

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 24 July 2002

**relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement
(Case No COMP/29.373 — Visa International — Multilateral Interchange Fee)**

(notified under document number C(2002) 2698)

(Only the English text is authentic)

(Text with EEA relevance)

(2002/914/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by Regulation (EC) No 1216/1999 ⁽²⁾, and in particular Article 6 and Article 8(1) thereof,

Having regard to the application for negative clearance and the notification with a view to an exemption submitted by Visa International on 31 January 1977 pursuant, respectively, to Articles 2 and 4 of Regulation No 17,

Having regard to the complaint lodged by EuroCommerce on 23 May 1997 pursuant to Article 3(2)(b) of Regulation No 17,

Having regard to the Commission decision of 6 May 1999 to initiate proceedings in this case,

Having given the parties concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 19(1) of Regulation No 17 and with Commission Regulation (EC) No 2842/98 of 22 December 1998, on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty ⁽³⁾,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case ⁽⁴⁾,

Whereas:

I. THE FACTS

1. INTRODUCTION

- (1) On 31 January 1977 Ibanco Ltd, since 1979 known as Visa International, notified various rules and regulations governing the Visa association and its members to the Commission, applying for negative clearance under Article 81(1) or, in the alternative, an exemption under Article 81(3) ⁽⁵⁾.

⁽³⁾ OJ L 354, 30.12.1998, p. 18.

⁽⁴⁾ OJ C 286, 22.11.2002.

⁽⁵⁾ In its letter of 23 March 1994 Visa International requested the Commission to extend its existing notification to Article 53(1) and (3) EEA.

⁽¹⁾ OJ 13, 21.2.1962, p. 204.

⁽²⁾ OJ L 148, 15.6.1999, p. 5.

- (2) After having initially sent a comfort letter, in 1992 the Commission re-opened the investigation in the Visa case, following a complaint and the comfort letter was withdrawn. The re-opened investigation also took into account a complaint filed on 23 May 1997 by EuroCommerce, a European retailers organisation, concerning various aspects of, *inter alia*, the Visa International payment card scheme, in particular interchange fees. In its decision of 9 August 2001⁽⁶⁾, the Commission cleared certain provisions in the Visa rules under Article 81(1) of the EC Treaty/Article 53(1) of the EEA Agreement, however this decision explicitly did not cover the interchange fee issue.
- (3) The present decision relates to the intra-regional interchange fee scheme of Visa International for consumer cards, as applied to cross-border point of sale Visa card payment operations between EEA Member States and as modified as described in section 3.2.3.

2. THE PARTIES AND THE COMPLAINANT

2.1. VISA INTERNATIONAL AND ITS MEMBERS

- (4) Visa International Service Association ('Visa') is a privately owned, for-profit corporation owned by about 20 000 member financial institutions from around the world. Visa's revenue amounts to USD 1 455 million worldwide. Visa, which is incorporated in the United States of America, operates the Visa card system network. To that end it manages trade marks, lays down the rules of the system and provides authorisation and clearing services via a world-wide computer and telecommunication network, called VisaNet. Visa itself does not issue Visa cards to cardholders nor does it contract merchants for Visa card acceptance, but its member financial institutions, which have received a licence to that end from Visa, do.
- (5) Visa has divided the territory in which it is active into six regions worldwide. In the Visa EU Region, which also covers Iceland, Liechtenstein, Norway, Turkey, Israel, Cyprus, Malta and Switzerland, in addition to the Community, there are over 5 000 Visa members. Decision making is delegated to the Visa EU Regional Board of Directors ('Visa EU Board'), which is elected every two years from Visa member financial institutions in the EU Region. The Visa EU Board is responsible for intra-

regional affairs, such as for example, the adoption of regional regulations like the Visa EU Regional Operating Regulations.

- (6) There are various classes of membership in the Visa corporation but broadly speaking all classes of membership are open to any institution organised under the commercial banking laws of its own country and authorised to accept demand deposits. However, Visa does not accept for membership any applicant that is deemed by the Board of Directors to be a competitor of the corporation⁽⁷⁾.

2.2. EUROCOMMERCE

- (7) EuroCommerce is a retail, wholesale and international trade representation in the European Union. It has about 56 members throughout the EEA.

3. THE AGREEMENTS

3.1. GENERAL

- (8) The notification by Visa concerns rules and regulations governing the Visa association and its Members, that is, the Certificate of Incorporation, International By-Laws and Regional Board Delegations, as well as the international provisions relating to Visa's payment cards. These are the General International Operating Regulations, European Union Regional Operating Regulations, Dispute Resolution Rules and Card and Marks Specifications. All notified Visa rules and regulations will hereinafter be referred to as 'the Visa Rules'.
- (9) The present decision relates to the proposed modified Visa EU intra-regional interchange reimbursement fee scheme for consumer cards⁽⁸⁾, to be implemented in the Visa Rules in the course of 2002⁽⁹⁾. This intra-regional interchange fee scheme is applicable to cross-border Visa consumer card transactions at merchant outlets in the EEA (that is the 15 Member States of the European Union as well as Iceland, Liechtenstein and Norway), and by default to domestic Visa card payment operations within a Member State, in cases where no distinct Visa interchange fee rate has been set by the national Visa

⁽⁶⁾ OJ L 293, 10.11.2001, p. 24.

⁽⁷⁾ The Visa membership provisions are under examination in the context of case COMP/37.860 and are not the subject of the present decision, which is adopted without prejudice to the outcome of the Commission's examination of that case.

⁽⁸⁾ As approved by the Visa EU Board on 27 June 2001, and subsequently modified and extended, the final Visa Proposal being described in section 3.2.3 below.

⁽⁹⁾ With the exception of the new distinct intra-regional interchange rate for mail order and telephone payments (see section 3.2.3.4 below), which will be implemented by April 2003.

member for that Member State ⁽¹⁰⁾. However, the present decision relates only to the notified intra-regional interchange fee of Visa as applied to cross-border Visa card payment operations between EEA Member States, not to any domestic interchange fees set by national Visa members, nor to any application of the intra-regional interchange fee of Visa to domestic Visa card payment operations within a Member State. Furthermore, the present decision does not apply to the current intra-regional interchange fee of Visa for commercial cards [...] ^(*) (see footnote 12 below).

- (12) The MIF was introduced by Visa in 1974 (at that time still called Ibanco Ltd). In 1981, with the introduction of a separate administrative region covering the EU, a specific MIF for intra-regional transactions in the EU was set. Until Visa's proposal for a modified MIF scheme, the average level of the MIF had been gradually increased. According to Visa the weighted average of the various interchange fee levels in the year 2000 was [...] ^{*}.

3.2.2. *The current MIF scheme*

3.2. THE VISA INTERCHANGE REIMBURSEMENT FEE

3.2.1. *General*

- (10) Pursuant to the Visa Rules, in the absence of a bilateral agreement, the acquiring bank (that is, the bank which contracts merchants for Visa card acceptance) has by default to pay to the issuing bank (that is, the bank which issues Visa cards to consumers) an interchange reimbursement fee for each transaction with a Visa card ⁽¹¹⁾. In the EU Region this interchange fee is set by the Visa EU Board; its exact level varies according to the type of Visa card used (consumer or commercial cards) and according to the type of transaction. Bilateral agreements between banks on interchange arrangements are permitted, with no restrictions on their content.
- (11) The multilaterally-determined interchange fee (hereafter MIF) which is set by the Visa EU Board applies by default to all EU intra-regional Visa card transactions, that is transactions where a Visa card, issued in Member State A is used at a merchant's outlet in Member State B. According to Visa, in 1999 of all Visa card transactions at merchant outlets in the EU/EFTA countries about 10 % were intra-regional transactions. Where national Visa members have not set (multilateral or bilateral) interchange rates for domestic transactions, the default fee set by the Visa EU Board also applies to such domestic transactions.

- (13) As from its introduction, the MIF set by the Visa EU Board has been set as a percentage of net sales. Despite the carrying out of a cost study for reference purposes, the Visa EU Board has been free to set the MIF at any level it considers appropriate, independently of any specific services provided by issuing banks to the benefit of acquiring banks.

- (14) Visa does not consider its MIF as a price for specified services provided by issuers to acquirers or merchants. Rather it considers the MIF as a transfer between undertakings that are cooperating in order to provide a joint service in a network characterised by externalities and joint demand. The MIF is, according to Visa, necessary as a financial adjustment to the imbalance between the costs associated with issuing and acquiring and the revenues received from cardholders and merchants. Visa claims that in the present Visa scheme, the revenues from cardholders are materially lower than the costs incurred by the issuing bank. Conversely, revenues of acquiring banks from merchants are materially in excess of the costs on behalf of the payment system as a whole incurred by the acquiring bank. On this view, the interchange fee serves to adjust these imbalances, with a view to increasing demand for and use of the payment service. Visa claims that without an appropriate interchange fee, the system would not operate at its optimal level and the key strength of the Visa system, namely a large number of cardholders and merchants, would be undermined.

⁽¹⁰⁾ According to Visa these Member States are Greece, Ireland, Italy, the Netherlands and Sweden. The Visa Rules also contain provisions relating to cash disbursement reimbursement fees, to be paid by the ATM acquirer to the card issuer. These fees are not the subject of the complaint by EuroCommerce, nor of the present decision.

^(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

⁽¹¹⁾ Visa defines the interchange reimbursement fee as 'a fee reimbursed by an acquirer to an issuer in the clearing and settlement of an interchange transaction' (Visa EU Regional Operating Regulations, [...] ^{*}).

- (15) Visa has in the past considered the level of the MIF and the way in which it is determined by the Visa EU Board as a business secret, not to be disclosed by the Visa members to their clients. Therefore, acquiring banks which in practice pass on to merchants the interchange fee that they have to pay to the issuing bank in part or in whole, were not permitted to inform merchants about the level of the MIF. Therefore, merchants have not been made aware of the exact components of the MIF in their merchant fee.

