JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

14 April 2011 *

In Case T-461/07,

Visa Europe Ltd, established in London (United Kingdom),

Visa International Service, established in Wilmington, Delaware (United States),

represented initially by S. Morris QC, H. Davies and A. Howard, Barristers, V. Davies and H. Masters, Solicitors, and subsequently by S. Morris and P. Scott, Solicitor, A. Howard, V. Davies and C. Thomas, Solicitor,

applicants,

v

European Commission, represented initially by F. Arbault, N. Khan and V. Bottka, and subsequently by N. Khan and V. Bottka, acting as Agents,

defendant,

* Language of the case: English.

APPLICATION for annulment of Commission Decision C (2007) 4471 final of 3 October 2007 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (COMP/D1/37860 — Morgan Stanley/Visa International and Visa Europe) and, in the alternative, an application for annulment or reduction of the fine imposed on the applicants by that decision,

THE GENERAL COURT (Fifth Chamber),

composed of M. Jaeger, President, V. Vadapalas and M. Prek (Rapporteur), Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 20 May 2010,

gives the following

Judgment

Facts giving rise to the dispute

1 Visa International Service ('Visa International') is a private commercial corporation which is registered in the United States of America and owned by the financial

institutions which are its members. Visa International is responsible for the management and coordination of the international payment card network of the same name ('the Visa system'), which includes in particular laying down the rules of the network and providing authorisation and clearing services to its member institutions. Responsibility for issuing Visa cards and contracting with merchants for Visa card acceptance lies with the member financial institutions.

2 Morgan Stanley, formerly Morgan Stanley Dean Witter & Co., ('Morgan Stanley') is a financial institution registered in the United States of America, where it owned throughout the administrative procedure the 'Discover Card/Novus' network, which operates 'Discover' cards ('the Discover system').

3 On 23 February 1999 Morgan Stanley set up in the United Kingdom a subsidiary named Morgan Stanley Bank International Ltd.

4 On 22 March 2000 Morgan Stanley was informed that it was not eligible for Visa International membership in the 'European Union' region.

5 On 12 April 2000 Morgan Stanley submitted a complaint, pursuant to Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), alleging that Visa International had infringed Articles 81 EC and 82 EC by refusing to admit it to Visa International membership in the 'European Union' region. Morgan Stanley brought an action before the High Court of Justice (England & Wales) relating to the same conduct. That action was stayed pending the outcome of the procedure before the European Commission.

6 Morgan Stanley's complaint related to the application to it of Rule 2.12(b) ('the Rule') of the Visa International By-Laws, various versions of which have been notified to the Commission. Since 4 December 1989 the Rule has been worded as follows: '[i]f permitted by applicable law, the Board (including Regional Boards and Group Members) shall not accept for membership any Applicant which is deemed by the Board of Directors to be a competitor of the corporation'.

7 Prior to 1 July 2004 the decision making power in respect of Visa International's 'European Union' region — which, in addition to the Member States of the European Union, includes Iceland, Liechtenstein, Norway, Switzerland, Turkey and Israel — was delegated to the Visa International Regional Board for the European Union. Since 1 July 2004 that power has been held by Visa Europe Ltd ('Visa Europe'), the Regional Board of which has exclusive authority to regulate all matters within the 'European Union' region and, in particular, to decide whether to accept or reject any application for membership of Visa Europe. Since October 2004 the Rule has been replicated in paragraph 3 of Clause 5 of the Membership regulations of Visa Europe.

8 On 2 August 2004 the Commission addressed a statement of objections to Visa International and Visa Europe ('the applicants') on grounds of infringement of Article 81 EC. On 3 December 2004 the applicants lodged written observations in response to the objections raised by the Commission. At that time they also requested a hearing, a request which they withdrew on 5 April 2005.

9 On 1 and 2 September 2004, 19 November 2004, 17 December 2004 and 12 January 2007 the applicants were given access to the Commission file.

10 On 15 October 2004 the Commission sent a non-confidential version of the statement of objections to Morgan Stanley. On 22 October 2004 Morgan Stanley submitted its written observations on the statement of objections. On 23 February 2005 the applicants commented on those observations.

11 On 23 December 2004 the Commission sent to the applicants a first letter setting out the facts at issue ('the first letter of facts') to which the applicants replied by letters dated 14 January and 23 February 2005.

12 On 6 July 2006 the Commission sent to the applicants a second letter setting out the facts at issue ('the second letter of facts'), to which the applicants replied by letter dated 22 September 2006.

13 On 21 September 2006 agreement was reached between Morgan Stanley and the applicants, recognising Morgan Stanley as a member of Visa Europe and providing that the complaint lodged with the Commission should be withdrawn and the proceedings brought before the High Court of Justice discontinued.

14 On 22 September 2006 Morgan Stanley became a member of Visa Europe and withdrew the complaint it had lodged with the Commission. The Commission, however, took the view that it retained a legitimate interest in adopting a decision penalising the applicants' anti-competitive practices.

Contested decision

15 On 3 October 2007 the Commission adopted Decision C (2007) 4471 final relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (COMP/D1/37860 — Morgan Stanley/Visa International and Visa Europe) ('the contested decision'), the main elements of which are set out below.

A — *Definition of the relevant market*

16 The Commission considered that the services provided in the context of a payment card network may be subdivided into three distinct groups:

— services provided by a payment card network to financial institutions, where competition between different payment card schemes takes place;

— services provided by the banks issuing payment cards to cardholders;

— services provided to merchants, enabling them to accept cards ('acquiring services').

17 The Commission inferred from this that three separate markets could be differentiated: an upstream market, consisting of network services, in which card networks provide services to various financial institutions; a first downstream market, in which payment card issuers compete with each other to issue cards and provide related services to individuals ('the issuing market'); a second downstream market, in which acquirers of card-based transactions compete to conclude contracts with merchants for all the services necessary for the merchants to accept cards ('the acquiring market').

18 While the Commission argued that the Rule could have effects restrictive of competition in both downstream markets, it stated that it was focussing solely on the acquiring market, where the restrictive effects of the Rule on competition were the most appreciable.

19 Accordingly, the Commission defined the relevant market as that for the provision of credit and deferred debit charge card acquiring services to merchants in the United Kingdom ('the relevant market' or 'the market in question').

B — *Conduct subject to complaint*

20 In recital 25 of the contested decision, the Commission stated that the conduct of the applicants which was the subject of complaint was not the Rule in itself but its application to Morgan Stanley ('the conduct at issue').

C — *Application of Article 81 EC*

21 In reaching the conclusion that the conduct at issue fell within the scope of Article 81(1) EC, the Commission, first, took the view that the rules and regulations setting out the framework for the functioning of the Visa system (including the Visa International By-Laws and the Membership Regulations of Visa Europe which contain the Rule) and the decision to apply them to an undertaking could be regarded either as an agreement between undertakings or as a decision of an association of undertakings. The Commission took into account the fact that, on the one hand, the applicants and their respective members engage in economic activities and hence are undertakings within the meaning of Article 81(1) EC and, on the other hand, that the applicants are membership organisations.

22 Secondly, the Commission found that the conduct at issue had produced anti-competitive effects in that the result of the refusal to accept Morgan Stanley as a member in the 'European Union' area of Visa International and thereafter within Visa Europe (taken together, within 'Visa') was to prevent a potential competitor from entering a market marked by a high degree of concentration and in which, despite competition not being ineffective, there was scope for further competition.

23 In that regard, the Commission noted that the refusal to admit Morgan Stanley to Visa not only prevented it from acquiring transactions effected with Visa cards but also, more generally, excluded it from the entire acquiring market, including that for transactions effected using MasterCard cards. The Commission took into account the fact that merchants seek to enter into contracts for acceptance of the most widely held cards in the United Kingdom, namely Visa and MasterCard, with one and the same acquirer.

24 The Commission analysed in the contested decision the possibility, raised by the applicants, of Morgan Stanley's entering the acquiring market by concluding a 'fronting arrangement' with a Visa member financial institution. The Commission defined a fronting arrangement, essentially, as referring to circumstances in which the Visa member, the fronting partner, has withdrawn from the merchant acquiring business and acts as a mere interface between Visa and a third-party acquirer, also described as the de facto acquirer, which takes responsibility for virtually all elements of an acquiring service and bears the risk with respect to the merchant's revenue stream. The Commission concluded that, for an international bank such as Morgan Stanley, entering into a fronting arrangement was not an efficient means of entering the relevant market.

25 In response to the various arguments advanced by the applicants in the course of the administrative procedure which sought to justify the conduct at issue, the Commission considered that it was not realistic to think that Morgan Stanley was in a position to extend its Discover system in the European Union and thus compete with Visa once it was active on that market. Similarly, in the Commission's view, the refusal to admit Morgan Stanley could not be justified by the concern to avoid 'free-riding' by one of Visa's direct competitors, which would thus be in a position to obtain confidential information. In that regard, the Commission noted that certain Visa members have a credit or deferred payment card system which competes directly with Visa and that the Rule was not applied to them.

26 The Commission found that Article 81(3) EC did not apply in the present case.

27 Finally, the Commission took the view that it retained a legitimate interest in adopting a decision penalising the applicants' anti-competitive practices, despite the fact that the infringement ended when Morgan Stanley was admitted to Visa on 22 September 2006.

D — *Calculation of the fine*

28 Although the Commission considered that the infringement began on 22 March 2000 and lasted for six and a half years, it took as its starting point for the calculation of the fine a shorter period, namely from the date of the statement of objections on 2 August 2004 to Morgan Stanley's admission to Visa on 22 September 2006. The Commission took the view that the infringement was serious and that there were no aggravating or mitigating circumstances.

29 Articles 1 and 2 of the operative part of the contested decision read as follows:

'*Article 1*

[Visa International] and [Visa Europe] have infringed — the former during the period from 22 March 2000 to 22 September 2006 and the latter from its creation on 1 July 2004 until 22 September 2006 — Article 81(1)[EC] and Article 53 of the EEA Agreement by excluding [Morgan Stanley] from membership of Visa Europe.

Article 2

For the infringement referred to in Article 1 a fine of EUR 10 200 000 is imposed on [Visa International] and [Visa Europe], for which they are jointly and severally liable.'

Procedure

30 The applicants brought the present action by application lodged at the Registry of the General Court on 19 December 2007.

31 By separate document lodged at the Registry of the Court on 24 July 2009, the applicants applied, pursuant to Article 114(1) of the Rules of Procedure, for a preliminary decision on the admissibility of certain arguments and evidence and proposed the adoption of measures of organisation of procedure pursuant to Article 64(4) of the Rules of Procedure.

32 By document lodged at the Court Registry on 18 September 2009, the Commission submitted its observations on the applicants' requests.

