⁸ *Id.* at Preamble, ¶ 463

²⁰⁹ *Id.* at ¶ 7.2.4.

why banks are interested in issuing cards, therefore costs of e.g. marketing cannot be a justification for the existence of MIF. On the other hand, there are also revenues on the issuing side, which may compensate the costs arising from issuing cards. If so, this means that MIF is gratuitous and may effect the improvement of the market on a negative way.²¹⁰ It is also argued by the Commission that payment card systems which operate without MIF show a higher number of card usage than systems which operate with MIF.²¹¹ The Commission did not accept the “Baxter model” because “Baxter’s result finally relies on the unrealistic assumption of a perfectly competitive banking industry”:²¹² for example, it takes consumer and merchant demand as given, and it relies on unrealistic assumption of a perfectly competitive banking industry.²¹³

As against the argument of MasterCard that MIF is necessary in order to reach the maximization of card issuance the Commission referred to that considering the European ranking regarding the number of transactions per capita among the first seven states there are four in which the system is operated without MIF.²¹⁴ Furthermore, according to the Commission it is not probable that in case of transforming the MasterCard payment system by omitting MIF cardholders’ fees would increase appreciably, because (1) in payment systems operating without MIF fees are not as high as in payment systems operating with MIF, (2) issuing banks have other revenues and advantages from the existence of payment cards besides MIF, and (3) competition among issuing banks would limit the increase of cardholders’ fees.²¹⁵ The Commission also referred to that MasterCard positively encouraged de-centralized horizontal decision making which exists e.g. in the UK, Germany and is in the process of being launched e.g. in Hungary and Poland.

²¹⁰ *Id.* at Preamble, ¶¶ 685-686.

²¹¹ *Id.* at Preamble, ¶ 697.

²¹² *Id.* at Executive Summary ¶ 8, ¶¶ 3.1.7.(b), 8.2.2.2. (f-g).

²¹³ European Commission Decision COMP/34.579, *supra* note 2, at 704-708.

²¹⁴ *Id.* at ¶ 697; Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 140.

²¹⁵ European Commission Decision COMP/34.579, *supra* note 2, at ¶ 7.3.4.4.; Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 143.

3.2.10 The indispensability or necessity of MIF in payment card systems

The GVH did not address this issue in detail²¹⁶, because it considered it not necessary to evaluate the legal adjudication of the agreement. This question is relevant from the point of view of Article 81 (3) and is discovered in detail in point 3.2.14 of this paper.

3.2.11 Effect on trade between Member States

The GVH reasoned²¹⁷ that the agreement of the undertakings might have potentially affected the trade between Member States because it extended to all domestic transactions including transactions made on the territory of Hungary with cards issued in Hungary, and because the majority of the parties are Hungarian subsidiaries of multinational companies which are active in other Member States too. Furthermore, MIF applies to transactions when a non-resident made transaction with cards issued in Hungary.

The criterion whether there is an actual or potential effect on trade between Member States can be broken down into three elements: (1) actual or potential effect, (2) trade between Member States and (3) appreciable effect. As the Commission pointed out in the MC Decision “The primary focus for analyzing whether there is an appreciable effect on competition is the position and importance of the parties on the market taking into account the market structure.”²¹⁸ According to the Commission this analysis includes the volume and value of MasterCard or Maestro payments, the revenues from Intra-EEA fallback interchange fees and the market position of MasterCard (the number of issued MasterCard or Maestro cards, the strong acceptance network, the size of the membership network and the transaction volumes, the penetration amongst different classes of customers (cardholders, merchants), the volume of transactions and acceptance, and the relative size of MasterCard compared to rival networks). According to the Commission MasterCard’s market position seems to be stable: in

²¹⁶ Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 218.

²¹⁷ *Id.* at ¶ 164.

²¹⁸ European Commission Decision COMP/34.579, *supra* note 2, at ¶ 105.

the EEA 45% of issued payment cards were bearing MasterCard or Maestro logo in 2004.²¹⁹ By referring to an “independent industry report” the Commission said that “The acceptance network of Visa seems equally strong (...) most merchants accepting MasterCard credit cards also accept Visa credit cards (...)”²²⁰ Regarding the number of transactions it is not easy to get exact data, because “With the exception of a few EEA Member States, MasterCard does not process its own transactions and therefore has no direct access to data.”²²¹

In sum, it is questionable whether the decision of the GVH is in compliance with EC competition case law. On one hand there may be effect on the trade between Member States if the agreement extends to the whole territory of one Member State²²², but on the other hand there are cases in which the Court found that the agreement of the undertakings extending to the whole territory of one Member State did not affect the trade between Member States.²²³ In sum, the GVH should have analyzed this question more precisely.