3.2.3. The modified MIF scheme

- (16) On 27 June 2001 the Executive Committee of the Visa EU Board approved a proposal for a modified MIF scheme. This proposal was further clarified and slightly amended by Visa following comments of the Commission and third parties. The modified scheme relates to point of sale (POS) transactions with consumer cards⁽¹²⁾. The final proposed modified MIF scheme involves four main changes as compared with the present scheme.

3.2.3.1. Reduction of the level

- (17) Under the modified scheme, Visa will reduce the overall level of the intra-regional MIF applicable to consumer card payments in the Visa EU Region through the introduction of a fixed rate per transaction MIF for debit cards⁽¹³⁾. Visa will also carry out a phased reduction of the level of the *ad valorem* per transaction MIFs applicable to certain types of credit and deferred debit cards.
- (18) As concerns debit cards, Visa will introduce flat-rate intra-regional MIFs before the end of 2002. Visa has undertaken that the yearly weighted average of the different MIF levels (weighted by the volume of transactions in each category) will not exceed EUR 0,28. This fee will be maintained for five years, subject only to adjustment in the event of a significant change in issuer's costs as included in the cost study as described in section 3.2.3.2. Visa will bear the burden of proof to demonstrate such significant change. According to Visa this represents a reduction of more than 50 % for an average debit card transaction, as compared with the continued application of the current intra-regional MIF for debit cards.

⁽¹²⁾ Commercial cards (that is, cards issued to business users for their business expenses only) were excluded from the initial proposal for modifications because, according to Visa, they constitute a relatively new product with specific characteristics which may only be issued to individuals to enable them to pay for business expenditures. Following the comments made by the complainant and third parties (see section 6 below) [...]*. However, as said above (recital 9) the present decision does not cover the current [...]* MIF for commercial cards. Where in this decision reference is made to the Visa proposal for a modified MIF scheme, this relates exclusively to the proposal made with regard to Visa EU intra-regional POS transactions with consumer cards.

⁽¹³⁾ Debit cards are also known as direct debit cards or immediate debit cards.

- (19) The rates of MIF applicable to intra-regional transactions on credit and deferred debit cards will be reduced over a five-year period. These reductions will leave the weighted average MIF at 0,7 % by 2007 (according to Visa's estimate of likely transaction volumes at that date in the different categories of transactions to which different MIF levels are applicable), compared with [...]* in 2000⁽¹⁴⁾.
- (20) Visa estimates that the effect of the modifications (debit, deferred debit and credit cards combined) on interchange revenues for issuing banks from intra-regional transactions will be a reduction of more than 20 % over the five-year period, compared with what the revenue would have been if the offer were not implemented.

3.2.3.2. Objectivity

- (21) Under the modified scheme, Visa will use three categories of issuers' costs involved in supplying Visa payment services as an objective criterion against which to assess the Visa intra-regional MIFs currently paid by acquirers to issuers on POS transactions. These three cost categories are: (1) the cost of processing transactions, (2) the cost of the free funding period for cardholders⁽¹⁵⁾ and (3) the cost of providing the 'payment guarantee'⁽¹⁶⁾. A cost study, with data being split into figures relating to immediate debit cards and data referring to deferred debit and credit cards, will quantify the cost elements comprised within each of the three cost categories⁽¹⁷⁾.
- (22) Visa will submit to the Commission, within [12 to 18 months]* of the adoption of this decision, the first cost study showing the calculations based on the three cost categories mentioned above (data being split into figures relating to credit and deferred debit cards, and data relating to debit cards). The cost study will be carried

⁽¹⁴⁾ The reduction in the weighted average MIF for credit and deferred debit transactions is to be achieved in the following stages: 2002, [0,81 % to 0,93 %]*; 2003 [0,78 % to 0,90 %]*; 2004, [0,77 % to 0,89 %]*; 2005 [0,74 % to 0,86 %]*; 2006 [0,70 % to 0,82 %]*; 2007, 0,7 %.

⁽¹⁵⁾ This corresponds, for deferred debit cards, to the cost of any time difference between payment to the acquirer and debiting of funds from the cardholder's current account. For credit cards, it corresponds only to the cost of any time difference between payment to the acquirer and the time when either payment must be made by the cardholder, or the balance of the credit card bill rolled over into the extended credit facility, to which a rate of interest is applied (that is, it does not include any costs arising from the granting of extended credit to cardholders). For debit cards, it represents only the processing time necessary to debit the transaction to the cardholder account; for deferred debit and credit cards it represents also the extra interest-free period before which payment must be made or extended credit used.

⁽¹⁶⁾ Visa does not use the terminology 'payment guarantee'. In the present decision, this term is used to describe the promise of the issuing bank to honour payments to the acquiring bank, even those which turn out to be, *inter alia*, fraudulent or for which the cardholder ultimately defaults, on condition that the merchant undertakes all the security checks necessary to enable the issuing bank to promise payment. As concerns default losses, only losses occurring during the free-funding period are to be included in the MIF cost study.

⁽¹⁷⁾ Visa has informed the Commission of the subcategories of costs which will be included within the three main categories. This information is considered as business secrets by Visa.

out by Visa and audited by an independent firm of accountants. The Commission will approve the firm of accountants who will audit the cost study. The data used in the preparation of the cost study will be provided by a representative sample of Visa member banks from the Visa EU Region, located within the EEA. Further cost studies will be prepared, and copies submitted to the Commission, no less frequently than every [18 to 36 months]* thereafter.

- (23) For the sake of full transparency on the MIF cost study, it can be specified that, in the proposal made by Visa, the cost elements to be included under the three cost categories can be broken down as follows (although this information does not constitute a basis for the Commission's reasoning in granting an exemption under the terms of Article 81(3) of the Treaty):

immediate debit cards:

- the cost of processing transactions, that is, the following subcategories of costs: [...]*,
- the free funding period (as defined in footnote 15 above),
- the cost of the 'payment guarantee', that is, the following subcategories of costs: [...]*;

deferred debit and credit cards:

- the cost of processing transactions, that is, the following subcategories of costs: [...]*,
- the free funding period (as defined in footnote 15 above),
- the cost of the 'payment guarantee', that is, the following subcategories of costs: [...]*.

- (24) Under the modified scheme, the effective level of the MIFs will not exceed the sum of these three categories of costs except in exceptional circumstances, such as for example, to discourage behaviour which could impede technical progress, and following consultation with the Commission. Below this level Visa will have discretion to determine the MIF level which it considers to be commercially appropriate. The level resulting from the cost study will thus constitute the cap for the MIFs for consumer card payment by debit card on the one hand and deferred debit and credit card on the other, regardless of the specific reductions agreed by Visa (detailed in section 3.2.3.1).

3.2.3.3. Transparency

- (25) Furthermore, Visa will change its EU Regional Operating Regulations so as to allow member banks to disclose to merchants both the level of the Visa EU intra-regional MIFs in force and the relative percentages of the three cost categories, should merchants request such information. Merchants are to be made aware of the possibility to request this information from their banks.

3.2.3.4. Separate MIF for mail order/telephone order transactions

- (26) Following the comments made by third parties in reaction to the 19(3) notice of 11 August 2001 (section 6.2. below) Visa proposed to introduce a separate intra-regional MIF rate for mail order/telephone order (MO/TO) transactions. The objective criterion for this will be based on the same information gathered for the deferred debit and credit card cost study, but corrected as to two specific cost categories, under 'payment guarantee' and 'processing of transactions' to reflect the costs specific to MO/TO transactions⁽¹⁸⁾. Visa will apply the abovescribed cost study for MO/TO in the same way as it will apply the relevant cost study for credit/deferred debit transactions, i.e. allowing for the fact that the MIF level resulting from the cost study is a (maximum) cap. The MO/TO MIF is not included in the Visa offer to reduce the level of MIFs, described in section 3.2.3.1.

3.3. THE COMPLAINT

- (27) In its complaint, and in its subsequent submissions, EuroCommerce has objected in principle against multilateral interchange fees. Notwithstanding the modifications proposed by Visa, EuroCommerce has maintained its complaint. EuroCommerce considers the interchange fee as a mechanism to shift onto merchants (and indirectly onto customers who pay by means other than Visa card) the costs of free advantages offered to cardholders. Since the level of the fee is said to be agreed on between the banks without any pressure from the market the setting of the MIF amounts, according to EuroCommerce, to a price-fixing cartel.
- (28) EuroCommerce considers that the MIF is not indispensable for the Visa scheme to function successfully, and has provided examples of payment card schemes, which, it claims, function without a MIF. In particular, EuroCommerce has referred to the German ec-Karte scheme, an allegedly four-party domestic debit card scheme functioning without interbank fees, depending on the function of the card chosen by the merchant. Ec-Karte cards can have different functions (e.g. guaranteed or unguaranteed) and the merchant decides which function he wants to use. In particular, merchants are free to choose a guaranteed payment (in which case they have to pay a certain fee to the issuing bank) or an unguaranteed payment. Moreover, EuroCommerce has provided the example of the Australian EFTPOS debit card scheme, which functions without a multilateral interchange fee paid by the acquiring bank to the issuing bank. Instead, in this payment card system there are bilaterally-agreed

⁽¹⁸⁾ These categories are [...]* and [...]*.

fees, which go in the reverse direction (from issuing bank to acquiring bank). EuroCommerce has also put forward the example of the Canadian Interac scheme, a domestic four party debit card scheme which functions with an MIF set at zero ⁽¹⁹⁾.