33 By order of 14 December 2009 the Court (Fifth Chamber) reserved for the final judgment its decision on the applicants' request under Article 114(1) of the Rules of Procedure.

34 By decision of the President of the Court, the composition of the Fifth Chamber of the Court was altered for the purpose of these proceedings.

35 On hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure and, in the context of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, put written questions to the Commission. The Commission replied to those questions within the prescribed time-limit.

36 The parties presented oral argument and replied to questions put by the Court at the hearing on 20 May 2010.

Forms of order sought by the parties

37 The applicants claim that the Court should:

— annul the contested decision;

— in the alternative, annul Article 2 of the contested decision;

— in the further alternative, reduce appropriately the amount of the fine imposed;

— order the Commission to pay the costs.

38 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

A — *The claim for annulment of the contested decision*

39 In support of this claim the applicants put forward three pleas in law.

40 By their first and third pleas, the applicants challenge the Commission's analysis that the conduct at issue had effects restrictive of competition within the meaning of Article 81(1) EC.

41 The second plea alleges an infringement of the applicants' rights of defence, in that the legal test used by the Commission in the contested decision in order to assess the restrictive effects of the conduct at issue was not the same as that used during the administrative procedure.

1. *Preliminary issues*

(a) Admissibility of particular arguments and a document

42 The applicants, in their written pleadings and by separate document of 24 July 2009, submitted pursuant to Article 114(1) of the Rules of Procedure, consider that the Commission, both in the contested decision and in its written pleadings, relies on arguments and on a document on which the applicants did not have the opportunity to state their point of view during the administrative procedure. The arguments concerned relate to the existence of a strategy on the part of Morgan Stanley to acquire from merchants transactions effected using cards issued by Morgan Stanley ('the "on-us" transaction acquiring strategy') and the document concerned is Annex 57 to the second letter of facts, containing Morgan Stanley's presentation for the hearing.

43 As regards the arguments linked to the existence of an 'on-us' transactions acquiring strategy, the applicants maintain that those arguments were not put forward by the Commission during the administrative procedure.

44 As regards Annex 57 to the second letter of facts, the applicants claim, in essence, that they were not given sufficient notice of this, since no reference to that annex was to be found in the actual body of that letter.

45 The Commission considers that it was entitled, both in the contested decision and within its written pleadings, to rely on those arguments and on that document.

46 The Court will analyse the admissibility of those arguments and that document when examining the various pleas in law to which they relate.

(b) Admissibility of an annex to the application

47 The Commission disputes the admissibility of Annex A5 to the application, which comprises a joint expert report (the 'joint expert report').

48 The Commission contends that the applicants present in the joint expert report arguments which do not appear in the application and comments that this is contrary to the purely evidential and instrumental function of annexes.

49 According to the applicants, the pleas in law and arguments in support of which the joint expert report was submitted were stated sufficiently in the application and, consequently, the provisions of Article 44(1)(c) of the Rules of Procedure have been respected.

50 Under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure, each application is required to state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. According

to settled case-law it is necessary, for an action to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to certain passages in documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application. Furthermore, it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (see Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 94 and case-law cited).

51 In the present case, it is indeed the case that the various pleas in law and arguments in support of which reference was made to the joint expert report are clearly identifiable in the body of the application itself. The applicants refer to that document as part of their criticism of the Commission's analysis that there was scope for further competition in the market in question, in order to dispute the relevance of the effect on competition which the entry of a financial institution in the market in question had allegedly had in the past and in order to claim that the description by the Commission of Morgan Stanley as an efficient, large and experienced acquirer was wrong.

52 However, it is clear that the joint expert report exceeds the purely evidential and instrumental function reserved to annexes. The reading of that report reveals that it is not limited to supporting or supplementing matters of fact or of law expressly set out in the body of the application, but introduces fresh arguments.

53 Consequently, Annex A5 to the application will be taken into consideration by the Court only in so far as it supports or supplements pleas or arguments expressly set

out by the applicants in the body of their written pleadings and in so far as it is possible for the Court to determine precisely what are the matters contained in Annex A5 that support or supplement those pleas or arguments (see, to that effect and by analogy, *Microsoft* v *Commission*, paragraph 50 above, paragraph 99).

2. *The second plea in law: infringement of the applicant's rights of defence*

(a) Arguments of the parties

54 The applicants complain that the fact that the Commission altered its analysis in the course of the administrative procedure and that they had no opportunity to express their views constitutes an infringement of their rights of defence which should entail the annulment of the contested decision. In paragraphs 198 to 200 of the statement of objections and in paragraphs 5 to 9 of the second letter of facts, the basis of the Commission's argument that there were appreciable effects on competition was the premiss that competition in the acquiring market was limited. However, in recital 200 of the contested decision, the Commission declared, for the first time, that it did not consider the competition in the market to be ineffective. The applicants conclude that the Commission's analysis is based on a test, stated for the first time in the contested decision, to the effect that although there might be effective competition in the United Kingdom acquiring market, there was scope for further competition.

55 The Commission considers that there was no infringement of the applicants' right to be heard.

(b) Findings of the Court

56 According to the case-law, the statement of objections must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission (Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 63). Due observance of the rights of the defence in a proceeding in which sanctions such as those in question may be imposed requires that the undertakings and associations of undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views effectively on the truth and relevance of the facts, objections and circumstances put forward by the Commission (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 553). That requirement is satisfied if the decision does not allege that those concerned have committed infringements other than those referred to in the statement of objections and only takes into consideration facts on which they have had the opportunity of making known their views. It follows that the Commission may adopt only objections on which those concerned have had the opportunity to make known their views (Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 47).

57 It is also clear from settled case-law that the decision is not necessarily required to be an exact replica of the statement of objections. The Commission must be permitted in its decision to take account of the responses of the undertakings concerned to the statement of objections. It must be able not only to accept or reject the arguments of the undertakings concerned, but also to carry out its own assessment of the facts put forward by those undertakings in order either to abandon such complaints as have been shown to be unfounded or to supplement and redraft its arguments, both in fact and in law, in support of the complaints which it maintains. Thus it is only if the final decision alleges that the undertakings concerned have committed infringements other than those referred to in the statement of objections or takes into consideration different facts that there will be an infringement of the rights of the defence. That is not the case where the alleged differences between the statement of objections and the final decision do not concern any conduct other than that in respect of which the undertakings concerned had already submitted observations and are therefore unrelated to any new complaint (see Joined Cases T-191/98, T-212/98

to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 191, and case-law cited).

58 Further, in asserting that there was an infringement of the rights of the defence with regard to the complaints made in the contested decision, it is not sufficient for the undertakings concerned to point to the mere existence of differences between the statement of objections and the contested decision without explaining precisely and specifically why each of those differences constitutes, in the circumstances, a new complaint upon which they were not given the opportunity to comment. According to settled case-law, an infringement of the rights of the defence must be examined in relation to the specific circumstances of each particular case, since it depends essentially on the objections raised by the Commission in order to prove the infringement which the undertakings concerned are alleged to have committed (see *Atlantic Container Line and Others* v *Commission*, paragraph 57 above, paragraph 192, and case-law cited).

59 In paragraphs 198 to 200 of the statement of objections, the Commission relied on certain characteristics of the market, and, in particular, the fact that it was highly concentrated, to conclude that competition in that market was limited, particularly as regards the acquiring of small and medium-sized merchants.

60 In their observations of 3 December 2004 the applicants challenged that analysis by the Commission by referring, in particular, to the reduction of merchant service charges or the ease with which merchants could change acquirer. It was in response to those observations that the Commission stated, in recital 200 of the contested decision, that the competition in the market was not 'ineffective' and that there was scope for further competition.

61 It is clear that the Commission does not, in recital 200 of the contested decision, address a new complaint to the applicants nor does it rely on new factual material. The Commission merely completed its analysis by taking into account the applicants' observations, as it is bound to do pursuant to the case-law cited in paragraphs 56 and 57 above.

62 Accordingly, that change in the reasoning in the contested decision as compared with that to be found initially in the statement of objections, far from disclosing an infringement of the applicants' rights of defence, proves, on the contrary, that the applicants were able to express their views on the complaint made by the Commission that, in the light of the existing level of competition in the market in question, the conduct at issue had effects which were restrictive of competition.

63 The fact that the Commission relied in the contested decision on the fact that there was scope for further competition on the relevant market therefore does not constitute an infringement of the applicants' rights of defence.

64 The second plea in law must therefore be rejected.

3. *The first and third pleas in law, denying that the conduct at issue was restrictive of competition*

65 The applicants do not accept the Commission's assessment that the conduct at issue had effects restrictive of competition within the meaning of Article 81(1) EC. By their first plea, they deny that the effect of the conduct at issue was to close the market in question to Morgan Stanley. In their third plea, they criticise the Commission's

assessment of the effect on competition which the presence of Morgan Stanley might have had on that market.

66 Before the merits of those two pleas are analysed, it should be stated that the applicants do not reproduce, within the present action, the arguments set out in the course of the administrative procedure, to the effect that the reason why the Rule was applied to Morgan Stanley was that the Discover system was a competitor of Visa, and accordingly the applicants do not call into question the Commission's assessments in the contested decision to the effect that there was no objective justification for the conduct at issue.

67 It is evident from settled case-law that in assessing an agreement, a decision of an association of undertakings or a concerted practice under Article 81(1) EC, account should be taken of the actual conditions in which they produce their effects, in particular the economic and legal context in which the undertakings concerned operate, the nature of the products or services concerned, as well as the real operating conditions and the structure of the market concerned, unless the matter at issue is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets. In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 81(3) EC, with a view to granting an exemption from the prohibition in Article 81(1) EC (see Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 136, and case-law cited).

68 The examination of conditions of competition on a given market must be based not only on existing competition between undertakings already present on the relevant market but also on potential competition, in order to ascertain whether, in the light of the structure of the market and the economic and legal context within which it functions, there are real concrete possibilities for the undertakings concerned to compete

among themselves or for a new competitor to enter the relevant market and compete with established undertakings (*European Night Services and Others* v *Commission*, paragraph 67 above, paragraph 137).

69 Further, if an agreement, a decision of an association of undertakings or a concerted practice is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement, decision of an association of undertakings or concerted practice in dispute (see, to that effect, Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 76, and case-law cited).

70 As regards the scope of judicial review of the Commission's appraisals, it is appropriate to recall the settled case-law that, although as a general rule the Courts of the European Union ('the Courts of the Union') undertake a comprehensive review of the question whether or not the conditions for the application of Article 81(1) EC are met, their review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers (see *Deere* v *Commission*, paragraph 69 above, paragraph 34, and case-law cited). However, while the Courts of the Union recognise that the Commission has a margin of appreciation, that does not mean that they must decline to review the Commission's interpretation of economic data. The Courts of the Union must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (see *Microsoft* v *Commission*, paragraph 50 above, paragraph 89, and case-law cited).