3.2.12 Sanctions

The main focus of this point of the paper is whether MasterCard fulfilled the orders (sanctions) made by the Commission, and if yes, how is it possible that about two years later the GVH fined MasterCard.

The GVH established the infringement regarding 22 banks but imposed fines only on those undertakings (7 banks) plus Visa and MasterCard which took part in the conclusion of the agreement. The total amount of the fines of the seven banks is HUF 968 million (about EUR 3,57 million), the two payment card companies Visa and MC were fined for HUF 477-477 million (EUR 1,76 million each). “When calculating the fines, the GVH took into account the total amount of domestic interchange fees between 2004-2007. The GVH also took into

²¹⁹ *Id.* at ¶¶ 109-110.

²²⁰ *Id.* at ¶ 115.

²²¹ *Id.* at ¶ 117.

²²² Judgment of the Court of 17 October 1972. - *Vereeniging van Cementhandelaren v Commission of the European Communities.* - Case 8-72.

consideration” among several mitigating factors “the 1996 and current market shares of the banks concerned.”²²⁴

The Commission did not impose fine in its decision. It ordered that the infringement shall be brought to an end “by formally repealing its intra-EEA and SEPA/intra-Eurozone fallback interchange fees within 6 months upon notification of the Decision. They shall moreover modify the association’s network rules to reflect the Commission Decision. They shall repeal all decisions taken by MasterCard’s European Board and/or by MasterCard’s Global Board (...) on Intra-EEA fallback interchange fees on SEPA fallback interchange fees and on Intra-Eurozone fallback interchange fees. (...) shall communicate all changes of the association’s network rules and the repeal of decisions to all financial institutions (...)”²²⁵ Additionally, in case of failing to comply with the decision, a daily penalty payment would be imposed on MC.

MasterCard has appealed for annulment the Commission’s Decision before the Court of First Instance on 1 March 2008. It believes that its interchange fee methodology is consistent with the MC Decision. It has temporarily repealed its MasterCard and Maestro Intra-EEA²²⁶ cross-border consumer card interchange fees as of 21 June 2008.²²⁷ As of 1 July 2009 MasterCard has implemented new interim Intra-EEA cross-border POS (point of sale) interchange fees on MasterCard and Maestro consumer cards. MasterCard continues defining default intra-country (domestic) interchange fees.²²⁸

²²³ Judgment of the Court (Sixth Chamber) of 21 January 1999. *Carlo Bagnasco and Others v Banca Popolare di Novara soc. coop. arl. (BNP) (C-215/96)* and *Cassa di Risparmio di Genova e Imperia SpA (Carige) (C-216/96)*.

²²⁴ http://www.gvh.hu/gvh/alpha?do=2&m5_doc=6071&pg=72&m5_lang=en&p4jli=5.

²²⁵ European Commission Decision COMP/34.579, *supra* note 2, at 209-210.

²²⁶ The MasterCard Europe EEA sub-region includes the 27 Member States of the European Union (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom), Iceland, Liechtenstein, Norway, Andorra, Falkland Islands, Faroe Islands, French Guiana, Gibraltar, Greenland, Guadeloupe, Martinique, Monaco, Reunion, San Marino, and Holy See (Vatican). (source: <http://www.mastercard.com/us/company/en/whatwedo/interchange/Intra-EEA.html>)

²²⁷ Source: http://www.mastercard.com/us/merchant/support/interchange_fees.html

²²⁸ Source : <http://www.mastercard.com/us/company/en/whatwedo/interchange/Country.html>

3.2.13 Uniform application of EC competition law

According to Article 16 (2)²²⁹ of the Council Regulation 1/2003²³⁰ “When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.” GVH found that this is applicable in case of the MasterCard Decision when making the GVH Decision. Based on the differences among the cases of the Commission and the GVH MIF case the applicability of this provision is doubtful. The subject matters of the Decisions were not the same, in fact, quite different: in the MasterCard Decision only cross-border default MIF was examined. In the GVH Decision the MIF was questioned. These are akin issues but not the same.

The GVH held (see point 3.2.4 of this paper) that issuing banks and the card companies distorted competition and infringed Article 81 (1) of the EC Treaty from 1 May 2004 until 30 July 2008 by agreeing uniform MIF. In the same time, the agreement infringed Article 11 (1) of the HCA from its conclusion, 1 January 1997, until 30 July 2008. As it was mentioned in point 2.3.4 in the Visa II Decision the Commission granted exemption to Visa from 2002 until the end of 2007 regarding intra-regional MIF scheme of Visa International, as applied to cross-border operations. The GVH disregarded this fact and it is questionable whether its decision was in compliance with the negative clearance decision of the Commission.