4. THE ECONOMIC IMPACT OF THE VISA MIF

- (29) As said above (recital 10) the Visa MIF has to be paid for each transaction with a Visa card. Given the importance of Visa card transactions in the EEA it is clear that these fees can add up to substantial sums. With over 145 million cards in the EU Region, over 4 million merchants outlets accepting Visa cards and about 5 250 million transactions per year, Visa estimates that the actual amount of international interchange paid by Visa acquirers to Visa issuers in the EU on international transactions (made up of both intra-regional and international interchange) in 1999 was about [...]*.

5. THE PROCEEDINGS

- (30) After the re-opening of the Visa case in 1992, the Commission sent several requests for information pursuant to Article 11 of Regulation No 17, in particular to Visa and several of its members as well as to EuroCommerce. On 29 September 2000 the Commission sent a Supplementary Statement of Objections to Visa with regard to its MIF, stating that it restricted competition within the meaning of Article 81(1) and that it had not been established that the conditions for an exemption under Article 81(3) were fulfilled. Visa's written observations were received on 11 December 2000 and on 6 February 2001 an oral hearing took place. This hearing was attended, apart from by Visa itself, also by EuroCommerce and by third parties Europay International and MasterCard International. In March 2001 supplementary observations, particularly on issues which arose out of the oral hearing, were received from Visa, from EuroCommerce and from the third parties which attended the hearing.
- (31) In April 2001 Visa contacted the Commission to discuss possible changes to its MIF. A concrete proposal was approved by the Executive Committee of the Visa EU Board on 27 June 2001. On 11 August 2001 the Commission published a notice in the Official Journal (OJ C 226, p. 21) describing the proposed modified MIF scheme and inviting interested third parties to provide their comments.

⁽¹⁹⁾ From EuroCommerce's complaint, it is clear that it is not advocating the 'prohibition of the MIF' in the sense of the removal of any default arrangement on the terms of exchange of debt between the issuing bank and the acquiring bank (which would leave issuing banks free to impose unilaterally any interchange discount rate they wish), but rather, EuroCommerce wishes the Commission to impose on Visa 'the exchange of paper at par', which would amount to leaving the MIF in place but reducing its level to zero, as in the Canadian Interac system.

- (32) On 7 September 2001 the Commission sent an Article 6 letter pursuant to Regulation (EC) No 2842/98, rejecting on a preliminary basis the complaint by EuroCommerce. The reply from EuroCommerce was received on 29 October 2001.

- (33) Further contacts between the Commission and Visa led to one further specific modification (concerning mail order and telephone operations), leading to the final version of the proposed modified MIF as described in section 3.2.3. The complainant was given the opportunity to comment on that further modification, by letter of 22 March 2002.

6. COMMENTS RECEIVED ON THE PROPOSED MODIFIED VISA MIF SCHEME, AND OBSERVATIONS OF THE COMMISSION

6.1. COMMENTS FROM THE COMPLAINANT EUROCOMMERCE

- (34) An Article 6 letter was sent to EuroCommerce on 7 September 2001 relating to its complaint against the MIF in the Visa scheme in the parallel EuroCommerce proceeding ⁽²⁰⁾. In its reply dated 29 October 2001, EuroCommerce opposes any exemption for the proposed modified MIF scheme of Visa. EuroCommerce holds firstly that the agreement setting the MIF is a price cartel and as such not exemptible under any circumstances. Furthermore, EuroCommerce adds, in exempting it, the Commission would be acting as a price regulator. In its view, Visa's proposal of a cost-based MIF is impossible to implement, since it is not feasible to identify accurately a cost price for a service in the banking sector, due to the high proportion of general overhead costs and the arbitrary nature of allocation of these general costs between different banking products. According to EuroCommerce, any cost study must be carried out independently by an external auditor not designated by Visa. EuroCommerce argues against the inclusion of all three of the cost elements included in the proposed modified Visa MIF, on the basis that none of them relates to a service which is to the benefit of merchants; consequently, there should be no costs included in the MIF calculation, and the MIF should be zero. EuroCommerce further argues that the proposed reductions in MIF levels should come into effect in full immediately, and in any case probably represent cost reductions already achieved or planned. Finally, according to EuroCommerce, the revealing of MIF levels and constituents to merchants will not increase the negotiating power of merchants ⁽²¹⁾.

⁽²⁰⁾ Case COMP/36.518. See recital 2, recital 7, and recital 27 to 28.

⁽²¹⁾ The Commission's observations on these comments from the complainant can be found in recital 39 below, insofar as they are not dealt with in part II of the present decision (see in particular sections 7.4.3 and 8.1.3). EuroCommerce made two further points which are not dealt with in the present decision, since they fall outside its scope. These are firstly that the Visa MIF for commercial cards (not covered by the Visa proposal described in the Article 6 letter) was not exemptible, and secondly that the intra-regional MIF of Visa should be considered in conjunction with the MIFs for domestic Visa payments applicable in the Member States (these are not part of Visa International's notification).

6.2. COMMENTS FROM THIRD PARTIES

(35) Following the publication of a 19(3) notice on 11 August 2001, 140 replies were received from third parties: two from payment card systems other than Visa, one from a bank, two from national competition authorities, one from a private individual and the remaining replies from retail merchants or organisations of such ⁽²²⁾.

(36) One other card payment system commented that it failed to understand how in law, a reduction in the level of a price could have any relevance for the granting of an exemption; it had the impression that the Commission was acting as a price regulator in this regard and thus abusing its powers. It held that capping MIFs at or below relevant costs would undermine the development of four-party card payment systems and slow down innovation and technological development. In its view MIFs do not restrict competition at all. The second card payment system to reply, while defending MIFs as inherent in a four-party card payment system, considered that the cost of any free funding period concerns only the relationship between a card issuer and a cardholder, and noted that that cost is excluded from the calculation of its own MIF. It also opposed the transparency provisions, on the grounds that it is unprecedented to oblige the revealing of wholesale costs to retail customers.

(37) One of the national authorities that replied considered that the changes to the Visa MIF did not justify a negative clearance, but did not state whether they merited an exemption, in its view. According to another national authority an MIF in a four-party card payment scheme is a price fixing agreement within the meaning of Article 81(1), which may however qualify for exemption, provided that the level of the fee is not excessive. In this context it held that the costs of processing and some of the costs of the 'payment guarantee' relating to fraud may be included in calculating the appropriate level of the MIF; however it did not consider the free funding period and the cardholder default element in the 'payment guarantee' as justified cost components in the MIF.

(38) The replies from retailers (and an individual), all considered the changes to the Visa MIF, compared to the unrevised MIF that was the subject of a supplementary State-

ment of Objections in September 2000, as not justifying a change in the Commission's position. Some replies nevertheless welcomed the improvements made by Visa to its MIF, but most regarded the changes as minor in their effect. Specific points made on consumer cards included the following ⁽²³⁾:

- (a) debit cards are hardly used for cross-border payments (mainly for ATM cash withdrawals), and therefore the seemingly drastic reduction in the MIF for such cards will be of limited effect;
- (b) there are inadequate safeguards to ensure that Visa's cost study will be carried out in an independent and neutral manner; use of an external auditor is not an adequate guarantee of this, and the cost study should therefore be carried out by experts designated by the Commission;
- (c) the inclusion of the cost of the 'payment guarantee' in the MIF is not justifiable for Visa payments which are not guaranteed for the merchant, such as 'card not present' transactions (payments by telephone, mail order, and over the internet);
- (d) the reduction of around 20 % in the estimated MIF revenue for issuing banks is largely a consequence of cost reductions already decided (such as the EMV standard for cards), and of the forecast increasing use of electronic transactions and chip cards, which already bear a lower MIF than non-electronic transactions;
- (e) merchants should not pay for the free funding period in particular, since they considered it not to be at all to their benefit, but only that of the cardholder. In particular they denied that it led to any increase in aggregate consumer spending;
- (f) some replies opposed the inclusion of processing costs in the MIF, on the grounds that any processing carried out by the card issuing bank is for the benefit of its own customer, the cardholder;
- (g) the measures to increase transparency, while welcomed by retailers, will not significantly increase the negotiating power of merchants, since the MIF will still effectively constitute a floor to merchant fees.

⁽²²⁾ Ninety-five of the replies in the latter category had identical text, and many others displayed a high degree of similarity in their drafting.

⁽²³⁾ Many replies also commented that since no modifications to the MIF for Visa commercial cards had been offered since the issuing of the supplementary Statement of Objections of 29 September 2001, there was no reason for the Commission to change its position in this regard, and envisage an exemption. As the MIF for commercial cards is not covered by the present decision, there is no need to consider that point.

6.3. OBSERVATIONS OF THE COMMISSION

(39) The Commission makes the following observations on those comments from the complainant and from third parties:

— the existence of general overhead costs in all economic sectors is not an obstacle to the production of meaningful and useful results by the application of analytical accountancy methods, in which a great deal of expertise exists in independent accountancy firms, some of them specialised in the banking sector,

— as concerns the points made about the reduction in the level of MIFs in recital 38, the Commission emphasises that reductions in the level of MIFs were part of a package of modifications proposed by Visa, together with elements on 'objectivity' and 'transparency'; these proposals must be considered as a package, not in isolation. The Commission does not consider that in evaluating such a package of proposals under Article 81(3), it is acting as a price regulator ⁽²⁴⁾,

— on debit cards (recital 38(a)), the Commission does not consider that the market share of such cards is a criterion for determining whether any modification to the MIF for such cards qualifies for an exemption,

— as regards the cost study (recital 38(b)), Visa has assured the Commission that they will be audited by an independent firm of accountants, bound by rules of professional ethics which guarantee its independence and with specific experience in payment card cost studies,

— on 'Card not present' transactions (recital 38(c)), firstly as concerns internet payments, Visa pointed out that as from April 2002, such payments benefit from a full 'payment guarantee', on condition that a security software, entitled '3-D secure' be used by the retailer. The use of this software, whose cost is far from prohibitive according to Visa, is taken as meeting the relevant criteria for benefiting from the 'payment guarantee'. As for the other category of 'card not present' transactions, mail order and telephone payments, Visa confirmed that these do not benefit from any guarantee against fraud-related losses, and agreed to create the distinct 'MO/TO' MIF rate described above in section 3.2.3.4 to respond to this concern,

— the Commission does not see the relevance of the point described under recital 38(d), and reiterates that the proposed modified MIF scheme must be considered as a whole,

— the 'free funding period' mentioned in recital 36 recital 37 and recital 38(e), is dealt with in recital 89 below,

— processing costs are dealt with in recital 85 below,

— the benefits to merchants of the modified MIF scheme are dealt with under recitals 92 and 93 below.