71 In the light of those considerations the merits of the two pleas in law put forward by the applicants will be examined by the Court.

(a) The first plea in law: the Commission's failure to take into account the possibility that Morgan Stanley could enter the market concerned through a fronting arrangement

Arguments of the parties

72 This plea as submitted by the applicants has two parts.

73 In the first part, the applicants claim that the Commission's reasoning is vitiated by an error of law because of the application of the wrong legal test, in that the Commission discounted the possibility of Morgan Stanley entering the market through a fronting arrangement on the grounds that such an arrangement, first, did not in practice ensure efficient market entry for a bank such as Morgan Stanley and, secondly, did not constitute for Morgan Stanley a substitute for acquiring in its own name.

74 The second part of the plea consists of the applicants' claim that the various justificatory arguments put forward by the Commission are vitiated by errors of fact and assessment. The applicants' first claim is that the Commission was wrong to have taken the view that fronting arrangements are not used by the large international banks.

75 The applicants' second claim is that the argument that a fronting arrangement would not have allowed Morgan Stanley to pursue an integrated issuing and acquiring strategy is wrong. Moreover, that argument, in that it concerns an 'on us' transaction acquiring strategy, should be declared inadmissible, since it was mentioned for the first time in the contested decision and was not made known to the applicants during the administrative procedure.

76 The applicants' third claim is that the Commission was wrong to conclude that it would have been difficult for Morgan Stanley to find a fronting partner. The Commission (i) ruled out without any justification the large banks active in the acquiring market, (ii) underestimated the possibilities of finding a fronting partner among Visa members who are not active on the acquiring market and (iii) ignored the possibility of Morgan Stanley concluding a fronting arrangement with a foreign bank.

77 The applicants' fourth claim is that it is false to state that fronting arrangements cause additional costs and added complexity. The applicants argue in particular that Chapter 2.10 of the Visa Europe Regional Operating Regulations, to which the Commission refers in the contested decision, is not applicable to fronting arrangements. Moreover, account must be taken of the fact that Visa members must also incur the costs of recruiting merchants. It is apparent from the evidence of one of the directors of a processing company that fronting arrangements are not less efficient than direct acquiring as a Visa member but offer, on the contrary, advantages to the de facto acquirer. The applicants' last claim is that the Commission was wrong to allege 'further inefficiencies' in the conclusion of a fronting arrangement on the ground that Morgan Stanley is also a member of the MasterCard payment network (the 'MasterCard system').

78 The Commission considers that this plea is unfounded.

Findings of the Court

79 This plea requires an examination of whether, and in what circumstances, the fact that Morgan Stanley had the possibility of entering into a fronting arrangement with a Visa member should have led the Commission to the conclusion that the conduct at issue did not have the effect of excluding Morgan Stanley from the market in question.

80 First, it is evident that the parties do not dispute the description of fronting arrangements set out in recital 110 of the contested decision as follows:

'[B]anks have effectively withdrawn from the merchant acquiring business and act as a mere interface (or a "front") between Visa and MasterCard and a third-party provider. In such cases it is the third-party provider who takes responsibility for virtually all elements of an acquiring service and bears the risk with respect to the merchant's revenue stream. In order to comply with the [Visa] scheme rules, the merchant contracts are generally tri-partite between the merchant, the third-party provider and the member bank. Such arrangements between a Visa/MasterCard member bank and a third-party provider are sometimes referred to as "fronting arrangements".

81 As stated in paragraph 67 above, in assessing an agreement, a decision of an association of undertakings or a concerted practice under Article 81(1) EC, account should be taken of the actual conditions in which they produce their effects, in particular the economic and legal context in which the undertakings concerned operate, the nature

of the products or services concerned, as well as the real operating conditions and the structure of the market concerned.

82 The fact that the Visa system rules reserve to members the acquiring of transactions entered into with merchants constitutes, it is true, one factor in the economic and legal context in which the conduct at issue must be assessed. However, account must also be taken of the other factors which determine the opportunities for access to the market in question (see, to that effect and by analogy, Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 20).

83 In that regard, a possibility that operators who do not have Visa membership may enter the market in question by entering into a fronting arrangement with a Visa member is one factor of the economic and legal context which should have been taken into account in the event that it represented a real concrete possibility for Morgan Stanley to enter the market concerned and compete with established undertakings (see, to that effect and by analogy, *Delimitis*, paragraph 82 above, paragraph 21).

84 In order to determine whether the conclusion of a fronting arrangement with a Visa member represented a real concrete possibility for Morgan Stanley to enter the market concerned and compete with established undertakings, account must be taken of the conditions in which competition takes place in the market concerned.

85 It necessarily follows that a possibility of entering the market concerned which, in the light of those conditions, would be unrealistic or purely theoretical, cannot be taken into consideration.

86 In the first part of the plea, alleging an error of law on the part of the Commission, the applicants criticise the terms used by the Commission in recital 121 of the contested decision, worded as follows:

'although in theory [banks] considering entry into the credit and deferred debit/charge card merchant acquiring market could carry out such acquiring activities by way of a fronting arrangement, such an arrangement does not, in practice, ensure efficient market entry for a bank like Morgan Stanley, and does not constitute a substitute for acquiring in its own name.'

87 It is impossible on the basis of that recital alone to come to the conclusion that the Commission erred in law by applying the wrong legal test, since such an error can only be detected by means of an analysis of the arguments with which the Commission justified its conclusion, the merits of which are challenged in the second part of the plea.

88 Accordingly, the two parts of this plea in law will be examined together.

89 In the contested decision, the Commission relied on four sets of arguments: (i) the fact that fronting arrangements are not used by the large international banks; (ii) the impossibility of Morgan Stanley being able to pursue an integrated acquiring and issuing strategy through a fronting arrangement; (iii) the difficulty for Morgan Stanley in finding a fronting partner and (iv) the additional complexity and costs caused by that type of acquiring.

90 It is sufficient, in the present case, to examine the merits of the arguments put forward by the Commission in relation to Morgan Stanley's difficulty in finding a fronting partner.

91 It is evident from the examples of fronting arrangements to be found in the contested decision, but also from those provided by the applicants, that such arrangements have essentially been entered into with de facto acquirers already present on the acquiring market — financial institutions or processing companies — and have therefore not had the effect of allowing a new competitor to enter the market concerned but rather of strengthening the competitive position of those already present in that market.

92 The only examples of a new competitor entering the market by means of a fronting arrangement concern processing companies with close commercial links with the Visa member acting as the fronting partner. However, it is clear that Morgan Stanley's situation, given its status as a financial institution and, therefore, as a competitor of the Visa members in markets other than the acquiring market, is not comparable to those of processing companies which do not carry out any banking activities.

93 Under those conditions, the possibility asserted by the applicants that Morgan Stanley, a financial institution with no presence in the market concerned, could find a fronting partner among the large banks who might be likely to leave the market concerned, the Visa members who are not active on that market or a foreign bank which is a Visa member and wants to establish a banking presence in the United Kingdom, is essentially theoretical and speculative.

94 The Commission was therefore correct to hold that it would have been difficult for Morgan Stanley to find a fronting partner. The Court considers that that finding alone justified the Commission's rejection of the possibility that Morgan Stanley could enter the market concerned by means of a fronting arrangement.

95 For the sake of completeness, it should be stated that the merits of the Commission's conclusion are reinforced by the arguments that acquiring as part of a fronting arrangement is more complex and more costly than acquiring as a Visa member.

96 First, as regards the greater complexity which is characteristic of acquiring as part of a fronting arrangement, it is appropriate to take into consideration the finding made in recital 117 of the contested decision that contracts entered into with merchants as part of a fronting arrangement are generally tripartite, in that they also include the fronting partner. It is clear that while the applicants dispute the precise content of the obligations of a de facto acquirer within that type of contract they do not deny that the contracts concerned are tripartite.

97 The Commission also considered, in essence, in recital 118 of the contested decision, that the fronting partner had obligations to Visa and that such obligations were also sources of constraints on de facto acquirers.

98 The applicants challenge the extent of those obligations by stating that the chapter of Visa Europe's internal regulations on which the Commission relies is not applicable to de facto acquirers.

99 In the first place, it should be observed that the applicants have not expressly specified the precise rules governing the respective obligations of the fronting partner and of de facto acquirers, the form submitted as an annex to their reply being inadequate in that regard.

100 In the second place, it is clear that the applicants do not dispute that the function of the fronting partner is to serve as an interface between Visa and the de facto acquirer. It can reasonably be inferred from that interface role that there are obligations which are imposed both on the fronting partner and on the de facto acquirer which do not exist where a Visa member acts directly in the acquiring market.

101 Consequently, the Commission could validly conclude that acquiring as part of a fronting arrangement was more complex than acquiring as a Visa member, and there is no need to determine the relevance and the merits of its assessment that the conclusion of a fronting arrangement would cause 'further inefficiencies' because of Morgan Stanley's status as a member of the MasterCard system.

102 Secondly, as regards the additional costs engendered by acquiring through a fronting arrangement, the Commission referred to the fact that the de facto acquirer not only had to remunerate its fronting partner for the purchase of its acquiring portfolio, but was also required to pay charges.

103 The applicants dispute that analysis on the ground that a Visa member acting directly in the acquiring market is also subject to costs, in particular those of recruiting merchants. The charges paid by the de facto acquirer to its fronting partner were accordingly the consideration, in particular, for the referral of merchants used by the fronting partner.

104 That argument does not affect the merits of the Commission's analysis. While a proportion of the charges paid may in fact represent costs which would, in any event, be borne by a Visa member acting directly on the acquiring market, the Commission could nonetheless reasonably take the view that the payments made to the fronting partner are also remuneration for the provision of interface services and represent, at least partly, costs which are not borne by a Visa member acting directly on the acquiring market.

105 Consequently, the Commission did not commit a manifest error of assessment in stating that acquiring by means of a fronting arrangement was more complex and costly than acquiring as a Visa member.

106 As stated in paragraph 84 above, the Court must have regard to the conditions under which competition takes place in the market in question when examining the effect of the above considerations on the possibility claimed by the applicants that Morgan Stanley could enter that market by means of a fronting arrangement.

107 It must be recalled that the Commission found that two factors favoured the access to the market of a new entrant, namely the possibility of competing on variables other than the price, and in particular quality of service, and the fact there were simple and inexpensive procedures permitting merchants to switch acquirer.