Another possible connection or interpretation of the case from the point of view of Article 16 (2) of the Council Regulation 1/2003 is that based on the Regulation the GVH should have suspended its procedure until the decision would be made in the new Visa proceeding started in 2008 and conducted by the Commission. This was solicited by some

²²⁹ See also Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 159.

parties but rejected by the authority. However, the undertakings fined or subject to the infringement decision probably have appealed the GVH Decision at the Metropolitan Court of Budapest and this can be one of the issues the court has to address in its judgment. Unfortunately, it might take about 2 years or even more to arrive to a final judgment in the case.

3.2.14 Some other possible outcomes (individual exemption, commitment)

Individual exemption

Based on Article 17 of the HCA and Article 81 (3) of the Treaty it is possibility to get exemption from under Article 11 of the HCA or Article 81 (1) of the Treaty. According to Article 83 (1) of the Treaty undertakings can invoke an exception if they can prove the following four, cumulative conditions: (1) the agreement “contributes to improving the production or distribution of goods or to promoting technical or economic progress, (...) (2) while allowing consumers a fair share of the resulting benefits, (...) (3) not to impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives and (...) (4) not to afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”²³¹

Both the Commission and the GVH rejected the claim of the undertakings regarding the individual exception. The GVH basically summarized the decision of the Commission in its Decision.²³² In the legal background section of its decision it presented the relevant Article of the HCA and it repeated the arguments of the Commission from the MC Decision.²³³ It supported its view with that the measure of MIF remained unchanged for a long period of time while the market had been changing a lot, the measure of MIF was the same in case of debit and credit cards and when defining the measure of MIF the undertakings did not take

²³⁰ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Official Journal L 1, 04.01.2003, p.1-25)

²³¹ European Commission Decision COMP/34.579, *supra* note 2, at ¶¶ 666-667.

²³² Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶¶ 138-142.

into consideration the different and changing demands of the two sides of the market. According to the view of the GVH the undertakings should have demonstrated the efficiencies regarding the uniform level of MIF and that these exceed the disadvantages caused by the distortion of competition.

As the GVH based its decision on the arguments of the Commission, in the followings the relevant part of the MC Decision will be summarized because at this point it is more detailed than the GVH Decision. The Commission emphasized that it is a question related to Article 81 (3) whether a business model would be more efficient or would operate better with a certain restriction than without it. From the point of view of analyzing whether there is a restriction of competition the following two questions has to be analyzed: (1) Could banks cooperate in an open card payment system without MIF as well, and (2) if the answer is no for the first question, is there another –less restrictive – way of cooperation? The Commission’s answer for the first question was yes, therefore it did not examine the second question.

As to the first condition (“contribution to improvement”) in the Commission’s view, in theory, it is possible to get exemption by proving that it is more efficient and advantageous that the undertakings operating on two different sides of the market divide their costs instead of each side would bear its own costs, but “only objective benefits can be taken into account”, therefore “cost savings (...) that do not produce any pro-competitive effects (...) are irrelevant here and it has to be demonstrated as well that MIF “brings appreciable objective advantages which compensate for the disadvantages”.²³⁴ According to the Commission’s view although payment card schemes represent economic and technical progress, but MIF does not specifically contribute to that.²³⁵ Therefore it was decided by both the Commission and the

²³³ *Id.* at ¶¶ 206-219.

²³⁴ European Commission Decision COMP/34.579, *supra* note 2, at ¶¶ 670. In this point the Commission referred to the case law of the Court of Justice too.

²³⁵ European Commission Decision COMP/34.579, *supra* note 2, at ¶¶ 679.

GVH that a conclusive proof would have been needed to prove that dividing the costs has beneficial effects.²³⁶

As to the second condition of exemption (“allowing consumers a fair share of the resulting benefits”) the Commission referred to Commission Guidelines on Article 81 (3) and said that “the claimed efficiencies must outweigh the anticompetitive effects.”²³⁷ In its view, although there might be advantages for the merchants by network effects on the issuing side, these do not necessarily compensate the disadvantages caused by the inflated merchant’s fees.

As to the third condition of exemption (indispensability of the restrictions) the Commission said that MasterCard did not prove the Commission with conclusive proof regarding the definite necessity of MIF in order to obtain the maximum number of card issuance. The authority provided several examples of payment systems which operate successfully without MIF.²³⁸ It emphasized furthermore that issuing banks have other revenues and advantages from payment cards besides MIF.

The Commission did not address the fourth condition in its Decision at all – presumably because of the lack of presence of the above mentioned conditions.