II. LEGAL ASSESSMENT

7. ARTICLE 81(1) EC TREATY/ARTICLE 53(1) EEA AGREEMENT

7.1. THE RELEVANT MARKET

7.1.1. *According to Visa*

(40) Visa argues that the relevant product market comprises all consumer payment Instruments, that is, apart from (all types of) payment cards also cheques of all types and cash. To that end Visa refers in particular to the opinion of several of its members. Moreover, Visa mentions two previous Commission decisions relating to cheques, in which the Commission allegedly recognised substitutability between cheques and other means of payment ⁽²⁵⁾. In addition, Visa refers to two judgements of American Courts, stating, in the context of complaints against respectively the multilateral interchange fee and the no-discrimination rule in the Visa International scheme, that the relevant market in which Visa operates and competes is that for all consumer payment systems ⁽²⁶⁾.

(41) As far as the relevant geographical market is concerned, Visa submits that in the light of global e-commerce on the Internet and the introduction of the euro, the market is moving towards an EU-wide or even world-wide market. This view is according to Visa shared by several of its members.

⁽²⁵⁾ Decision of 30.6.1993 under Merger Regulation (EEC) No 4064/89 in Case IV/M.350 WestLB/Thomas Cook which says in recital 9 that '... it would seem that travellers' cheques to a certain degree are in competition with other methods of payment, such as e.g. credit cards and eurocheques.' Commission decision of 10.12.1984 in Case IV/30.717 — Uniform Eurocheques (OJ L 35 of 7.2.1985, p. 43) which says in recital 41 that a person travelling to a foreign country generally has a choice between several means of payment, such as cash, travellers' cheques, postal payment orders, credit cards, ATM cards and eurocheques.

⁽²⁶⁾ *Nabanco Bancard Corporation v. Visa USA* [596 F. Supp.1231 (S.D. Fla. 1980) aff'd 770 F.2d 592 (11th Cir. 1986)] and *South Trust Corporation v. Plus System* [71.219 (N.D. Ala. 1995)]. However, in its litigation with Discover in the United States of America in the early 1990s, Visa submitted that the market was credit cards only [*SCFC Inc v Visa USA*, 36 F3d, 958, 966 10th Circuit, 1994].

⁽²⁴⁾ Rather, it is the complainant EuroCommerce who advocates that the Commission regulate the level of the MIF, by imposing that it be set at zero. See footnote 19.

7.1.2. *According to EuroCommerce*

- (42) EuroCommerce considers that a number of distinct markets are involved. It considers that Visa is active on a market for card networks, while within the Visa system, three markets should be distinguished, a market for card issuing, for card acquiring, and for transaction processing.

7.1.3. *According to the Commission*

7.1.3.1. *The relevant product market*

- (43) As the Commission stated in its decision in the Visa case of 9 August 2001 ⁽²⁷⁾ two types of competition relevant to payment cards can be distinguished. The first is between different payment systems (that is, different payment card schemes and possibly means of payment other than cards), while the second is between financial institutions (usually banks) for card-related activities (essentially issuing of cards to individuals and 'acquiring' of merchants for card payment acceptance). The former of these two types of competition is conventionally termed 'system/network market' or 'upstream market', while the latter is conventionally termed 'intra-system or downstream markets'. On the intra-system markets, within each four-party payment system (Visa, for example), financial institutions (in the EU normally banks) compete with each other to issue cards bearing that brand or to acquire merchants accepting that card.

- (44) Both types of competition are affected by the Visa Rules and by the MIF in particular. Firstly, they affect the competitive position of Visa with regard to other payment systems. Secondly they affect competition between banks within the Visa system in so far as they prevent banks from differentiating themselves from other banks by offering different terms and conditions.

- (45) As for the intra-system markets, on the issuing side, banks and other Visa card issuers compete with each other to issue Visa cards to individuals, and to persuade their cardholders to use those Visa cards rather than any other cards that those individuals may hold. A Visa card is usually (but not invariably) linked to a bank account, but is not normally a bundled product, which would be inevitably included in a package with a bank account. A Visa card can therefore be considered as a distinct product. On the acquiring side, Visa acquirers (which may be banks or entities owned by banks) sign merchants for all of the services necessary for the merchant to accept Visa cards: these normally include providing authorisation, processing, crediting merchants' accounts, software and technical backup services,

clearing and settlement with the issuing bank. A merchant does not need to hold his principal bank account with his Visa acquirer.

- (46) However, the inter-system market needs to be discussed in greater detail, as the Commission does not share Visa's view that the relevant market comprises all consumer means of payment. This can be explained as follows. On the inter-system market, the usage of different payment systems (and thus market shares) is determined by the inter-related decisions of consumers and merchants; for a payment card to be widely used, it must be accepted by large numbers of merchants, and then cardholders must choose to use that card among the different cards they hold and which are accepted by the merchants in question. Demand from both merchants and cardholders must therefore be analysed in order to determine the correct definition of the system market ⁽²⁸⁾. Consequently, in order that two different payment Instruments be considered as substitutable and therefore included on the same relevant inter-system market, they must be substitutable for both consumers and merchants. If one or the other user of payment Instruments considers two different payment Instruments as not substitutable, then those two Instruments are not substitutable on the inter-system market.

- (47) On this market, all types of distance payments (giro transfers and so on) can clearly be excluded since they cannot be used to pay for items across the counter in shops.

- (48) Next, as concerns cash and cheques, neither of these can be considered as substitutable with payment cards, either from the point of view of merchants or that of consumers. For merchants first of all, such non-card payment instruments are not at all substitutable with cards, since the loss of revenue for merchants from ceasing to accept all cards would be far greater than the loss of revenue from increasing their general level of prices by the amount of any small but sustained increase in merchant fees for all cards.

- (49) For consumers, cash is inconvenient and dangerous to carry in large amounts, and unsuitable for expensive purchases. It frequently runs out and must be renewed (normally by means of a cash withdrawal card). In all Member States, the average amount of a cash purchase is far lower than the average amount of a card purchase, and although for some medium-value payments either cash or cards are used, this is true only within a limited range of transaction sizes.

⁽²⁷⁾ OJ L 293, 10.11.2001, p. 24.

⁽²⁸⁾ In a four party payment card systems such as Visa, both merchants (in their capacity as clients of the acquiring services) and cardholders (in their capacity as clients of the issuing services) are to be considered as consumers.

(50) Furthermore cheques, in most Member States, are hardly ever used for over-the-counter purchases (being reserved for distance payments)⁽²⁹⁾. In those Member States where cheques are often used for face-to-face purchases (mainly France, the United Kingdom and Ireland), the regulatory framework sometimes differs (for example, in France, banks are currently prohibited by law to charge for issuing cheques). In any case, cheques have significantly different characteristics compared with cards (a chequebook contains a limited number of cheques, a cheque is often only accepted in conjunction with either a cheque guarantee card or an identity card, and a cheque must be filled in, thus losing time).

(51) For all these reasons, cash and cheques can be excluded from the inter-system market. It remains to be seen whether all types of card must be included on the relevant market. Possible criteria for effecting a distinction between different cards are whether the card is a card issued for consumer use or for commercial expenses, whether it can be used internationally or only within the State where it is issued, and the payment facility offered by the card (debit, deferred debit or credit). In practice, credit cards are normally (but not exclusively) international, and debit cards are often domestic, although there is an increasing tendency for domestic debit cards to have an international debit function through the addition of a maestro or an electron brand. In many Member States many individuals hold both a domestic debit card and an international credit card. But international credit cards can also of course be used for domestic payments (the great majority of payments with international cards are domestic payments), and for very many credit cards, the revolving credit facility is never used. Visa cards are always internationally-usable cards, but their payment facility varies, they can be credit or deferred debit cards, and sometimes even debit cards (some Visa/CB cards issued in France, and some Visa/Delta cards issued in the United Kingdom, for example)⁽³⁰⁾.

(52) In conclusion, for the purposes of the present decision, it is not necessary to make any distinction between types of payment card in order to define the relevant product market in the present case, and therefore the relevant inter-system market is to be considered as comprising all types of payment card. This does not rule out that a distinction between consumer and commercial cards, between national and international cards, or between

debit, charge and credit cards may be sufficiently important to consumers that those types of card constitute distinct product markets.

7.1.3.2. The relevant geographical market

(53) As the Commission held in its decision of 9 August 2001, the relevant geographic market to be taken into account for assessing competitive issues relating to payment card schemes is still mainly national. However, since cross-border issuing and acquiring are both now permitted by Visa⁽³¹⁾, are technically feasible, and occur to some extent, the markets in question are developing attributes which are more than purely national. In particular, as concerns inter-system competition, the geographic market may be wider than national markets. However, since Visa holds an important market position even on a worldwide market, the precise geographic market definition in this case can be left open.