108 However, the Commission also found in the contested decision, without contradiction by the applicants on that point, that the structure of the market concerned was characterised by a high degree of concentration. It is apparent from recitals 166 to 168 of the contested decision that, on the basis of information available to the Commission, in 2003 the main two acquirers represented 61 % of the acquiring market and the four largest acquirers represented 90 % of that market, the remainder of the market

being shared between four acquirers. The Commission also pointed out, in recital 169 of the contested decision, a trend towards consolidation of that market, referring to the fact that several smaller acquirers had sold or delegated their acquiring business to a small number of financial institutions and processing companies.

109 Similarly, it was noted in the contested decision that the last entry into the market concerned was in 1996 and that none of the financial institutions questioned by the Commission envisaged entering it.

110 Consequently, it must be held that the structure of the acquiring market, notwithstanding the factors which the Commission accepted would favour the access of a new entrant, means that it is difficult to conceive of Morgan Stanley entering the market in question by means of a fronting arrangement which would immediately place it at a disadvantage in comparison with its main competitors established on that market.

111 In the light of all of the foregoing, it is clear that the Commission's conclusion, that the possibility of Morgan Stanley entering by means of a fronting arrangement should be rejected, is sufficiently justified by the arguments relating to the difficulty of finding a fronting partner and, for the sake of completeness, those relating to the additional complexity and costs engendered by fronting arrangements. The Commission therefore did not, contrary to what is claimed by the applicants, apply an incorrect legal test.

112 In those circumstances, there is no need to examine the other criticisms of the Commission's arguments that fronting arrangements are not used by the large international banks and that it was impossible to pursue an integrated acquiring and issuing strategy. Accordingly, there is no need to respond to the applicants' claims that the

Commission's arguments concerning Morgan Stanley's alleged intention to pursue an 'on us' transaction acquiring strategy are inadmissible.

113 The first plea must therefore be rejected.

(b) The third plea in law: the effects on competition of Morgan Stanley's presence in the market in question

114 In this plea, the applicants complain that the Commission, first, applied a test which was legally and economically incorrect in order to assess the effects on competition of the conduct at issue and, second, underestimated the level of competition in the market in question. The applicants also criticise the Commission's analysis of the effects which any entry of Morgan Stanley into the market in question might have had.

The first part of the plea: the application of the wrong legal and economic test

— Arguments of the parties

115 The applicants complain that the Commission erred in law by applying the wrong legal and economic test, namely that there was 'scope for further competition' in the market in question, while conceding that that competition was effective.

116 The applicants state that the competition referred to in Article 3(1)(g) EC and Article 81 EC means effective competition. Consequently, securing further competition over and above the effective level is not an objective of the Treaty and, by penalising the refusal to admit Morgan Stanley on that ground, the Commission applied an incorrect test.

117 The applicants refer to the joint expert report and claim that competition is, by its very nature, a dynamic process within which there is always scope for further competition, whatever its level of effectiveness. The Commission's position therefore amounts to the implication that there can never be effective competition in a market.

118 As regards the Commission's assertion, in its defence, that exclusion from the market should always be deemed to be restrictive of competition, the applicants submit that that assertion is not supported by any reference to case-law. The applicants consider, next, that the Commission's analysis is equivalent to criticising the applicants on the ground that the object of the conduct at issue was to restrict competition, whereas the contested decision is based on the effects of the refusal to admit Morgan Stanley. Lastly, the applicants note that such an analysis is entirely contrary to the case-law, in that it implies that there can be a restriction regardless of the state of competition in the market in question. That analysis is also inconsistent with certain documents published by the Commission and, in particular, its Guidelines on the application of Article 81(3) [EC] (OJ 2004, C 101, p. 97). It is apparent from footnote No 31 in those Guidelines that the position of the Commission itself is that the object of Article 81 is to protect competition in the market for the benefit of consumers.

119 The applicants challenge the argument raised in the defence that the entry of a new competitor could have effects on competition in certain segments of the market in question, more appreciable than those which the global picture of the acquiring market might suggest. That argument was indeed made in the statement of objections

but was not reproduced by the Commission in the contested decision, following its rebuttal by the applicants.

120 The Commission denies the applicants' claims.

— Findings of the Court

121 The applicants base their claim of an error of law, in essence, on (i) the Commission's concession in recital 200 of the contested decision that competition in the market in question was not 'ineffective' and (ii) the statement in recitals 187 and 200 of the contested decision that there was 'scope for further competition' in the market in question. The applicants' reference to the joint expert report will be taken into account only to the limited extent stated in paragraph 53 above.

122 In order to determine the merits of those arguments, account must be taken of all the arguments set out in the contested decision devoted to the analysis of the effects of the conduct at issue which were restrictive of competition within the meaning of Article 81(1) EC.

123 It is evident that the Commission relied on several factors relating, first, to the degree of actual competition in the market in question and, second, to potential competition. As regards the former, as stated above in paragraphs 108 and 109, the Commission took the view that the structure of the market in question was characterised by a high degree of concentration and a trend towards consolidation. As regards potential

competition, the Commission considered, in essence, in recitals 169 to 174 of the contested decision, that that was confined merely to large banks or the large international processing companies which were capable of attaining the size necessary to become competitors of the current acquirers. The Commission noted that Morgan Stanley was the only potential entrant which had expressed its intention to enter that market.

124 It is clear that such an analysis cannot be described as legally incorrect, as claimed by the applicants.

125 First, pursuant to the case-law cited in paragraph 68 above, the examination of conditions of competition must be based not only on existing competition between undertakings already present on the relevant market but also on potential competition.

126 Second, it is also evident from the case-law of the Court of Justice that Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the interests of competitors or consumers but also to protect the structure of the market and thus competition as such (Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 38, and Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others* v *Commission* [2009] ECR I-9291, paragraph 63).

127 Consequently, inasmuch as its appraisal of the extent to which the effects of the conduct at issue were restrictive of competition was founded on the potential competition represented by Morgan Stanley and on the structure of the market in question, the Commission adopted a correct interpretation of Article 81(1) EC and therefore did not commit the error in law claimed by the applicants.

128 Moreover, as regards more specifically recital 200 of the contested decision, as already stated in paragraphs 60 to 62 above, that represents merely the acknowledgement by the Commission, in response to arguments submitted by the applicants during the administrative procedure, of the existence of some competition among the players in the market in question.

129 However, such an acknowledgement does not mean that the conduct at issue could not have the effects restrictive of competition maintained by the Commission.

130 First, to accept the applicants' argument would amount to making the analysis of the effects of the conduct at issue on potential competition dependent on the examination of the level of competition currently existing in the market in question. It is clear that such reasoning would be incompatible with the settled case-law cited in paragraph 68 above, which requires that the examination of conditions of competition on a given market be based not only on the existing competition between undertakings already present in the market in question, but also on potential competition.

131 Secondly, in the light of the characteristics of the market in question, the Commission could justifiably take the view that the entry of a new player would have created scope for further competition in a market distinguished by a high degree of concentration. Consequently, the use of the expression 'scope for further competition' in recitals 187 and 200 of the contested decision is not, as claimed by the applicants, incorrect.

132 Accordingly, the first part of that plea must be rejected.

The second part of the plea: incorrect analysis of the existing level of competition in the market in question

— Arguments of the parties

133 The applicants consider that the Commission manifestly underestimated the intensity of the competition that actually existed in the acquiring market. In essence, while acknowledging that they agree with most of the elements taken into account by the Commission, the applicants complain that the Commission assessed those elements wrongly and drew inconsistent inferences. A correct analysis of those elements should have led the Commission to the conclusion that there was intense competition in the acquiring market.

134 In the first place, the Commission was wrong to focus on the number of players in the market in question and the trend in that market towards consolidation, since such indicators are not in themselves determinative of the assessment of the level of competition in a market. According to the applicants, the Commission should rather have based its analysis on indicators of competition such as potential entry into the market, changes in market shares, movements in charges paid by merchants to their acquirer bank, non-price competition and switching of acquirers by merchants.

135 In the second place, the applicants complain that the Commission did not draw all the inferences from the evidence which they had supplied to it.

136 First, by way of example, the applicants claim that the Commission considered the entry into the market of de facto acquirers as having led to further consolidation of the market — in that they merely replaced their fronting partner in the market — while conceding that those new players could contribute to the improvement of acquiring services and a reduction of their costs. The applicants state, in that regard, that it is evident from the contested decision itself that some de facto acquirers linked up with banks without an issuing business or with foreign banks.

137 Second, the Commission was wrong to accept that some foreign banks had entered the United Kingdom acquiring market but to dismiss that phenomenon as 'niche', when it was clear from the evidence available to it that the cross-border acquirers' share of total turnover increased by 50 % between 2002 and 2004. Moreover, the applicants complain that the Commission, in essence, confined itself to the analysis of actual competition from cross-border acquirers, and thereby ignored the potential competition which they represented.

138 Third, the applicants note that the Commission accepted that the market in question was characterised by simple and inexpensive acquirer switching procedures and claim that the Commission should have concluded from this that that ease of switching was the cause of intense competition between the companies already present in the market.

139 In the third place, the applicants complain that the Commission relied on what happened when a bank last entered the market in question, in 1996, without enquiring into the state of competition at that time. It is clear however from the joint expert report that competition was not as effective at that time, and accordingly that experience loses any relevance.

140 The Commission contests the merits of the arguments put forward by the applicants and contends that they should be rejected.

— Findings of the Court

141 In essence, the applicants consider that the Commission underestimated both the actual and potential degree of competition in the market in question. The applicants also claim that the Commission was not justified in taking into account the effects on competition of the last entry into the market in question, in 1996.

142 In the first place, as regards actual competition in the market in question, the Commission could validly base its analysis on the number of players present in that market and the trend towards consolidation, since such factors relating to the structure of the market in question were, in the light of the case-law cited in paragraph 126 above, particularly relevant.

143 As regards more specifically the effects on competition which the presence of several de facto acquirers might have in the market in question, the Commission took the view, in recital 115 of the contested decision, that, in the great majority of cases, a de facto acquirer took the place of a bank which was active in the acquiring market. The Commission also stated, in essence, in recital 169 of the contested decision, that the presence of large banks and processing companies acting as de facto acquirers led to a consolidation of the market in that they tended to take over the business of smaller acquirers who wanted to leave that market.

144 That analysis does not appear to be manifestly incorrect and the applicants' criticism of it is not persuasive. The fact that the de facto acquirers concerned might contribute to an improvement of acquiring services and to the reduction of costs is not inconsistent with the Commission's decision to base its approach on the structure of the market in question.

145 As regards examples given by the applicants of de facto acquirers who are associated with non-issuing banks or with foreign banks, it must be observed that those agreements have generally not led to the entry of a new player into the market in question but to the strengthening of the position of acquirers already present on that market.