Proposed commitment in the GVH procedure

On 22 October 2008 the banks under investigation submitted a proposition of commitment via the Hungarian Banking Association conditioned to the termination of the procedure. In the Competition Board did not accept the commitment, though earlier it gave guidelines regarding its content such as remedying the negative effects of the MIF, strengthening the bargaining power of merchants and forward to merchants the reduction of interchange fees on behalf of card companies.

²³⁶ European Commission Decision COMP/34.579, *supra* note 2, at ¶¶ 682. and Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at 138.

²³⁷ Commission Guidelines on Article 81 (3) EC [2004] OJ C101/97 para 86.

²³⁸ Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at 142.

According to Article 75 (1) of the Hungarian Competition Act if the undertaking(s) offer a commitment during the authority proceedings it is possible to terminate the proceedings by ordering those commitments binding on the parties without concluding whether or not there has been or still is an infringement of the Act. There are two cumulative conditions thereof: first, the commitment must be appropriate to ensure compliance of their practices with the provisions of this Act or of Article 81 or 82 of the EC Treaty, and second, if effective safeguarding of public interest can be ensured in that manner.

Banks (but not the two card companies) offered a commitment twice²³⁹ during the proceedings but it was not accepted by the GVH based on the reasoning that the commitments regarding educational campaigns, improvement of market standards and improvement of card acceptance were not sufficient and appropriate because of the characteristics of the infringement.

The commitment would have had only indirect effects and which was more important argument, the infringement happened in the past. The authority also emphasized that in the GVH's view it is not possible establishing infringement and accepting commitment in the same decision.²⁴⁰ As to this last argument it has to be remarked that in another case decided earlier in 2008 by the GVH the authority accepted the commitment of the undertaking and imposed fine in the same procedure. There is no such provision in the HCA which would prevent the authority to make such a decision.

²³⁹ Hungarian Competition Authority [GVH] Decision No. Vj-18/2008/341, *supra* note 1, at ¶ 2. (the first offer was made on 22 Dec. 2008 and the second, modified offer was submitted on 12 July 2009).

²⁴⁰ Case Nr Vj-118/2007. available in Hungarian at: http://www.gvh.hu/gvh/alpha?do=2&pg=11&st=1&m5_doc=5213 and http://www.gvh.hu/gvh/alpha?do=2&pg=11&st=1&m5_doc=5212

CONCLUSION

In the last couple of decades the most successful, global payment card systems have been operating with multilaterally agreed interchange fees and the industry has shown enormous growth. In the Visa, MC and GVH Cases authorities tried to answer the question whether MIF is a price-fixing agreement, whether it prevents, restricts or distorts competition. Even if the subject matters of these cases are different (fallback/non-fallback, cross-border/domestic, multilaterally agreed/bilaterally agreed) as it is illustrated in Appendix III at some important points they have similarities.

It can be concluded that in the last fifteen years competition law adjudication of interchange fee became harsher. Meanwhile in the Visa I decision the Commission said that Article 81 (1) was not infringed by the relevant network rules of Visa in the Visa II Decision the Commission focused more on interchange fee for the first time and granted individual exemption for a five-year time-period provided that the MIF would be linked to, and capped at, certain costs. Now, in the MasterCard Decision fallback MIFs applied to cross-border operations were found to have restrictive effect and the Commission said that there might be a restrictive object as well. The Commission went even further when stating that MIF might not be necessary for the operation of payment card systems and even questioned the reasonableness of the direction of paying MIF. In sum, right now it seems that issuing banks are expected by authorities either not to charge interchange fees²⁴¹ or charge bilaterally agreed, cost based interchange fees.²⁴²

In Hungary bank card industry was born in the middle of the 1990's. In the beginning seven card issuing banks operating and two card companies – Visa and MasterCard –

²⁴¹ See also Figure 40 on pg 112 of the Report on the retail banking sector inquiry, Commission Staff Working Document, accompanying the Communication from the Commission - Sector Inquiry under Art 17 of Regulation 1/2003 on retail banking ("Final Report") [COM(2007) 33 final] SEC(2007) 106, 31 January, 2007, European Commission, Directorate-General for Competition, http://ec.europa.eu/competition/sectors/financial_services/inquiries/retail.html

concluded an agreement first informally (“the Bank Card Forum”), later more formally regarding MIF. This was the time of setting up the frames of the bank card industry in Hungary. The huge growth of the industry shows that the system has been operating successfully. Although there are arguments that without MIF the industry might have produced even stronger growth it seems to be a convincing counter-argument that nobody can estimate what would have happened if the bank card industry would have been developed without MIF (even if it is possible to set up a due mathematical formula). In 2008 the reason for the termination of their agreement was that banks were under increasing pressure caused by the Commission decisions and the competition law concerns that the GVH raised regarding MIF. A year later the authority decided that the agreement of banks violated both Community law and Hungarian law because both its object and its effect was the restriction of competition. In the context of the reasoning of the decision it is interesting that the GVH did not expressly qualify the infringement as “hardcore”.