7.1.3.3. Market position of Visa

(54) On the national markets for cards (international cards like Visa and Eurocard/Mastercard, store cards and main national debit schemes) in the EU region Visa holds, in terms of number of cards in circulation a market share varying between 4 % in the Netherlands and 69 % in Portugal. In terms of volume and value of Visa card transactions Visa's market share varies between respectively 2 % to 95 % and 2 % to 93 % (again in the Netherlands and Portugal respectively). However, the market power of Visa should not only be measured in terms of market shares. Like Europay, Visa has important network economies: almost all banks issue Visa cards and Visa cards are accepted in some four million merchant outlets throughout the EU. Moreover, a significant number of merchant categories, such as airlines, internet retailers, mail order companies, restaurants, are dependent on international card networks such as Visa with numerous users.

7.2. DECISIONS OF AN ASSOCIATION OF UNDERTAKINGS/ AGREEMENTS BETWEEN UNDERTAKINGS

(55) As stated in recital 53 of the decision of the Commission of 9 August 2001 in the Visa International case, the Visa Rules can be regarded either as decisions of an association of undertakings or as agreements between undertakings within the meaning of Article 81 of the EC Treaty/ Article 53 of the EEA Agreement.

⁽²⁹⁾ It is to be noted in this regard that the Commission decisions referred to by Visa (see footnote 25), apart from the fact that they do not take into account the latest developments in the payment sector, relate to substitutability of other means of payment to cheques and not the other way around. Moreover, the Commission in both decisions left the exact definition of the relevant market open.

⁽³⁰⁾ The substitutability of debit cards, on the one hand, and deferred debit and credit cards, on the other, may vary in a domestic and a cross-border context, as deferred debit and credit cards have certain features which are particularly beneficial in a cross-border context. See recital 89 below.

⁽³¹⁾ As described in the Commission decision of 9 August 2001, mentioned in recital 2 above, sections 3.2.3 and 3.2.4.

7.3. NECESSITY OF THE MIF FOR THE OPERATION OF THE VISA SYSTEM

7.3.1. *According to Visa*

- (56) In Visa's view its MIF does not fall within the scope of Article 81(1). To that end Visa argues that the Visa payment service is jointly provided by the Visa member banks and that the MIF is a device enabling this business to function most efficiently and effectively. In particular, in the absence of joint action with regard to the MIF the banks would take no account, or too little account of the 'positive externalities generated by their decisions'. Visa refers in this context to the Commission's Guidelines on Horizontal cooperation, in particular paragraph 24 thereof, stating 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' ⁽³²⁾. According to Visa its MIF is covered by this paragraph and hence does not fall within the scope of Article 81(1) by its very nature.
- (57) As a subsidiary argument, Visa submits that, in the event the Commission were to take the view that the MIF restricted competition, the MIF would qualify as an ancillary restraint and as such fall outside Article 81(1) since its MIF would be directly related and necessary for the functioning of the Visa system.

7.3.2. *According to the Commission*

- (58) The Commission disagrees with the arguments put forward by Visa that its MIF falls outside the scope of Article 81(1). To start with, the Commission doubts whether it is correct that none of the Visa members can 'carry out the project or activity covered by the cooperation.' It seems that at least the Visa Group members and larger banks in Visa are capable of offering a card payment system alone. This is proven for example by the fact that Citigroup is the owner of Diners' Club, a competing card system.
- (59) Secondly, the Commission accepts that, at least as concerns the medium-sized and small banks in Visa, the cooperation enables them to provide a service that they could not provide individually. This is why the Commission has not objected to the majority of the rules notified by Visa concerning the functioning of the Visa Inter-

national payment card scheme. However, it cannot be argued that the MIF itself enables the Visa member banks to offer the Visa card service, since Visa itself admits that the Visa scheme would exist without the MIF. Visa only says that without the MIF 'the scale of Visa's operations would be greatly reduced and so would its competitive impact. The "product" offered to both classes of user could be different and inferior; cardholders would get access to a smaller network of merchants and merchants to a smaller pool of cardholders'. Such arguments are however to be considered under Article 81(3) EC/Article 53(3) EEA and not under Article 81(1)/Article 53(1) EEA; where the question is whether the clause is technically necessary for the operation of the Visa payment scheme. The only provisions necessary for the operation of the Visa four-party payment scheme, apart from technical arrangements on message formats and the like, are the obligation of the creditor bank to accept any payment validly entered into the system by a debtor bank and the prohibition on (*ex post*) pricing by one bank to another ⁽³³⁾. Accordingly, it is in theory technically feasible for the Visa scheme to function with alternative arrangements than an MIF, not involving collective price agreements between undertakings. For example, issuing banks could recover their costs in whole or in part from cardholders.

- (60) In conclusion, the MIF in the Visa scheme is not 'by its nature' outside the scope of Article 81(1) EC/Article 53(1) EEA, nor to be regarded as an ancillary restraint.

7.4. RESTRICTION OF COMPETITION

7.4.1. *According to Visa*

- (61) Visa submits that its MIF does not restrict competition within the meaning of Article 81(1) either between Visa acquirers or among Visa issuers, or between card payment systems nor between various payment instruments. In particular, according to Visa its MIF does not involve price fixing. It does not consider its MIF as a price for specified services provided by issuers to acquirers or merchants. Rather it considers the MIF as 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 (see recital 14).

⁽³²⁾ OJ C 3, 6.1.2001, p. 2.

⁽³³⁾ See in this sense also the Dutch banks acceptance giro decision of 8 September 1999 (OJ L 271, 21.10.1999, p. 28), stating that, for the proper functioning of the payment system at stake joint agreements on technical specifications and procedural aspects of transactions processing are necessary. Also, an a priori agreement on the level of charges (that is, whether to charge or not and, in the affirmative, how much) was held to be necessary, but not necessarily in the form of an MIF (recital 46).

- (62) Visa also points out that in a three-party payment system, such as American Express, the owner of the payment scheme is free to allocate costs between the issuing and acquiring side of its activity, and freely calculate the prices it charges to cardholders and to merchants in the way which it believes to be in the best interest of its system. Such a three-party system would implicitly also contain an MIF. Visa contends that to prohibit a four-party system from doing the same by means of an explicit MIF would amount to discrimination against four-party systems.

7.4.2. *According to EuroCommerce*

- (63) EuroCommerce considers the MIF to be 'a price fixing cartel and therefore a hard-core infringement of competition law'. Under these conditions it believes that no exemption is possible.

7.4.3. *According to the Commission*

- (64) For the reasons given below, the Commission considers that the MIF in the Visa system restricts competition within the meaning of Article 81(1) EC/Article 53 EEA by restricting the freedom of banks individually to decide their own pricing policies. Moreover the MIF has a restrictive effect on competition among Visa issuers and among Visa acquirers.

- (65) As concerns the arguments put forward by Visa, the Commission does not accept that the 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. The Commission does accept that a four-party payment scheme is characterised by externalities, and that there is interdependent demand from merchants and cardholders, but not that there is joint supply of a single product. Visa card issuers and acquirers each offer a distinct service to a distinct customer. Issuing and acquiring are fundamentally different activities, involving different specialisations

and costs. Thus the MIF cannot be considered as an exchange of costs between partners in a production joint venture.

- (66) Rather, according to the Commission, the MIF is an agreement between competitors, which restricts the freedom of banks individually to decide their own pricing policies, and distorts the conditions of competition on the Visa issuing and acquiring markets. All Visa banks issue Visa cards and are thus competitors on the Visa issuing market. Some Visa banks are also acquirers, and compete with each other on the Visa acquiring market. Both these activities are affected by the MIF, and the Visa member banks are thus competitors as concerns their agreement on the MIF. In particular, the agreement on a collective MIF between the banks involved is likely to have an effect on price competition at the acquiring and issuing level since the MIF agreement will fix a significant part of the parties' final costs and revenues respectively ⁽³⁴⁾.

- (67) The Commission in earlier decisions has also concluded that a MIF amounts to a restriction of competition under Article 81(1) EC/Article 53(1) EEA ⁽³⁵⁾. Issuing banks are required to charge acquiring banks a certain fixed fee and are therefore prevented from developing at wholesale level an individual pricing policy vis-à-vis acquiring banks in so far as they provide services to them (for example a 'payment guarantee' for most transactions).

- (68) The MIF moreover has as its effect to distort the behaviour of acquiring banks vis-à-vis their customers (at resale level), because it creates an important cost element (according to EuroCommerce on average approximately 80 % of the merchant fee) which 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 ⁽³⁶⁾.

⁽³⁴⁾ See in this context the Commission decision in the case 'Rheims II' (OJ L 275 of 26.10.1999), also with respect to the dissuasive effect which a default fallback agreement has on the conclusion of bilateral agreements among the parties.

⁽³⁵⁾ See in this sense Commission decisions ABB (OJ L 7, 9.1.1987, p. 27), ABI (OJ L 43, 13.2.1978, p. 51), NVB (OJ L 253, 30.8.1989, p. 1) and NVB II (OJ L 271, 21.10.1999, p. 28). Compare also the Commission's 'Notice on the application of the EC Competition rules to cross-border credit transfers' (13.9.1995, SEC(95) 1403 final) which says: 'a multilateral interchange fee agreement is a restriction of competition falling under Article 85(1) now 81(1) because it substantially restricts the freedom of banks individually to decide their own pricing policies.'

⁽³⁶⁾ See in this sense also Visa's own economic experts in the USA proceedings, David Evans and Richard Schmalensee, acknowledging that 'interchange fee place a floor under the price that merchants pay their acquirers for processing card transactions' ... 'the only significant price the system sets is the interchange fee' ... 'since the acquirer has to pay the issuer an interchange fee for each transaction, that fee sets a floor under the merchant discounts' (in their book 'Paying with plastic', pp. 113 and 155).

- (69) However, the Commission does not consider the MIF agreement to be a restriction of competition by object, since a MIF agreement in a four-party payment system such as that of Visa has as its objective to increase the stability and efficiency of operation of that system (see section 8.1.1 below), and indirectly to strengthen competition between payment systems by thus allowing four-party systems to compete more effectively with three-party systems.