146 As regards the Commission's acknowledgment that there are simple and inexpensive acquirer switching procedures, it is sufficient to point out, as stated in paragraphs 129 to 131 above, that the Commission was fully entitled to accept that there was competition between the players in the market in question and at the same time conclude that the exclusion of a potential competitor had effects restrictive of competition within the meaning of Article 81(1) EC.

147 In the second place, as regards the potential competition in the market in question, it must be observed that, in recitals 169 to 174 of the contested decision, the Commission concluded that, because of the high degree of concentration and the consolidation apparent in the market in question, potential competition could come only from large banks or large international processing companies capable of attaining the size necessary to become competitors of the current acquirers. The Commission took particular note of the fact that, in order to run an acquiring business profitably, undertakings must be able to have work of a substantial volume and to achieve significant economies of scale. In that regard the Commission stated that, in relation to

acquiring, it is essential that there is a large acquired transaction turnover, because the main revenue of acquirers, namely the merchant service charge, is calculated as a percentage of the value of transactions carried out.

148 On the basis of a list provided by the applicants during the administrative procedure, the Commission held that, in addition to Morgan Stanley, nine financial institutions established in the United Kingdom could be considered to be potential competitors. The Commission's view on that matter is not expressly challenged by the applicants.

149 The applicants' criticism relates to a failure to take into account potential competition from cross-border acquirers. In that regard, it should be stated that, notwithstanding the increased number of cross-border acquirers between 2002 and 2004, as referred to by the applicants, it is evident from recitals 65 to 68 of the contested decision, the accuracy of which is not disputed, that the number of merchants acquired by the main cross-border acquirers in 2004 represented only 0.3 % of all merchants acquired. In the light of that figure, the Commission justifiably considered that the conditions of competition between the various national acquiring markets in Europe were not sufficiently homogeneous to have the consequence that cross-border acquiring might apply competitive pressure on the players in the market in question and, therefore, that the evaluation of potential competition had to be based on the established players in the United Kingdom market.

150 In the third place, as regards the criticism of the fact that the Commission took into account the last previous entry of a bank into the market concerned in 1996, suffice it to say that the reasoning behind the Commission's approach of analysing the effects on competition of the most recent entry into the market in question as at the date of the contested decision is not misconceived.

151 Moreover, it is clear from recital 181 of the contested decision that that entry was made against a background of declining prices, a decline which the presence of that bank in the market accelerated. It is therefore undeniable that there is a similarity with the market situation in the relevant period, which was also marked by a decline in the prices invoiced to merchants. Consequently, such an example serves to demonstrate that the fact that prices fall in the market concerned, because of the competition between undertakings currently in the market, does not detract from the effects on competition which the presence of a new actor in that market might have. Given the circumstances of the present case, it was therefore particularly relevant.

152 The second part of the plea must therefore be rejected.

The third part of the plea in law: insufficient and erroneous analysis of the effects of Morgan Stanley's non-admission on competition

— Arguments of the parties

153 The applicants claim that the Commission failed to meet its obligation to carry out a comparative examination of, on the one hand, the competitive situation in the market in question in the absence of Morgan Stanley and, on the other hand, what it would have been if Morgan Stanley had been admitted as a Visa member prior to September 2006.

154 The applicants' first complaint is that the Commission committed an error of law by not applying the tests drawn from *European Night Services and Others* v *Commission*, paragraph 67 above, to Morgan Stanley's entry prospects, since the Commission satisfied itself with Morgan Stanley's professed intention to enter the United Kingdom acquiring market.

155 The applicants contrast the Commission's analysis of Morgan Stanley's prospects of entering the United Kingdom acquiring market to that adopted, in the contested decision, in relation to the potential entry of the Discover system to the European payment card system market, where the Commission referred to the lack of material, such as an official launch announcement, capable of demonstrating that an entry strategy was being implemented. The applicants see in that approach a stringent application of the tests deriving from Case T-114/02 *BaByliss* v *Commission* [2003] ECR II-1279, mentioned in the contested decision. The applicants complain that the Commission ignored those same tests when it undertook to determine whether Morgan Stanley was a potential entrant to the United Kingdom acquiring market.

156 The hypothetical nature of the Commission's analysis is also inconsistent with its Guidelines on Vertical Restraints (OJ 2000 C 291, p. 1).

157 The applicants' second complaint is that the Commission based the assumption that Morgan Stanley, once it became a Visa member, would have entered the acquiring market on nothing other than Morgan Stanley's professed 'continued intention', for which there was no independent corroborative evidence. The applicants consider that Morgan Stanley did not seek Visa membership in order to implement a particular strategy in relation to the acquiring market, as maintained by the Commission, but that Morgan Stanley was interested solely in the possibility of issuing Visa cards. In that regard, the applicants do not accept the Commission's interpretation of Morgan Stanley's complaint.

158 The applicants claim that Morgan Stanley's declaration of its intention to enter the acquiring market post-dated the complaint and appeared in an internal document, the strategic plan for acquiring merchants in Europe dating from June 2002, and that that document has no probative value. They also claim that the second document relied on by the Commission, Morgan Stanley's implementation plan, is part of Annex 57 to the second letter of facts and ought, for the reasons mentioned in paragraphs 42 and 44 above, to be declared to be inadmissible. In any event, it has no probative value. The applicants also consider that the Commission was wrong not to take into account the fact that Morgan Stanley, following its admission to Visa membership, did not seek to enter the acquiring market, but concentrated solely on issuing Visa cards, which, according to the applicants, was its real objective.

159 The applicants' third complaint is that the Commission did not itself examine in depth the possible effects of Morgan Stanley's entry on existing competition in the market in question. The Commission's conclusions on the positive effects which Morgan Stanley's entry would have had on competition are no more than unsubstantiated assertions.

160 The applicants also argue that Morgan Stanley would not have been capable, in the light of the characteristics of the market, of adding value to the quality and price of services already offered in that market. They also challenge the various factors relied on by the Commission to justify the description of Morgan Stanley as an 'efficient, large and experienced acquirer'. In any event, even if that description is accurate, that does not in any way distinguish Morgan Stanley from acquirers already present in the market in question. None of the factors relied on by the Commission demonstrates that Morgan Stanley was in any way superior to the incumbent acquirers.

161 The Commission contends that those complaints should be rejected.

— Findings of the Court

162 The applicants' first complaint, namely that the Commission applied an incorrect legal test in order to assess Morgan Stanley's prospects of entering the market in question, is equivalent, in essence, to claiming that the Commission failed to establish that Morgan Stanley was a potential competitor.

163 The applicants' criticisms are essentially based on the fact that the Commission was satisfied with Morgan Stanley's declaration of its intention to enter the market in question.

164 The applicants also refer to the definition of a 'potential supplier' given by the Commission in its Guidelines on Vertical Restraints. They recall that it is there stated that a possibility of entering a market is not sufficient if it is merely theoretical and that entry into the market must be capable of taking place within one year.

165 In the first place, it should be observed that Morgan Stanley's intention to enter the market in question is not the only factor relied on by the Commission to support the conclusion that Morgan Stanley was a potential competitor. It is evident from the contested decision, and in particular recitals 190 to 198, that the Commission reached that conclusion by relying, in essence, on two sets of arguments, relating to Morgan Stanley's intention to enter the market in question, but also to its ability to do so. As regards the latter, the Commission held that Morgan Stanley has long experience of merchant acquiring. The Commission also referred to the experience gained by Morgan Stanley, as a member of the MasterCard system, of the rules and

procedures specific to a four-party network. On that basis the Commission came to the following conclusion in recital 198:

'[I]n the context of consolidation of the acquiring markets …, Morgan Stanley is one of the few large international banks that could be considered potential efficient pan-European acquirers. It is interested in entering the United Kingdom market and domestic acquiring markets of Contracting Parties to the EEA Agreement, and in cross-border acquiring, which it was also prevented from doing in the absence of a Visa licence.'

166 In the second place, as regards the legal tests which should be applied in order to determine whether Morgan Stanley was a potential competitor in the market in question, it follows from the case-law cited in paragraphs 68 and 69 above that the Commission was required to determine whether, if the Rule had not been applied to Morgan Stanley, there would have been real concrete possibilities for it to enter the United Kingdom acquiring market and to compete with established undertakings.

167 It is also clear from the case-law that such a demonstration must not be based on a mere hypothesis, but must be supported by evidence or an analysis of the structures of the relevant market (see, to that effect, *European Night Services and Others* v *Commission*, paragraph 67 above, paragraphs 142 to 145). Accordingly, an undertaking cannot be described as a potential competitor if its entry into a market is not an economically viable strategy (see, to that effect and by analogy, Case T-177/04 *easyJet* v *Commission* [2006] ECR II-1931, paragraphs 123 to 125).

168 It necessarily follows that, while the intention of an undertaking to enter a market may be of relevance in order to determine whether it can be considered to be a potential competitor in that market, nonetheless the essential factor on which such a description must be based is whether it has the ability to enter that market.

169 It should, in that regard, be recalled that whether potential competition — which may be no more than the existence of an undertaking outside that market — is restricted cannot depend on whether it can be demonstrated that that undertaking intends to enter that market in the near future. The mere fact of its existence may give rise to competitive pressure on the undertakings currently operating in that market, a pressure represented by the likelihood that a new competitor will enter the market if the market becomes more attractive.

170 As to whether account should also be taken of the tests set out by the Commission in its Guidelines on Vertical Restraints, it should be stated that, in the circumstances of the present case, the reference by the applicants to the definition of 'potential supplier' in those Guidelines is of no relevance. Recourse should rather be had to the — essentially equivalent — definition of 'potential competitor' in the Guidelines on the applicability of Article 81 [EC] to horizontal cooperation agreements (OJ 2001 C 3, p. 2, the 'Guidelines on cooperation agreements').

171 It is stated in footnote No 9 in the Guidelines on cooperation agreements that '[a] firm is treated as a potential competitor if there is evidence that, absent the agreement, this firm could and would be likely to undertake the necessary additional investments or other necessary switching costs so that it could enter the relevant market in response to a small and permanent increase in relative prices'. Moreover, '[t]his assessment has to be based on realistic grounds, the mere theoretical possibility

to enter a market is not sufficient'. It is also stated that '[m]arket entry needs to take place sufficiently fast so that the threat of potential entry is a constraint in the market participants behaviour' and that, '[n]ormally, this means that entry has to occur within a short period'. In that regard, the Commission refers to a period of one year while stating that 'in individual cases longer time periods can be taken into account' and that '[t]he time period needed by companies already active in the market to adjust their capacities can be used as a yardstick to determine this period'.