The GVH identified two differences among the finding of facts of the Commission’s procedures and its own procedure: firstly, Hungarian banks agreed with Visa and MasterCard not making a difference between the two card companies; secondly, both the object (which was not the case in the Commission proceedings) and the effect of the parties was the prevention, restriction or distortion of competition. From the comparison of the GVH Decision and the MC Decision the followings can be concluded:

- (1) The GVH Decision’s reasoning is based predominantly on the MC Decision even if the subject matter of the two cases are different.
- (2) The GVH overran the statutory time-frame during its procedure which is contrary to statutory regulations and constitutional principles.

²⁴² E.g.: Semeraro, Steven, Credit Card Interchange Fees: Three Decades of Antitrust Uncertainty. *George Mason Law Review*, Vol. 14, 2007; TJSL Legal Studies Research Paper No. 970375. Pg. 84. Available at SSRN: <http://ssrn.com/abstract/id=970375>

- (3) The subject matter of the MC Decision (MC cross-border fallback MIF) and the subject matter of the GVH Decision (domestic, non-fallback MIF) are related but clearly different.
- (4) The GVH did not say that existence of interchange fee is anticompetitive in general, but it did not give guidance regarding the acceptable level of MIF.
- (5) In the Commission's proceedings against Visa and MC banks were not involved as parties. Contrarily, in the GVH Decision both banks and card companies were investigated and fined.
- (6) The GVH did not analyze properly the relevant market and acted contrary to both the EC law and the Hungarian statutory provisions. It did not conduct analysis regarding the geographical market although the HCA orders that the relevant market shall be defined with regard to the geographical territory too.²⁴³
- (7) The GVH held those banks which later joined the agreement also infringed competition law, because they did not object the agreement.²⁴⁴ This view has been criticized based on that these banks did not have any possibility to change the structure of the system to which they wanted to join.
- (8) The GVH found that both the effect and the object of the agreement and the behavior of card companies were anticompetitive. At this point it went further than the Commission which only considered it possible that the object might have been illegal.
- (9) The reasoning²⁴⁵ of the GVH regarding the question of the "affect on the trade between Member States" does not seem to be convincing.²⁴⁶

²⁴³ Article 14 (1) of the HCA.

²⁴⁴ European Commission Decision COMP/34.579, *supra* note 2, at 171.

²⁴⁵ GVH Decision pt. 164.

²⁴⁶ E.g. Article 50 (1) and Article 72 (1) of the Act CXL of 2004 on the General Rules of Public Administrative Procedures and Services includes provisions regarding the finding of the facts of the case and the motivation of decisions made in administrative procedures.

- (10) The GVH imposed heavy fines, the Commission did not impose fine in its decision; it ordered that the infringement shall be brought to an end and other duties were imposed on MC too.
- (11) The GVH established infringement related to that period (1997-2008) during which Visa was exempted based on the negative clearance decision of the Commission in the Visa II Case (2002-2007). The GVH disregarded this fact.
- (12) Based on Article 16 (2) of the Council Regulation 1/2003 the GVH should have suspended its procedure until the decision is made in the new Visa proceeding started in 2008 by the Commission. This was solicited by some parties but rejected by the authority.

There is an agreement²⁴⁷ on that issues related to MIF are complicated ones and have to be solved slowly:²⁴⁸ therefore it is important to act carefully on behalf of authorities. The legal (and economic) basis of MIF is not clear yet, and there are complicated policy issues as well in this area of competition law. It is not necessarily so that acquirer banks pass their costs from interchange fee on to merchants. It is logical to believe that acquirer banks determine prices which cover their costs but it always a question of business decision and interchange fee is not automatically built in merchant' fees.²⁴⁹ According to Weizsäcker (2002) “a fallback interchange fee is indispensable for the working of a four party credit card system and that a multilateral agreement to install such a fee is not a price fixing cartel.”²⁵⁰ – The competition law adjudication of interchange fee is not an inclosing question; both related to the MasterCard Decision and the GVH Decision there is an ongoing court supervising

²⁴⁷ Based on the presentations held at the III Lisbon Conference on Competition Law and Economics held on 14-15 January 2010 at the Gulbenkian Conference Centre in Lisbon, Portugal

²⁴⁸ Presentation of Michael Katz held at the III Lisbon Conference on Competition Law 14-15 January 2010, Lisbon, Portugal