7.5. APPRECIABLE EFFECT

7.5.1. *According to Visa*

- (70) Visa contends that its MIF does not restrict competition to an appreciable extent within the meaning of Article 81(1). As concerns competition between Visa acquirers for merchants, Visa puts forward three arguments. First, it says that the MIF represents only one element of the merchant service charge (MSC) paid by a merchant to its acquiring bank. Secondly, merchants are said to be sensitive to differences in the level of this charge and thirdly, Visa says that acquiring banks compete on elements other than price alone. Moreover, Visa submits that the MIF does not appreciably restrict competition between Visa issuers in relation to their customers since the MIF neither prevents issuers from charging fees to their cardholders nor from increasing those charges to recover their costs.

7.5.2. *According to the Commission*

- (71) As concerns the acquiring market, even though the MIF may be not be the only component of the MSC, it is by far the main cost component, representing according to EuroCommerce about 80 % of the MSC. The MIF therefore effectively imposes a floor to the MSC. Moreover, the economic impact of the MIF is very substantial. With over 145 million Visa cards in the EU region, over four million merchants accepting Visa cards and about 5 250 million Visa transactions a year, of which [about 10 %]* are intra-regional transactions, the revenue for issuing banks arising from the Visa intra-regional MIF amounts to [...]*. As far as the impact on the issuing market is concerned, the MIF may discourage innovation and efficiency on the issuing market and may lead to the over-supply of cards ⁽³⁷⁾.

⁽³⁷⁾ The argument that consumers are encouraged to become cardholders by reason of the scope of the system, and that there are advantages to the system of encouraging consumers to become cardholders, would seem to be true only in respect of geographic markets where the take up of cards has not reached saturation point. This may be the case only for certain Member States and for international transactions.

7.6. EFFECT ON TRADE BETWEEN MEMBER STATES AND BETWEEN THE COMMUNITY AND THE EEA

- (72) As the Commission stated in its decision of 9 August 2001, Visa cards are by their nature cross-border means of payment, that is, cards which can be used by cardholders not only in the country where the cards are issued, but also for payments at merchant outlets or for cash withdrawals in other countries. According to Visa, in 1998 of all Visa card transactions at merchant outlets in the EU/EFTA about 10 % were intra-regional transactions (see recital 11). The Visa Rules are applicable at least in the whole of the EEA, therefore the various provisions contained in these rules have at least potentially an effect on trade between the Member States and between the Community and the EEA. Visa does not deny that its rules have or potentially can have an effect on trade between Member States.

7.7. CONCLUSION ON ARTICLE 81(1) OF THE EC TREATY/ARTICLE 53 OF THE EEA AGREEMENT

- (73) The MIF in the Visa system amounts to an appreciable restriction of competition within the meaning of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement.

8. ARTICLE 81(3) OF THE EC TREATY/ARTICLE 53(3) OF THE EEA AGREEMENT

8.1. FIRST AND SECOND CONDITIONS: TECHNICAL AND ECONOMIC PROGRESS TO THE BENEFIT OF CONSUMERS

8.1.1. *According to Visa*

- (74) Although Visa accepts that the MIF is not necessary for the existence of the Visa system, Visa submits that the MIF was introduced precisely in order to promote the wider distribution and acceptance of Visa cards and all the services they provide. It says that the generation of positive network effects and hence the expansion of the system is dependent on the existence of the MIF.
- (75) In Visa's view maximising usage of the system through the MIF optimises overall consumer satisfaction. Without the MIF there would be fewer Visa cardholders because either the fees to cardholders would increase or issuers would spend less money recruiting cardholders. This would have a knock-on effect on the number of merchants accepting Visa cards. According to Visa merchants obtain many benefits from the Visa system, such as incremental sales, cost savings and speed of card transactions over cash and cheques payments.

- (76) The MIF, according to Visa, balances the conflicting interests of merchants and cardholders, by allocating the costs of the system between the two types of users in a way that corresponds with the marginal benefit that each user derives from the system, and thus maximising overall use of the system. Visa argues that it would be against Visa's own interest to set the MIF too high or too low. A MIF that was too high would, according to Visa, lead to merchants dropping out of the system; Visa cards would then be less attractive to cardholders, and cardholders would then drop out of the system; this could set off a negative spiral which would end with a considerably contracted Visa system, or even possibly the end of the Visa system. An MIF that was too low would, according to Visa, have the opposite effect, but with the same end result.

8.1.2. *According to EuroCommerce*

- (77) Firstly, EuroCommerce considers that no exemption for the Visa MIF is possible since, in its view, the MIF constitutes a price cartel and is as such a restriction of competition by object. It adds that any efficiency gains produced by a cartel cannot outweigh its negative effects.
- (78) EuroCommerce further argues that the MIF does not fulfil the first condition for exemption, as it slows down innovation, since banks concentrate on maintaining and developing their MIF income, to the detriment of developing new card-related products and services. On the second condition, EuroCommerce advances that the MIF is detrimental to merchants and unfairly advantageous to cardholders, since it transfers to merchants costs which relate to services ('free benefits') provided to cardholders, who in turn provide pressure on merchants to accept cards. In particular, it denies that the 'payment guarantee' has been requested by merchants or should be paid for by merchants. Moreover, in its reply to the Article 6 letter of 7 September 2001, EuroCommerce argued that the cost of processing and the cost of the free funding should not be included in the MIF either. Thus, according to EuroCommerce, the benefits each consumer gets from the Visa system are not reflected in the setting of the MIF in a proportionate manner, and the MIF thus fails to meet the second condition for exemption.

8.1.3. *According to the Commission*

- (79) As a preliminary remark, it is not the case that an agreement concerning prices is always to be classified as a

cartel and thus as inherently non-exemptible. Examples exist of agreements on prices which can meet the conditions for an exemption⁽³⁸⁾. Furthermore, a MIF is not a price charged to a consumer, but a remuneration paid between banks who must deal with each other for the settlement of a card payment transaction and thus have no choice of partner. The absence of some sort of default rule on the terms of settlement could lead to abuse by the issuing bank, which is in a position of monopsony as regards the acquiring bank for the settlement of an individual payment transaction. Thus, some kind of default arrangement is necessary, but the question of whether it qualifies for exemption or not will depend on the details of the arrangement.

- (80) Prior to the modifications described above in section 3.2.3 the Visa MIF was considered by the Commission (in its Supplementary Statement of Objections of 29 September 2000) as not satisfying in particular the second condition of Article 81(3), notably because the Visa EU Board was free to set the MIF at any level it wished, independently of the costs of the specific services provided by issuing banks to the benefit of merchants. Furthermore, because the MIF was a business secret, those who in the end pay the MIF, that is the merchants, could not know its level and therefore could therefore not effectively negotiate the merchant fee. The Commission found that there were upward pressures on the level of the previous MIF, in particular, the fact that most banks were members of both Visa and the competing Eurocard/Mastercard system, and therefore were likely to issue whichever of the two brands of card had the higher interchange level and brought them the most revenue. The possibility of merchants ceasing to accept Visa cards if the Visa MIF was too high was not sufficiently strong to constrain this upward pressure, as long as the MIF did not reach exceedingly high levels. This was due to the fact that once a merchant already accepts Visa cards, when faced with an increase in the MIF, and consequently an increase in merchant fees, recovering this cost increase through a very small price increase for all goods sold will normally lead to a smaller fall in turnover than ceasing to accept Visa cards⁽³⁹⁾. There was thus a possibility that the previous MIF could have been set at a revenue-maximising, output-limiting level, rather than the level maximising the output of the Visa system. These concerns have been mitigated by the revised Visa MIF, as explained below.

⁽³⁸⁾ See for example Article 3 of Regulation (EEC) No 4056/86 in the transport sector, providing for an exemption for price agreements between liner conferences under certain conditions and obligations. See also Article 4 of Regulation (EEC) No 1617/93, providing for a group exemption for price agreements between airlines with regard to IATA interlineable fares (OJ L 155 of 26.6.1993, p. 18).

⁽³⁹⁾ This 'lock in' effect is illustrated by the extreme paucity of examples of merchants who have decided to cease to accept Visa cards, having once accepted them.