172 It is clear that such a definition reproduces, and clarifies, the tests deriving from the case-law referred to in paragraphs 166 and 167 above. Consequently, since that definition does not appear to be inconsistent with the relevant case-law, it can be taken into account in order to determine whether the Commission was justified in describing Morgan Stanley as a potential competitor.

173 In the third place, as regards the application of those tests to the present case, it should be emphasised that the applicants, as they expressly acknowledged at the hearing, do not challenge the Commission's assessment of Morgan Stanley's ability to enter the market in question.

174 Accordingly, the applicants' criticisms, in that they are based essentially on an alleged lack of intention on the part of Morgan Stanley to enter the market in question, are principally directed at findings which, for the reasons mentioned in paragraphs 166 to 169 above, cannot be the essential factor for an assessment of whether the description of Morgan Stanley as a potential competitor was well founded.

175 In any event, the Commission cannot be criticised for having taken into account the possibility of Morgan Stanley's entering the market in question if the conduct at issue had not occurred.

176 Thus, first, the applicants' criticism of the fact that Morgan Stanley took no specific measures to bring about its entry into the market is not well founded, having regard to the circumstances of the present case.

177 Since Visa membership was a necessary precondition of entering the acquiring market, no inferences can be drawn from Morgan Stanley's failure to adopt measures, such as the implementation of an entry strategy, before its admission as a Visa member on 22 September 2006. On that aspect it is not necessary to determine whether the Commission disregarded the tests used in *BaByliss* v *Commission*, paragraph 155 above, to which the applicants refer, it being sufficient to observe that the circumstances of the present case can be distinguished from those of that judgment.

178 Moreover, as regards the fact that Morgan Stanley took no steps to enter the acquiring market following its admission to membership, it must be recalled that that admission was granted to it more than six years after its application for that purpose. Accordingly, that fact gives no guidance as to what Morgan Stanley might have intended or how Morgan Stanley might have acted if Visa membership had been granted to it at an earlier date.

179 Secondly, while it is true that Morgan Stanley did not explicitly refer to the acquiring market in the complaint addressed to the Commission on 12 April 2000, at least two documents from Morgan Stanley refer to the market in question.

180 It was explicitly stated by Morgan Stanley, in its action brought before the High Court of Justice on 27 September 2000, that the application of the Rule prevented it joining the United Kingdom acquiring market.

181 Moreover, Morgan Stanley produced a strategic merchant acquiring plan, which it adopted in June 2002. It is true that that document was supplied to the applicants only in a non-confidential version, with many parts redacted. Nonetheless, that document, which was sent to the applicants, discloses various factors relating to the analysis of the acquiring market in the United Kingdom and in other States which are members of the EEA. Likewise, that document gives an impression of what Morgan Stanley's entry strategy might have been.

182 As regards the probative value of those two documents, it must be recalled that the principle which prevails in European Union law is that of the unfettered evaluation of evidence and that the only relevant criterion for the purpose of assessing the evidence adduced is its reliability (Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 84). Accordingly, in order to assess the probative value of an item of evidence, regard should be had first to the credibility of the account it contains. Account must then be taken of, inter alia, the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears sound and reliable (*Cimenteries CBR and Others* v *Commission*, paragraph 56 above, paragraph 1838, Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission* [2006] ECR II-3567, paragraph 121).

183 It is indeed true that the source of those two documents was Morgan Stanley and that they were adopted during the administrative procedure, and that such factors affect their probative value.

184 However, as stated in paragraph 177 above, and having regard to the circumstances of this case, since Visa membership was a necessary precondition of entering the acquiring market, the Commission was not able to rely on material with a greater probative value, such as the implementation of an entry strategy.

185 Furthermore, the reliability of that evidence is strengthened by the fact, pointed out by the Commission, that Morgan Stanley has experience in merchant acquiring in other markets.

186 Consequently, the possibility of Morgan Stanley entering the market in question was not purely theoretical but, on the contrary, represented a plausible assumption. The Commission could therefore justifiably infer from Morgan Stanley's statements that it intended to enter the market in question.

187 Since it follows from the foregoing that (i) the Commission's assessments of Morgan Stanley's ability to enter the market in question are not challenged and (ii) the hypothesis that Morgan Stanley might enter the market in question is not merely theoretical, it must be concluded that the Commission did not err in law by describing Morgan Stanley as a potential competitor. The first complaint must therefore be rejected.

188 That conclusion is not invalidated by the fact that the Commission did not provide any estimate of the time required for Morgan Stanley to enter the market in question, which appears to be inconsistent with the definition in the Guidelines on cooperation agreements, which refer to a period of one year.

189 It is apparent from reading that definition, reproduced in paragraph 171 above, that the essential factor is the need for the potential entry to take place with sufficient speed to form a constraint on market participants, the period of one year being illustrative only.

190 The Commission noted in recital 186 of the contested decision that there were factors 'conducive to the success of new entry', including the fact that merchants could use simple and inexpensive acquirer switching procedures. It is clear that that factor — which is not in fact challenged by the applicants, who rely on it to support their argument — when allied to the factors identified by the Commission in recitals 193 to 198 of the contested decision as proving Morgan Stanley's ability to enter the market in question, one of those factors being its long experience of merchant acquiring, can establish that Morgan Stanley's entry could have taken place sufficiently quickly, for the purpose of the Commission's definition of a potential competitor in the Guidelines on cooperation agreements. Accordingly, the Commission's analysis is consistent not only with the case-law cited in paragraphs 166 and 167 above, but also with its own tests, as set out in the Guidelines on cooperation agreements.

191 The applicants' second complaint, namely that the Commission was wrong to hold that Morgan Stanley would have entered the market in question, must be rejected on the grounds specified in paragraphs 175 to 186 above, and there is no need to examine whether Morgan Stanley's implementation programme in Annex 57 to the second letter of facts constituted admissible evidence.

192 The applicants' third complaint, namely that the Commission did not examine in depth the possible effects of Morgan Stanley's entry into the market in question, also cannot succeed.

193 First, it should be stated that, in that context, the applicants restate their arguments to the effect that the analysis of the effects of the conduct at issue on potential competition should be dependent on an examination of the actual level of competition in the market. However, as already stated in paragraph 130 above, such reasoning cannot be followed.

194 Secondly, and in any event, it is clear that the applicants' arguments as set out in this complaint are based on a factually incorrect assumption, namely that there is a high degree of competition in the market in question. As stated in response to the first part of this plea, the fact that there is a degree of competition between the players currently present in the market does not preclude the Commission finding that there is a high level of concentration in the market in question.

195 In relation to a market containing a very small number of competitors, the Commission could legitimately conclude that the effect of the entry of a new player would be an improvement of the competitive situation for that reason alone, and it did not have to demonstrate that the new player was in any way superior to the already established players.

196 Consequently, a debate on the abilities of Morgan Stanley as compared with those of the players present in the market in question serves no purpose, since the applicants do not dispute its ability to enter that market. There is therefore no need to analyse the applicant's arguments challenging the experience and qualifications of Morgan Stanley.

197 The third complaint and, consequently, the entire plea in law must therefore be rejected.

198 In the light of all the foregoing considerations, the claim for annulment must be rejected.

B — *The claim for the annulment or reduction of the fine*

199 The applicants' primary contention is that the imposition of a fine is in the present case vitiated by errors of law and assessment and they claim that the fine they have been ordered to pay should be annulled. Alternatively, they ask the Court to reduce the amount of the fine imposed.

1. *The fourth plea in law: errors of law and assessment regarding the imposition of a fine*

200 This plea in law has three parts, alleging, first, infringement of principles of equal treatment and legal certainty and failure to state reasons, second, infringement of the obligation to adopt the contested decision within a reasonable time, and, third, the failure to take into account the uncertainty as to whether the conduct at issue constituted an infringement.

(a) The first part of the plea: infringement of the principles of equal treatment and legal certainty and failure to state reasons

Arguments of the parties

201 The applicants claim that the Commission was wrong to have imposed a fine even though the Rule had been notified to the Commission under Regulation No 17. The applicants state that the date chosen by the Commission as the starting point for the calculation of the fine is not that of the entry into force of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81[EC] and 82[EC] (OJ 2003 L 1, p. 1), but the date of the statement of objections. Accordingly, the Commission itself accepted that there were legitimate expectations of immunity from fines prior to that date. The applicants note, next, that the present case is the only one where the Commission has imposed a fine under Regulation No 1/2003 in relation to a notified agreement.

202 Moreover, on several occasions the Commission officials handling the case suggested that this case was not one in which a fine would be imposed.

203 The applicants compare the imposition of a fine on them with the position adopted by the Commission in two cases which they consider to be comparable, namely MasterCard (Case COMP/34.579, 'the MasterCard case') and Cartes Bancaires (Case COMP/38.606, 'the Cartes Bancaires case'). They claim that the Commission did not impose a fine in those cases because the measures in question had been notified under Regulation No 17. As regards more specifically the Cartes Bancaires case, the

applicants state, in essence, that that case was more serious than the present case, because the restriction of competition concerned was not only the effect but also the object and because the measures in question continued to produce effects up to the date of the Commission's decision.

204 The applicants deny that the differences pointed out by the Commission in its defence are real.

205 First, the applicants regard as irrelevant the difference which consists of the fact that, in the MasterCard case, the statement of objections made no mention of the possibility of a fine. The real issue is why the Commission adopted in the MasterCard case a different position from the statement of objections onwards, to the effect that no fine should be imposed, for the sole reason that there had been notification.

206 Second, the applicants dispute that the conduct at issue was not notified. They note that it is clear from the contested decision itself, and in particular from footnote No 312, that the application of the Rule to Morgan Stanley was notified and that is why an immunity from fines was justified until the date of the statement of objections. Next, the applicants maintained that position throughout the administrative procedure, and at no time did the Commission dispute that point. Lastly, in any event, the applicants state that they gave notification in 1990 not only of the Rule itself, but also of the fact that they had deemed Morgan Stanley to be a competitor. Since that date, the various versions of the Visa Operating Regulations notified to the Commission all stated that Morgan Stanley was deemed to be a competitor of Visa. Moreover, the Commission was informed as early as July or August 2000, in response to a request for information, of the reasons why Morgan Stanley was not eligible for membership.

207 Third, as regards the comparison with the Cartes Bancaires case, the applicants maintain that, since the effects of the measure in question persisted in spite of its suspension, that cannot justify their being treated differently in a way which is to their disadvantage. Further, they observe that there was no suspension of the measure at issue in the MasterCard case and that nonetheless no fine was imposed.

208 The applicants conclude from the foregoing that there was an infringement of the principles of equal treatment and legal certainty. Since the Commission gave no explanation of that point in the contested decision, the applicants claim that the duty to state reasons was also infringed.