²⁴⁹ Pg. 14 in Professor C. Christian von Weizsäcker: Comments Regarding “Reform of Credit Card schemes in Australia II” commissioned report by Professor Michael L. Katz (August 2001), March 14, 2002, available at: www.rba.gov.au/payments.../reforms/cc-schemes/.../mastercard-0302-2.pdf

procedure and there is an ongoing investigation regarding Visa by the Commission. There is a tendency to set or cap interchange fees by the legislation which can be perceived as an intention of the legislature to ‘exempt’ the question (i.e. if market players are entitled to charge a fee in accordance with the relevant statutory provisions, it is not illegal).²⁵¹

It is reasonable to believe that before any legislative action would take place, it is inevitable to have sound basis and sufficient information that the planned legislative action will be of benefit for the consumers and its effects should be examined before implementation.

²⁵⁰ Pg. 14 in Professor C. Christian von Weizsäcker: Comments Regarding “Reform of Credit Card schemes in Australia II” commissioned report by Professor Michael L. Katz (August 2001), March 14, 2002, available at: www.rba.gov.au/payments.../reforms/cc-schemes/.../mastercard-0302-2.pdf

²⁵¹ Hungary, 2010, UK Cruickshank Report 2000

APPENDIX I

**Article 101 (ex Article 81 TEC) of the Treaty on the Functioning of the European Union
- PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE VII:
COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF
LAWS - Chapter 1: Rules on competition - Section 1: Rules applying to undertakings²⁵²**

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

²⁵² Source: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:NOT>

APPENDIX II

Article 11 of the Hungarian Competition Act²⁵³ on the

Prohibition of Agreements Restricting Economic Competition

Article 11

(1)²⁵⁴ Agreements and concerted practices between companies, as well as the decisions of the social organizations of companies, public bodies, unions and other similar organizations of companies, unions (hereinafter referred to collectively as "agreements"), which are aimed at the prevention, restriction or distortion of economic competition, or which may display or in fact displays such an effect, are prohibited. An agreement concluded between companies that are not unrelated shall not be construed as such.²⁵⁵

(2) This prohibition shall, in particular, apply to the following:

- a) fixing the purchase or sales prices, and defining other business conditions directly or indirectly;
- b) restricting manufacture, distribution, technical development or investment or keeping them under control;
- c) dividing the sources of supply and restricting the freedom of choosing from among them, as well as excluding specific consumers and/or business partners from the purchase of certain goods;²⁵⁶
- d) dividing the market, excluding any party from selling, and restricting the choice of means of sales;
- e)²⁵⁷
- f) preventing any party from entering the market;
- g) where, in respect of transactions of an identical value or of the same nature, certain partners are discriminated against, including the setting of prices, payment deadlines, discriminatory sales or purchase conditions or the employment of methods which cause disadvantage to certain business partners in the competition;
- h) rendering the conclusion of a contract conditional upon undertaking any commitment which, due to its nature or with regard to the usual contractual practice, do not form part of the subject of the contract.

(3) The legal consequences which are attached by this Act to any infringement of the prohibition defined in sub-article (1) shall apply concurrently with the legal consequences prescribed in the Civil Code in connection with contracts that violate the provisions of the legal rules.

²⁵³ The Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Hungarian Competition Act, HCA) was passed on 25 June 1996 and subsequently, it was amended several times.

The HCA is available in English at: http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=129&m5_doc=4323&m176_act=22

²⁵⁴ Amended by Sub-articles (1)-(2) of Article I of Act CXXXVIII of 2000.

²⁵⁵ See Government Decree 86/1999 (VI. 11.) Korm.r, Government Decree 53/2002 (III. 26.) Korm.r, Government Decree 54/2002 (III. 26.) Korm.r, Government Decree 55/2002 (III. 26.) Korm.r, Government Decree 18/2004 (II. 13.) Korm.r, Government Decree 19/2004 (II. 13.) Korm.r, and Sub-article (5) of Article 32 of Act XVI of 2003.

²⁵⁶ Established: by paragraph (6) Article 29 of Act XLVII of 2008. In force: as of 01. 09. 2008.

²⁵⁷ Repealed by Sub-article (1) of Article 62 of Act LXVIII of 2005, effective as of 1 November 2005.