- (81) Turning to the first condition, it is not disputed that payment card schemes like Visa's represent, as such, considerable economic and technical progress. The question is whether the Visa MIF agreement, in its proposed modified form, specifically contributes to that progress. This question is intimately linked to that of benefits to consumers, therefore it is logical to take the first and second conditions together.
- (82) Concerning the second condition, it should be noted that four-party payment card schemes like that of Visa are networks with two distinct and interdependent types of consumers, merchants and cardholders. Each type of consumer would prefer the costs of the system to be paid by the other user: merchants thus have an interest in no, low or negative interchange fees (that is interchange fees paid by the issuer to the acquirer), while cardholders have an interest in positive interchange fees (that is, paid by the acquirer to the issuer).
- (83) The Visa network, like any network characterised by network externalities, will provide greater utility to each type of user the greater the number of users of the other type: the more merchants in the system, the greater the utility to cardholders and vice versa. The maximum number of users in the system will be achieved if the cost to each category of user is as closely as possible equivalent to the average marginal utility of the system to that category of user. The Commission accepts that this is not necessarily achieved with each bank simply charging its own customer, since one of the features of a four-party payment card scheme is that the card issuing bank provides specific services to the benefit of the merchant, via the acquiring bank. Given the difficulties of measuring the average marginal utility of a Visa card payment to each category of user, some acceptable proxy for this must be found, which meets the concerns of the Commission, as expressed in the Supplementary Statement of Objections of 29 September 2000 ⁽⁴⁰⁾.
- (84) To this end, Visa has in its proposal for a modified MIF identified three main cost categories which in its view constitute an 'objective benchmark' for the level of costs of supplying Visa payment services and constitute an 'objective benchmark' against which to assess the Visa intra-regional MIFs paid by acquirers to issuers for POS transactions. These cost categories are (a) the cost of processing transactions; (b) the cost of providing the 'payment guarantee' and (c) the cost of the free funding period.
- (85) The Commission sees no reason to contest the relevance of these three cost categories and accepts Visa's point of view that they can all be said to be, at least in part, to the benefit of the merchant. First, on the processing service the Commission accepts that apart from account maintenance to the benefit of the cardholder, the issuing bank also processes the request for payment of its debt to the acquiring bank and ultimately to the merchant, which incurs some administration costs. There is no doubt that the merchant benefits from the latter processing services, in particular in the context of international payment card transactions. EuroCommerce also initially accepted this ⁽⁴¹⁾.
- (86) Secondly, as concerns the payment guarantee, the Commission accepts that the 'payment guarantee' is a kind of insurance against fraud and cardholder default for merchants, and the 'payment guarantee' element in the revised Visa MIF is a kind of insurance premium, which is of importance in particular in the context of international card payments. In general, retailers benefit from a 'payment guarantee' because without it they would have few means of obtaining payment from Visa cardholders from other Member States in the case of fraud or insolvency. Fraud in particular, is much higher for cross-border transactions than for domestic ones. No evidence has been provided to the Commission to suggest that in the absence of a payment guarantee, insurance against fraud and credit losses linked to international card payments would be widely available to retailers, or if so, that it would be available on terms affordable to medium-sized and small retailers.
- (87) As to the cost element of the 'payment guarantee' relating to bad debt write-offs arising from cardholder default the important consideration is that in the absence of this element of the 'payment guarantee', merchants would also have to insure themselves against the possibility of the customer not respecting his card payment for reason of insolvency. Such insurance would be likely to be particularly expensive for cross-border payments, as the recovery of debts is more difficult in a cross-border context than domestically. The risk of default is also higher in a cross-border context, since cardholders with a history of defaulting are particularly likely to carry out purchases abroad, where they are less likely to be on any default 'black lists'. In any event, fraud and insolvency control is more likely to be efficient if done by the

⁽⁴⁰⁾ See recital 80.

⁽⁴¹⁾ See the complaint of 22 May 1997, p. 5, 'the charge that banks impose on merchants, the merchant fee, does not correspond to the price of the service that he receives, or only for a very small part of that amount. The service rendered to the merchant consists of the processing of the operation'. Letter of 22 January 1998, p. 3 'the only service that a card transaction generates is the processing of that transaction'.

issuing bank. The introduction of an optional 'payment guarantee' could lead the issuing banks to relax their controls, thus leading to an increase in the level of fraud and insolvency.

(88) Without a 'payment guarantee', some retailers would probably consider the risk of accepting Visa cards to be too great, and since the 'Honour All Cards' rule obliges them to accept all Visa cards, they would have no choice but to cease to accept Visa cards completely. Visa cards would then be less attractive to cardholders, and some of these might then give up their Visa card, leading to a downward spiral in the size and level of usage of the Visa system, and a loss in turnover for all merchants ⁽⁴²⁾.

(89) Thirdly, the 'free funding period' allows Visa cardholders to make purchases at any merchant who accepts Visa cards as if they all offered free credit. According to Visa, this benefits merchants because it encourages cardholders to increase their consumption by making additional purchases which otherwise they may not have made ⁽⁴³⁾. While it is not proven that this facility increases total aggregate consumption, it is plausible that it may well stimulate cross-border purchases by cardholders travelling abroad, who usually do not have the means to check their account balance and cannot delay their purchase to later. Without the free-funding period, cardholders travelling abroad are likely to be more prudent with regard to their overall spending for fear of taking their account into the red. Whilst this phenomenon may have a neutral overall effect on total consumption in Europe, it nevertheless facilitates and encourages cross-border spending as opposed to domestic spending. In this light the inclusion of the free-funding period in a MIF for cross-border purchases can be justified, primarily as it benefits merchants with whom such purchases are made, but also as it promotes cross-border purchases within the single market. The Commission therefore sees no reasons, for the purposes and duration of the present exemption ⁽⁴⁴⁾, to consider as unjustified the inclusion in the Visa intra-regional MIF of the cost of the free funding period, as a feature of international charge and credit cards that partly benefits the merchant for cross-border transactions.

(90) Given that the three services in question are provided by Visa issuing banks to merchants indirectly, via the acquiring bank, in the payment system of Visa issuers

cannot, in the absence of a contractual relation, charge the costs related to these services directly to the merchant (unlike in some national schemes, such as *ec-Karte* in Germany, where issuers charge merchants directly for the provision of an (optional) guarantee).

(91) In conclusion, the proposed modified intra-regional MIF in the Visa International Rules contributes to technical and economic progress in the meaning of Article 81(3) first condition, namely the existence of a large-scale international payment system with positive network externalities.

(92) The modified MIF (as described above), which is based on objective criteria (costs) and transparent for users of the Visa scheme who end up paying the MIF in whole or in part, can be said to provide a fair share of the benefits to each category of user of the Visa system, and thus to meet the concerns of the Commission. In particular, the level of the MIF will not exceed the cost of the specific services on which its calculation is based (as will be guaranteed by the cost study which will be carried out at a representative sample of Visa members and audited by an independent expert) and the Visa EU Board may set it at a lower level. The modified Visa MIF is therefore to the benefit of merchants in so far as the MIF cannot in future exceed the cost of the services which issuing banks provide wholly or partly to the benefit of merchants.

(93) As concerns the comments made by merchants in reply to the Commission's 19(3) and by EuroCommerce in its reply to the Article 6 letter of 7 September 2001, on the alleged minor effect of the changes to the Visa MIF, it should be noted that the practical effect of the changes to the Visa MIF (both to merchants and to cardholders) are inherently uncertain since the MIF is a wholesale price only. The present exemption is granted on the basis of the present facts: an exemption for a determined period of time is needed to look at the new balance of interests and to allow the Commission to review the impact of the revised MIF again if necessary.

(94) For Visa cardholders, the modified Visa MIF is not directly more advantageous than the previous one. However, in so far as it could lead to reduced costs for merchants, it may lead to more merchants accepting

⁽⁴²⁾ See also point 9 of judgment of the Court of Justice of the European Communities in Case C-18/92 *Bally*, ECR [1993], p. I-2871).

⁽⁴³⁾ Visa also argues that the free funding benefits merchants by representing a 'contracting out' of merchant consumer credit programmes. However, this argument seems weak, in light of the fact that many merchants who accept Visa cards nevertheless offer consumer credit, and other merchants who accept Visa cards have never desired to operate a consumer credit programme.

⁽⁴⁴⁾ It should be re-emphasised in this context that the present exemption only applies to the Visa intra-regional MIF as applied to cross-border transactions. An analysis of the exemptability of the inclusion of the free funding period in a MIF for domestic card payments might conceivably reach a different conclusion.

Visa cards, which would be in the interest of cardholders. In cases where there is strong price competition between merchants, the fall in merchants' costs could lead to reduced prices for all consumers, including those who pay by Visa card. Moreover, the changes to the MIF are not considered by Visa as likely to lead to any increases in charges to cardholders. Given that in Visa's proposal the level of costs of the three services mentioned above will effectively form a ceiling to the level of the MIF, the setting of the MIF at a level lower than that of the cost of the services in question could have been expected as potentially detrimental to cardholders, but on the other hand, the services in question are arguably to the benefit of both user in different proportions. Therefore it is appropriate to allow banks some leeway in splitting the costs between cardholders and merchants. Moreover, the setting of a MIF below costs will normally have as its goal the encouragement of improvements in the system [...]*, in the interest of all users of the system.

- (95) In conclusion, 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).

8.2. THIRD CONDITION — INDISPENSABILITY

8.2.1. *According to Visa*

- (96) According to Visa its MIF is indispensable for the functioning of the Visa system at its optimum level. According to Visa neither direct charging of cardholders for all issuers' costs nor bilateral interchange arrangements are feasible options for the Visa scheme. Moreover, according to Visa it cannot be concluded from the mere absence of an MIF to be paid by an acquirer to an issuer in a given payment card system that the MIF in the Visa system in the EU is unnecessary. In particular, Visa says that the various payment card schemes referred to in the Supplementary Statement of Objections as examples of card schemes functioning with alternative financing methods to an MIF do not prove that the Visa MIF is not objectively necessary for the Visa system. These card systems, according to Visa, are not comparable with the Visa system as they are all different in some way. The German ec-Karte system is a domestic debit card system, and furthermore has infrastructure that permits direct payments between merchants and card issuers. The Australian EFTPOS system (another domestic debit card system) involves a small number of banks among which bilateral agreements are feasible. The Canadian Interac system in fact has a MIF, albeit set at a level of zero.

8.2.2. *According to EuroCommerce*

- (97) EuroCommerce argues that the MIF is not necessary to make the payment card systems function, nor to achieve usage maximisation and stability of the system. In EuroCommerce's view, no services are provided between issuing bank and acquiring bank, therefore there is no need for any payment. The MIF is rather a tax, or levy, which has generated huge costs which are eventually paid by the consumer in higher retail prices.