209 The Commission contests the applicants' claims.

Findings of the Court

210 As regards, in the first place, the complaint based on infringement of the principle of legal certainty, it should be stated that, even were it accepted that the conduct at issue, and not merely the Rule, could be deemed to have been notified, the applicants' argument cannot succeed.

211 First, the Commission's power to impose a fine in relation to an agreement notified under Regulation No 17 stems from Article 34(1) of Regulation No 1/2003, which states that notifications are to lapse as from the date of its application. It necessarily follows that the immunity from fines for agreements notified under Article 15(5)

of Regulation No 17 ended when Regulation No 1/2003 entered into force. Accordingly, the Commission is, in any event, entitled to impose a fine on the applicants for the continuation of the conduct at issue after the entry into force of Regulation No 1/2003. The Commission acted in compliance therewith, by taking as the starting point for the setting of the fine the date of the statement of objections, 2 August 2004, which is after the date of the entry into force of Regulation No 1/2003, 1 May 2004.

212 Secondly, it must be borne in mind that the Commission has a margin of discretion when setting the amount of fines, since fines constitute an instrument of competition policy (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59). That margin of discretion extends, necessarily, to deciding whether or not it is appropriate to impose a fine (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 239).

213 Thirdly, as regards more specifically the fact that the Commission had not, in the past, imposed fines in relation to restrictions of competition by effect, that cannot mean that it is precluded from imposing a fine if that is necessary to ensure the implementation of competition policy. On the contrary, the proper application of the competition rules requires that the Commission be able at any time to adjust the level of fines to the needs of that policy (see, to that effect and by analogy, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 169, and case-law cited).

214 Lastly and fourthly, it must be stated that the applicants were informed, at the stage of the statement of objections, of the fact that the Commission envisaged the imposition of a fine.

215 Consequently, by imposing a fine on the applicants in the present case, the Commission did not infringe the principle of legal certainty.

216 As regards, in the second place, the complaint of an alleged infringement of the principle of equal treatment, the applicants claim, in essence, that the Commission should have adopted in their case the same approach as in the MasterCard and Cartes Bancaires cases.

217 According to settled case-law, the general principle of equal treatment and non-discrimination does indeed require that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 71 and case-law cited).

218 However, it is in the specific context of each case that the Commission, in the exercise of its discretion, decides whether it is appropriate to impose a fine in order to penalise the infringement found and to protect the effectiveness of competition law (*SCK and FNK* v *Commission*, paragraph 212 above, paragraph 239).

219 In any event, if the Commission were wrong not to impose fines in the MasterCard and Cartes Bancaires cases, the applicants' argument would amount to a plea that they should benefit from an unlawful act committed in favour of a third party, which would be contrary to the principle of legality (see Case T-120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraph 77 and case-law cited).

220 Consequently, the complaint alleging infringement of the principle of equal treatment must be rejected.

221 In relation to, in the third place, the complaint of an infringement of the duty to state reasons, it is settled case-law, as regards the determination of fines for infringements of competition law, that the Commission fulfils its obligation to state reasons where it indicates, in its decision, the factors on the basis of which the gravity and duration of the infringement were assessed, and is not required to include in it a more detailed account or the figures relating to the method of calculating the fines (see Case T-68/04 *SGL Carbon* v *Commission* [2008] ECR II-2511, paragraph 31 and case-law cited). It is clear that such information on the gravity and duration of the applicants' conduct, while relating primarily to the determination of the amount of the fine, is also such as to permit an understanding of why the Commission considered that it was appropriate to impose a fine. Accordingly, since the contested decision contains, in recitals 350 to 370, the necessary assessment factors, that complaint must be rejected.

222 Finally, in the fourth place, as regards the references made by the applicants to alleged statements by Commission officials, it is not clear from the applicants' written pleadings that they claim that such statements gave rise to any legitimate expectation that no fine would be imposed. In any event, even if that were the tenor of their argument, it is clear that the conditions under which they might rely on the principle of protection of their legitimate expectations are not satisfied.

223 In accordance with settled case-law, that principle extends to any individual in a situation where the authorities have caused him to entertain legitimate expectations, it being understood that no one may plead infringement of that principle unless precise, unconditional and consistent assurances, from authorised, reliable sources, have been given to him by the authorities (see Joined Cases T-236/01, T-239/01, T-244/01

to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 152 and case-law cited).

224 It is however clear that the statements referred to by the applicants cannot be described as precise, unconditional and consistent assurances, as the applicants themselves seem to accept when referring in their written pleadings to 'statements which suggested' that the Commission was not treating this case as one in which a fine would be imposed.

225 In the light of the foregoing, the first part of the plea must be rejected.

(b) The second part of the plea in law: infringement of the obligation to adopt the contested decision within a reasonable time

Arguments of the parties

226 According to the applicants, the fact that the administrative procedure took more than seven years is inexcusable, has caused them substantial prejudice and justifies annulment of the fine. Had there not been such delay, the Commission would have adopted the contested decision under Regulation No 17 and, consequently, no fine would have been imposed. The applicants state that, under Article 15(6) of Regulation No 17, a fine can be imposed in respect of a notified agreement only in cases where

there has been a formal decision of withdrawal of immunity. There was no such decision by the Commission, despite an express request from Morgan Stanley for such a decision.

227 Further, they state that compliance with a reasonable time-limit in the conduct of administrative procedures relating to competition policy constitutes a general principle of law, the infringement of which can justify the annulment of a decision if it affected the ability of the undertaking concerned to defend itself.

228 In order to determine whether the procedure was abnormally long, account should be taken of the whole period of its duration. In that regard, the applicants detail the chronology of the case and claim that it is evident that the Commission succumbed to one delay after another. In particular, the applicants argue that, in the three years which followed the lodging of the complaint, the Commission sent to them only two requests for information and that no request for information was sent to the merchants.

229 The duration of the administrative procedure in this case is even more reprehensible when Morgan Stanley itself had requested urgent action by the Commission and when parallel legal proceedings were stayed before the United Kingdom courts, which meant that this case needed to be given priority.

230 The Commission states that in view of the complexity of the present case there was no undue and unjustifiable delay on its part. In any event, all that matters is that the Commission complied with the limitation period laid down in Article 25(1) of Regulation No 1/2003.

Findings of the Court

231 Compliance with the reasonable time requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of European Union law whose observance the Courts of the Union ensure (Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 35). That principle is also set out in Article 41(1) of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2004 C 364, p. 1).

232 It must be borne in mind that a breach of that principle can lead to the annulment of the decision provided that it has affected the ability of the undertakings concerned to defend themselves and, therefore, has adversely affected their rights of defence (see, to that effect, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 231 above, paragraphs 42 and 43).

233 However, in the present case, the applicants do not claim that the duration of the administrative procedure has adversely affected their rights of defence.

234 In those circumstances, it is appropriate to recall the settled case-law relating to Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1), applicable to fines imposed in the context of implementing Regulation No 17. According to that case-law, where there is a complete system of rules covering in detail the periods within which the Commission was entitled, without undermining

the fundamental requirement of legal certainty, to impose fines on undertakings which are the subject of procedures under the competition rules, there is no room for consideration of the Commission's duty to exercise its power to impose fines within a reasonable period (see Case T-276/04 *Compagnie maritime belge* v *Commission* [2008] ECR II-1277, paragraph 41 and case-law cited).

235 The limitation periods laid down in Article 25 of Regulation No 1/2003 reproduce the relevant provisions of Regulation No 2988/74 on the basis of which the case-law mentioned in paragraph 234 above was established.

236 Thus, Article 25(1)(b) of Regulation No 1/2003 provides that the Commission's powers to impose fines are subject to a limitation period of five years. Under Article 25(2) of that regulation, time is to begin to run on the day on which the infringement is committed, or, in the case of continuing or repeated infringements, on the day on which the infringement ceases. The limitation period may however be interrupted or suspended, pursuant to Article 25(3), (4) and (6). Under Article 25(5) of Regulation No 1/2003, each interruption is to start time running afresh, but the limitation period is to expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment.

237 Consequently, the case-law relating to Regulation No 2988/74 is also applicable in relation to fines imposed in the context of implementing Regulation No 1/2003.

238 In the present case, the infringement in question was a continuous infringement which ceased on the date when Morgan Stanley was admitted to Visa membership on 22 September 2006. The period which elapsed between the cessation of the infringement and the contested decision imposing the fine is therefore of much shorter duration than the limitation periods laid down in Article 25 of Regulation No 1/2003.

239 The second part of the plea must therefore be rejected.

(c) The third part of the plea in law: failure to take account of the uncertainty as to whether the conduct at issue was an infringement

Arguments of the parties

240 The applicants complain that the Commission did not follow the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty (OJ 1998 C 9, p. 3, 'the 1998 Guidelines'), which were applicable to the present case. According to the applicants, the 1998 Guidelines provide that the existence of a 'reasonable doubt as to whether the restrictive conduct does indeed constitute an infringement' is an attenuating circumstance justifying the reduction of the basic amount of the fine. In essence, the applicants claim, referring to the approach followed in Case COMP/38.096 ('the Clearstream case'), that, where there is genuine legal uncertainty as to whether the conduct at issue constitutes an infringement, the Commission should not impose a fine. The complexity of this case,

admitted by the Commission itself, should have led it to follow an identical approach here.

241 First, the applicants claim that there is no Commission practice or Community case-law on the matter at issue in this case, the only precedent being a judgment of a United States court. Consequently, in order to determine whether they were entitled to refuse Morgan Stanley's application for membership and, as the case may be, on what conditions, the applicants had to interpret the existing Community case law by analogy. The intense debate entered into by the applicants and the Commission on the applicability of Article 81(1) and (3) EC bears witness to that difficulty.

242 Secondly, the applicants state, in essence, that the fact that the present case concerns a restriction of competition by effect is the source of additional complexity and, therefore, legal uncertainty. The Commission itself struggled with the novelty and complexity of the case. In that regard, the applicants renew their argument set out as part of their claim for annulment of the decision that the Commission changed its assessment of existing competition in the market in question. They also note that only at the stage of the second letter of facts did the Commission address the possibility that Morgan Stanley might enter the market in question by the use of a fronting arrangement.

243 While not disputing that there is a power in principle to impose a fine in relation to conduct which constitutes a restriction of competition by effect, the applicants state that the Commission has never imposed a fine in a case where there was no finding of an anti-competitive object.

244 Third, the Commission officials stated to the applicants that what mattered was not so much the application of the Rule to Morgan Stanley as the Rule itself, which was not sufficiently transparent or objective. Therefore, there was genuine uncertainty as to the nature of the objection at issue.