APPENDIX III

Comparison of Commission Decisions and the GVH Decision

The following elements (listed in the left column) must be present in order to constitute an infringement of Article 81 (1)²⁵⁸:

Subject matter of the proceeding	Visa I Decision	Visa II Decision	MasterCard Decision	GVH Decision
	internal rules governing the relationship between Visa and its members ²⁵⁹	intra-regional MIF scheme of Visa International, as applied to cross-border operations	Intra-EEA and the SEPA/Intra-Eurozone fallback MIFs as applied to cross-border operations	MIF agreed by banks and card companies as applied to domestic operations
The conduct of more than one undertaking is at issue	yes ²⁶⁰	not expressly examined (but yes)	yes, MasterCard was considered as a network	several card issuing banks (namely 23) operating in Hungary and two payment card companies, VISA Europe Ltd. and MasterCard Europe S.p.r.l.
The undertakings are independent (i.e. no collective economic entity)	Not expressly examined	Not expressly examined	Not expressly examined	7 issuing banks which signed the agreement on MIF in 1996 and the banks which joined later to it, plus Visa and MasterCard
There is an agreement between the undertakings or a decision by an association of undertakings or a concerted practice	“the rules governing the Visa payment card systems can be regarded either as decisions of an association of undertakings or as agreements between undertakings ²⁶¹ ”	“the rules governing the Visa payment card systems can be regarded either as decisions of an association of undertakings or as agreements between undertakings” ²⁶²	There is a decision by an association of undertakings before and after the 2006 IPO as well ²⁶³	agreement between the undertakings (Bank Card Forum) plus decision by an association of undertakings regarding Visa and MC (because their rules facilitated the BCF)

²⁵⁸ Essential EU Law in Charts, Christa Tobler, Jacques Beglinger, 2nd "Lisbon" edition, HVG-Orac, pg. 186

²⁵⁹ “Visa rules contain clauses with regard to the relationship between acquiring banks and merchants (such as the ‘no-discrimination rule’ and the ‘honour all cards rule’)” Visa I Decision pt. 3. 3.1 (10).

²⁶⁰ Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. 7.4 (53)

²⁶¹ Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. 7.4 (53)

²⁶² Visa II Decision, (24 July 2002) COMP/D1/29.373, OJ L318, 22.11.2002. pt. 7.2 (55)

²⁶³ MC Decision pt. 362, 372-374

There is an actual or potential effect on trade between Member States	potential effect on trade between the Member States ²⁶⁴	potential effect on trade between the Member States, reference was made to the Visa I Decision. ²⁶⁵	(1) Competition bw. Payment networks, (2) competition bw. Issuing banks, (3) competition bw. acquiring banks (4) There might be other market segments but no further analysis ²⁶⁶	potential effect on trade between Member States, but the reasoning is not very convincing
The object or effect is the prevention, restriction or distortion of competition	any possible effect of the rules are not appreciable other rules are not restrictive within the meaning of Article 81(1) of the Treaty ²⁶⁷	„MIF in the Visa system restricts competition ²⁶⁸ MIF is the main cost component of merchant service charge and its economic impact is very substantial, it may have appreciable effect on competition. ²⁶⁹	The effect is restriction of competition ²⁷⁰ there might be an object of restricting the competition too ²⁷¹	Both the object and the effect of the agreement in question was the prevention, restriction or distortion of competition
The case does not fall under the exemption in Article 81 (3) of the EC Treaty	„Not examined as an exemption, but as to the honour all cards rule the Commission found to fall outside Article 81(1) of the Treaty and stressed that this rule promotes the development of its payment systems ²⁷²	YES, granted for 5 years „The amended MIF contributes to technical and economic progress, while providing a fair share of these benefits to each of the two categories of user of the Visa system, and thus meets the first and second conditions of Article 81(3). ²⁷³	MIF is not necessary to the operation of the system MIF does not fulfill the first three requirements of Article 81 (3) If competition would be stronger, there would be no need for the intervention of the Commission	No possibility of getting exempted, the analysis of the authority is not very detailed

²⁶⁴ Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. 7.6 (72)

²⁶⁵ Visa II Decision, (24 July 2002) COMP/D1/29.373, OJ L318, 22.11.2002. pt. 7.6 (72)

²⁶⁶ MC Decision pt. 307

²⁶⁷ Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. 7.5.1.2 (56) and 7.5.1.3 (62)

²⁶⁸ Visa II Decision, (24 July 2002) COMP/D1/29.373, OJ L318, 22.11.2002. pt. 7.4.3 (64)

²⁶⁹ Visa II Decision, (24 July 2002) COMP/D1/29.373, OJ L318, 22.11.2002. pt. 7.5.2 (71)

²⁷⁰ MC Decision pt. 407-408

²⁷¹ MC Decision 402, 405

²⁷² Visa I Decision, (7 August 2001) COMP/D1/29.373, OJ L293, 10.11.2001. pt. 7.5.1.6 (67) and (69)

²⁷³ Visa II Decision, (24 July 2002) COMP/D1/29.373, OJ L318, 22.11.2002. pt. 8.1.3 (95)

GLOSSARY

Here a list of basic, special terms can be found which are used in the bank card industry. As the GVH – contrarily to the Commission – did not include a list of definitions in its Decision in the followings the definitions of the MC Decision will be used²⁷⁴. In case the GVH used a term with a different content in its Decision from the one used by the Commission a reference is made.