8.2.3. *According to the Commission*

- (98) First of all, it should be emphasised that the indispensability being considered under this heading is not indispensability to the existence of the Visa system, but indispensability for the achievement of the benefits identified under the first condition of Article 81(3), that is, in particular, the positive network externalities. The Visa MIF is, on the admission of Visa itself, not indispensable for the existence of the Visa system. However, as explained above, in the absence of a direct contractual relationship between issuers and merchants, without some kind of multilateral interchange fee arrangement, it would not be possible for issuers to recover from merchants the costs of services which are provided ultimately to the benefit of merchants, and this would lead to negative consequences, to the detriment of the entire system and all of its users.
- (99) However, only a MIF which is the least restrictive of competition out of all the possible types of MIF could be considered as indispensable. The Commission notes in this regard that while the former MIF allowed Visa member banks freedom to set the MIF at any level they choose, without any objective criteria and in particular regardless of the actual cost of providing the specific services in question, the modified Visa MIF is based on objective criteria (costs) and transparent (in the sense that its level will on request be disclosed to merchants). The Commission accepts that such an MIF can be considered as indispensable since it has not been established in the context of an international payment card scheme with thousands of members that any alternative financial arrangement than the modified MIF would be both feasible and less restrictive of competition, while maintaining the technical and economic progress identified above under Article 81(3) first condition.
- (100) In this regard the Commission takes into account that it has not been established that there are examples of an international credit or deferred debit card scheme that functions without an MIF. While the various domestic payment systems referred to by EuroCommerce (see recital 27) all have points of similarity with the Visa system, they also have differences, which preclude any useful comparison. Those systems either involve

fewer banks than the Visa system, or have direct links between issuing banks and merchants, or have a MIF fixed at a zero level, or have an on-line authorisation system, which considerably diminishes fraud.

(101) Although theoretically, bilateral agreements may be made on the level of interchange, a multilateral interchange fee is likely to lead to efficiency gains in the context of the Visa international payment scheme due to lower negotiation and transaction costs⁽⁴⁵⁾. With more than 5 000 banks in the Visa EU Region it is likely that due to negotiation and transaction costs bilateral interchange fees though theoretically possible, would result in higher and less transparent fees. This is in its turn likely to lead to higher merchant fees. For this reason, a default fallback MIF is necessary for cases where two banks have not been able, or have not tried, to reach a bilateral agreement.

(102) In the absence of an interchange arrangement, the issuing banks would have to absorb the costs of such services, or charge them directly in whole or in part to the cardholder. Absorbing the costs would probably lead to them being recovered by higher fees for unrelated services (cross-subsidisation). The charging of the costs of such services to the cardholder (in the form of increased annual fees for Visa cards or possibly to transaction-related fees) might be considered as such a less restrictive alternative compared to the MIF, because cardholder fees would be determined unilaterally by each bank and not by multilateral agreement. However, given the conclusions reached above in recital 85 to 89 about the beneficiaries of the different cost elements included in the revised Visa MIF, charging those costs to cardholders might destabilise the Visa system, as some cardholders could make less use of their Visa cards, considering the price now to be excessive as it includes the cost of services which are not in whole provided to them, but rather to merchants. This reduction in the use of Visa cards could in turn make the card less attractive to merchants, thus setting off a downward spiral in the use of the Visa system.

(103) In conclusion, no alternative, less restrictive than the revised Visa MIF, exists at present, which would achieve the advantages and benefits to consumers identified under the first and second conditions above, while being practically feasible in the context of the Visa international four-party card payment scheme. Therefore the revised Visa default intra-regional MIF meets the third condition of Article 81(3).

⁽⁴⁵⁾ This conclusion is not necessarily valid in a domestic context, where the number of banks may well be far fewer and the efficiency gains of a multilateral arrangement vis-à-vis bilateral agreements may not outweigh the disadvantage of the creation of a restriction of competition.

8.3. FOURTH CONDITION: NON-ELIMINATION OF COMPETITION

8.3.1. *According to Visa*

(104) According to Visa the MIF does not afford Visa the possibility of eliminating competition in respect of a substantial proportion of the products in question. Visa notes in this regard that its member banks are exposed to intra-system as well as inter-system competition. According to Visa the determination of the MIF by Visa member banks takes place in a highly competitive environment.

8.3.2. *According to EuroCommerce*

(105) EuroCommerce considers that the fourth condition is not met because Visa together with Europay, form a duopoly with a market share of 80 %.

8.3.3. *According to the Commission*

(106) The MIF does not eliminate competition between issuers, which remain free to set their respective client fees. Moreover, although it sets de facto a floor in the merchant fees it does not eliminate competition between acquirers either, since acquiring banks remain free to set the merchant fees and can still compete on the other components of the merchant fee apart from the MIF. Nor does it eliminate competition between Visa and its competitors, particularly Europay. The allegation by EuroCommerce that Visa would form a near-duopoly with Europay is not relevant to an agreement between Visa members. Although an analogous agreement exists among Europay members, the Commission has no evidence of concertation between Visa and Europay.

8.4. CONCLUSION ON ARTICLE 81(3) OF THE EC TREATY/ARTICLE 53(3) OF THE EEA AGREEMENT

(107) The modified Visa MIF fulfils the conditions for an exemption under Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement.

9. DURATION OF THE EXEMPTION, AND CONDITIONS

(108) Pursuant to Article 8 of Regulation No 17, a decision in application of Article 81(3) of the EC Treaty is to be issued for a specified period and conditions and obligations may be attached thereto. Pursuant to Article 6 of Regulation No 17, the date from which such a decision takes effect cannot be earlier than the date of notification. It follows from Article 7(1) of Regulation No 17 that the start of the exemption period cannot be earlier than the date that the notified agreement satisfied the conditions for exemption.

(109) The exemption should therefore take effect as and when the proposed modified Visa MIF scheme has been implemented in the Visa Rules and is in force until 31 December 2007. For the new MO/TO MIF described at section 3.2.3.4, the exemption will enter take effect when that MIF will be established, and remain in force until 31 December 2007. This period of time will allow the Commission to re-examine the practical impact of the modified Visa scheme on the market, and in particular its expected effect on merchant fees, also in light of the comments made by third parties to the 19(3) notice.

(110) In order to permit the Commission to verify whether the changes to the Visa MIF described above in section 3.2.3 are being implemented as Visa has undertaken to do the decision is subject to the following conditions:

- (a) Visa will submit to the Commission, within [12 to 18 months]* after the adoption of this decision, a copy of the cost study showing the calculations based on the three cost categories mentioned above in section 3.2.3.2 (data being split into figures relating to credit and deferred debit cards, and data relating to debit cards) as well as the relative impact in terms of value and volume of the different type of Visa cards. The cost study will be carried out by Visa and audited by an independent firm of accountants, which will have to be approved by the Commission. The data used in the preparation of the cost study will be provided by a representative sample of Visa member banks from the Visa EU region, located within the EEA. Further cost studies will be prepared, and copies submitted to the Commission, no less frequently than every [18 to 36 months]* thereafter;
- (b) following the completion of each of the aforementioned cost studies, the effective level of the MIFs for consumer cards will not exceed the sum of these three categories of costs except in exceptional circumstances which can be reconciled with Article 81(3) (such as for example to discourage behaviour which could impede technical progress) and following consultation with the Commission;
- (c) Visa will inform the Commission of any amendments and additions to its intra-regional MIF scheme,

Treaty and Article 53(3) of the EEA Agreement, to the modified Visa intra-regional multilateral interchange fee (hereinafter MIF) scheme, as applied to cross-border point-of-sale transactions with Visa consumer cards within the European Economic Area, until 31 December 2007.

2. The declaration of exemption in paragraph 1 shall apply subject to the following conditions:

- (a) the Visa Board shall, by 4 September 2002 at the latest, adopt the measures necessary to secure the implementation of the modified MIF scheme, object of this Decision;
- (b) within [12 to 18 months]* of the date of adoption of the present Decision, and no less frequently than every [18 to 36 months]* thereafter, Visa shall submit to the Commission a copy of the cost study for debit cards and for deferred debit and credit cards, calculating a maximum MIF level based on the following three cost categories:
 - the cost of processing transactions,
 - the cost of the free funding period for cardholders,
 - the cost of providing the 'payment guarantee'.

That cost study shall be carried out by Visa and audited by an independent firm of accountants, approved by the Commission.

The data used in the preparation of the cost study shall be provided by a representative sample of Visa member banks from the Visa EU region, located within the EEA, representing more than 50 % of the total volume of Visa intra-regional point-of-sale transactions;

- (c) following completion of each of the cost studies referred to in subparagraph b, the effective level of the MIFs for consumer cards may not exceed the figure indicated in the most recent such study as representing the maximum MIF level, based on the three cost categories specified in subparagraph a, except in exceptional circumstances which, in the opinion of the Commission, are compatible with Article 81(3) of the Treaty;
- (d) Visa shall inform the Commission, within one month of informing its members, of any amendments or additions to its intra-regional MIF scheme.

HAS ADOPTED THIS DECISION:

Article 2

Article 1

1. Without prejudice to Article 2, the provisions of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement are declared inapplicable, pursuant to Article 81(3) of the EC

1. The provisions of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement are declared inapplicable, pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement, to the Visa intra-regional interchange fee for mail order and telephone order transactions (hereinafter MO/TO transactions), which is the object of this decision, as applied to cross-border point-of-sale transactions with Visa consumer cards within the EEA, until 31 December 2007.

2. Provided that the declaration of exemption in Article 1 has become applicable, the declaration of exemption in paragraph 1 shall apply subject to the following conditions:

- (a) the Visa board shall adopt, by 30 April 2003 at the latest, the measures necessary to secure the implementation of the MO/TO transaction intra-regional interchange fee;
- (b) Visa shall comply with Article 1(2)(b) and (d);
- (c) following completion of each of the cost studies referred to in Article 1(2)(b), the effective level of the MIF for MO/TO transactions may not exceed the figure indicated in the most recent such study as representing the maximum MIF level for MO/TO transactions, which shall be based on the same information on the three cost categories referred to in Article 1(2)(b), but corrected as to two specific cost categories, under 'payment guarantee' and 'processing of transactions' to reflect the costs specific to MO/TO transactions.

Article 3

This Decision is addressed to:

Visa International Service Association
European Union Region
99 High Street Kensington
London W8 5TE.

Done at Brussels, 24 July 2002.

For the Commission

Mario MONTI

Member of the Commission