Acquiring bank	A credit institution that has a contractual relationship with a merchant for accepting a certain payment card at a POS [“Point Of Sale”].
Cardholder	A consumer that holds a payment card as an instrument for payment at a POS. Cardholders may be natural or legal persons. Legal persons hold cards for employees who then use such cards for payments for the account of the legal person (their employer).
Cardholder fee	Typically a yearly flat rate fee paid by a cardholder to the issuing bank for the use of a payment card.
Clearing	A service to member banks that is needed for a payment transaction to be settled. It occurs after a payment card transaction has been authorized by the issuing bank.
Clearing House	Refers to a bank which sends information on successful transactions (typically) in batched form (that is to say in a package of messages) to the acquiring bank for crediting on the merchant account and to the issuing bank for debiting on the cardholder account.
Cross-border interchange fees	The Intra-EEA fallback interchange fees.
Cross-border (payment card) transaction	A payment card transaction that occurs between an issuing bank and an acquiring bank that are located in different countries.
Domestic (payment card) transaction	A payment card transaction that occurs between an issuing bank and an acquiring bank in the same country.
Domestic MIF or Intra-country fallback interchange fee	Interchange fee that apply in the MasterCard payment organization as “fallback” to payment card transactions with MasterCard or Maestro branded payment cards within a Member State of the EEA. They apply to such domestic transactions unless the payments are subject to a bilateral agreement between the acquiring bank and the issuing bank involved. A domestic MIF replaces the Intra-EEA fallback interchange fees as fallback rate.
European Board	A board of European bank delegates whose meetings are organized by staff of MasterCard Europe S.p.a. and which set Intra-EEA fallback interchange fees until the IPO [“Initial Public Offering”] of MasterCard Incorporated on 25 May 2006 when a part of its shares were for the first time publicly traded at the New York Stock Exchange.

²⁷⁴ MC Decision pg. 7-11.

Global Board	Refers at the same time to the Board of Directors of MasterCard International Incorporated and to the Board of Directors of MasterCard Incorporated whose meetings are typically held at the same time due to the (partial) identity of the managers involved.
Honour All Cards Rule (HACR)	A network rule of MasterCard that obliges merchants to accept all valid MasterCard and Maestro branded cards and transactions equally and without discrimination according to the type of card used and the bank issuing the card.
Interchange fee	Refers to a fee paid by an acquiring bank to an issuing bank (or <i>vice versa</i>) for each POS payment card transaction. MasterCard refers to “fallback” or “default” interchange fees for those interchange fees that apply only in the absence of other agreements on interchange fees between the issuing and the acquiring bank. An interchange fee rate can be expressed as an ad valorem (a percentage) rate and/or a flat fee per payment.
Intra-EEA fallback interchange fee	Interchange fees that apply in the MasterCard payment organization as “fallback” to cross-border and/or domestic payment card transactions with MasterCard or Maestro branded payment cards between Member States of the European Economic Area or within a Member State of the European Economic Area. As “fallback” means that the Intra-EEA fallback interchange fees apply only if the payment is not subject to (i) a bilateral agreement between the acquiring bank and the issuing bank involved in the payment; (ii) a multilateral agreement between delegates on a national forum of MasterCard member banks which determines a specific interchange fee for the payment. MasterCard called Intra-EEA fallback interchange fees initially “Intra-EU fallback interchange fees” when the fees were notified in 1992.
Issuing bank	A credit institution that has a contractual relation with a cardholder which allows for the provision and use of a payment card.
Merchant	An entity that accepts payments by means of cards. Merchants can be retailers but also other undertakings such as airlines.
Merchant service charge (MSC) or merchant fee or merchant discount rate	A fee paid for each transaction by a merchant to an acquirer for accepting a card for payment. MSCs can be expressed as <i>ad valorem</i> (a percentage) rate and/or a flat fee per payment.
Multilateral Interchange Fee (MIF)	MIFs are based on a collective agreement between member banks of a payment association or the decision of a body which has been empowered by the member banks to determine the level and structure of interchange fees with binding force for them. A MIF is commonly distinguished from bilateral interchange fees which are agreed upon between two parties only, that is to say the issuing and the acquiring bank.
Payment card system/scheme/network	A technical and commercial infrastructure set up to serve one or more particular card brands for payments at a Point of sale.

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