245 The Commission denies that the applicants had real and substantial grounds to believe that their refusal to admit Morgan Stanley was not an infringement of Community law.

Findings of the Court

246 It is settled case-law that the Commission may not depart from rules which it has imposed on itself (see Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 53, and case-law cited). In particular, where the Commission adopts guidelines intended to specify, consistent with the Treaty, the criteria which it intends to apply in the exercise of its discretion, there is a self-imposed limitation of that discretion inasmuch as it must then follow those guidelines (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 57; Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 89, and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [1998] ECR II-2597, paragraph 267).

247 It is apparent from recitals 350 to 370 of the contested decision that the Commission applied the method set out in the 1998 Guidelines in order to calculate the amount of the fine imposed on the applicants.

248 Point 3 of the 1998 Guidelines provides for an adjustment of the basic amount of the fine where there are certain attenuating circumstances, one of which is the existence of reasonable doubt on the part of the undertaking as to whether the conduct at issue does constitute an infringement.

249 In the present case, the applicants consider that the uncertainty as to whether the conduct at issue was an infringement was such that the application of the 1998 Guidelines should have led the Commission not to impose a fine.

250 In order to determine whether the Commission was obliged to give the applicants the benefit of the attenuating circumstance of the existence of reasonable doubt, and even, as appropriate, not to impose a fine — as requested by the applicants in this plea in law — it must be ascertained whether the applicants should reasonably have been aware that they were infringing Article 81 EC (see, to that effect, Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 503).

251 It is important to note that the fine imposed was not based on the entire period of infringement, but only from the date of the statement of objections.

252 In that document, the Commission set out its objections with regard to the conduct at issue and explained why it considered that that conduct was contrary to Article 81 EC. Consequently, from that date, the applicants cannot maintain that they were not aware of infringing Article 81 EC (see, to that effect and by analogy, Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917, paragraph 314).

253 In that regard, there is a significant difference from the Clearstream case, referred to by the applicants, where the conduct at issue had ceased before the adoption of the statement of objections.

254 Accordingly, the applicants' arguments, based on an alleged lack of previous decisions or on the complexity of the case are ineffective in that such arguments could, in any event, do no more than demonstrate that there was a reasonable doubt prior to the statement of objections, in other words in a period which was disregarded in the calculation of the amount of the fine.

255 Lastly, it is of no consequence that some arguments referred to by the Commission in the contested decision do not appear in the statement of objections, such as the view that entry to the market in question by means of a fronting arrangement was inefficient. The information contained in the statement of objections was in itself sufficient to ensure the applicants could no longer entertain a reasonable doubt that the conduct at issue was an infringement.

256 It is therefore necessary to reject the third part and accordingly the plea in its entirety.

2. *The fifth plea in law: Errors of law and assessment in calculating the amount of the fine imposed*

257 In this plea, the applicants challenge the Commission's assessments relating to, first, the determination of the starting amount of the fine, second, the failure to take account of mitigating circumstances and, third, the duration of the infringement.

(a) The first part of the plea in law, relating to the determination of the starting amount of the fine

258 The applicants challenge, first, the classification of the infringement as 'serious' and, alternatively, the choice of a starting amount of EUR 8.5 million.

The nature of the infringement

— Arguments of the parties

259 According to the applicants, the infringement complained of should, in the light of the 1998 Guidelines, have been classified as 'minor'. Even if the infringement had an effect on the market, that effect did not have the economic impact claimed by the Commission, since the infringement concerned a single operator, in a very specific market and in a single Member State.

260 The applicants claim that while potential impact is sufficient to support a finding that there is an infringement of Article 81 EC, when calculating the amount of the fine the Commission should demonstrate, with supporting evidence, that there is an actual impact on the market. In this case, the Commission acknowledges that it did not quantify actual impact and accepts that it was content to infer the impact from its findings in relation to the infringement.

261 The Commission considers that it did not err in respect of its classification of the infringement.

— Findings of the Court

262 In the contested decision, the Commission's classification of the infringement in question as 'serious' was based on several factors.

263 The Commission noted, first of all, in recitals 358 and 359 of the contested decision, that Morgan Stanley had been prevented from offering acquiring services in respect of credit and deferred debit/charge cards in general, and not merely in respect of Visa cards.

264 The Commission then took the view that the infringement had an actual impact on competition. While recognising, in recital 357 of the contested decision, that it was not possible to measure precisely that impact, the Commission inferred from the implementation of the conduct at issue that it was 'reasonably probable that [the infringement had] a wide impact on the market'. In recital 360 of the contested decision the Commission also referred to the various factors which were the basis for its finding that there was an infringement.

265 The Commission lastly referred, in recital 362 of the contested decision, to the fact that the restriction had concerned the United Kingdom, which is a major market for payment cards.

266 It must be observed that, in line with the settled case-law, the gravity of an infringement is determined in the light of numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines, in respect of which the Commission has a margin of discretion (Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 153, and case-law cited).

267 As stated in paragraph 247 above, the Commission applied the method set out in the 1998 Guidelines in order to calculate the amount of the fine imposed on the applicants.

268 According to the first paragraph of Point 1.A of the 1998 Guidelines, in assessing the gravity of the infringement, account must be taken of its nature, its actual impact in the market, where this can be measured, and the size of the relevant geographic market.

269 It is clear from the description of minor and serious infringements in the 1998 Guidelines that the distinguishing features of the latter are essentially their impact on competition and the geographical extent of their effects. The description of serious infringements is that they will 'more often than not be horizontal or vertical restrictions of the same type as [minor infringements], but more rigorously applied, with a wider market impact, and with effects in extensive areas of the common market.' 'Minor' infringements are described as having 'a limited market impact and affecting only a substantial but relatively limited part of the Community market.'

270 In the first place, as regards the impact of the infringement on the market, the applicants complain that the Commission did not demonstrate that it was real. They also claim that, in any event, the impact could not be other than limited.

271 In accordance with settled case-law, in order to assess the actual effect of an infringement on the market, the Commission must take as a reference the competition that would normally exist if there were no infringement (see Case T-73/04 *Carbone-Lorrain*e v *Commission* [2008] ECR II-2661, paragraph 83 and case-law cited).

272 In recital 357 of the contested decision, the Commission stated the following:

'While it is not possible to precisely measure the actual impact in the market, the exclusion [of Morgan Stanley] decision was implemented and it is therefore reasonably probable that there was a wide impact on the market.'

273 It is true that an argument that there is automatically a causal link between the implementation of anti-competitive conduct and the existence of an impact is misconceived (see, to that effect, judgment of 12 September 2007 in Case T-30/05 *Prym and Prym Consumer* v *Commission,* not published in the ECR, paragraphs 109 and 110).

274 However, it is evident from recitals 358 to 360 of the contested decision that the Commission also relies in that regard on two other sets of arguments, namely (i) that the conduct at issue had the effect of preventing Morgan Stanley from offering acquiring services for all cards and not merely Visa cards and (ii) that the presence of Morgan Stanley in the market in question might have had positive effects.

275 First, the applicants do not dispute that the conduct at issue did have the effect of preventing Morgan Stanley from offering acquiring services in respect of all cards and not merely Visa cards.

276 Second, the Court has held, as part of its examination of the claims for annulment, that the Commission's assessments in relation to the restrictive effects of the conduct

at issue on competition, namely the degree of actual and potential competition, Morgan Stanley's status as a potential competitor and its intention to join the market in question, are not vitiated by illegality.

277 In that regard, it must be observed that the Commission stated, in recital 174 of the contested decision, that it had put to all the financial institutions identified as being potential competitors the question whether they had considered entering the market concerned and thereby reached the conclusion that Morgan Stanley was the only potential competitor expressing an intention to enter that market.

278 Accordingly, by concluding on the basis of those factors that the conduct at issue had a significant impact on the market, the Commission did not commit any error of assessment.

279 In the second place, as regards the Commission's examination of the geographical extent of the effects of the conduct at issue, the applicants consider that, since only the United Kingdom market was affected by that conduct, the Commission should have chosen to classify the infringement as 'minor'.

280 It should be recalled that it is settled case-law that a geographical market of national dimension corresponds to a substantial part of the common market (see Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others* v *Commission* [2005] ECR II-3033, paragraph 176 and case-law cited).

281 In recital 362 of the contested decision, the Commission referred to the fact that 'the United Kingdom is a major market for payment cards'. Having regard to the economic importance of that market — which is not, moreover, disputed by the applicants — the Commission could justifiably consider that the market in question represented an 'extensive area of the common market' within the meaning of the 1998 Guidelines.

282 In the light of the foregoing, the applicants' grounds of complaint relating to the nature of the infringement must be rejected.

The starting amount of the fine

— Arguments of the parties

283 According to the applicants, the starting amount of EUR 8.5 million chosen by the Commission is disproportionate and is vitiated by a failure to state reasons. The Commission should have fixed the starting amount at the lower end of the scale provided for serious infringements by the 1998 Guidelines, having regard to the impact of the infringement, the fact that the restriction of competition at issue is a restriction by effect, and the Commission's practice in relation to the setting of fines. The applicants state that, while the Commission is entitled to depart from its previous fining practice, it must apply the 1998 Guidelines and give objectively justifiable reasons in support of the figure chosen.

284 In their reply, the applicants claim that the fact that the Commission applied equivalent starting amounts in a number of earlier decisions demonstrates how disproportionate is the starting amount at issue in this case, since the conduct targeted by those decisions consisted of far more serious infringements of competition law.

285 The Commission considers that the starting amount is not disproportionate and that the decision contains a legally sufficient statement of reasons.

— Findings of the Court

286 First, the Court must reject the complaint that there was a failure to state reasons because the Commission did not indicate why it fixed the starting amount of the fine imposed on the applicants at EUR 8.5 million.

287 It is true that the contested decision does not contain explicit arguments to justify the determination of the starting amount, the Commission being content to refer, in recital 353 of the contested decision, to the reasons which led it to classify the infringement as serious.

288 However, it is clear that the Commission was not obliged to provide an explanation on that point. As stated in paragraph 221 above, it is evident from settled case-law that, as regards the determination of fines for infringements of competition law, the Commission fulfils its obligation to state reasons where it indicates, in its decision,

the factors on the basis of which the gravity and duration of the infringement were assessed, and is not required to include in the decision a more detailed account.

289 Consequently, the Commission was under no obligation to state explicitly why it specifically set the starting amount of the fine at EUR 8.5 million. Accordingly, the contested decision is not vitiated by a failure to state reasons in that regard.

290 As regards, secondly, the claim that that amount is disproportionate, it should be recalled that the 1998 Guidelines anticipate a starting amount in respect of infringements classified as 'serious' of between EUR 1 million and EUR 20 million.

291 The third, fourth and fifth subparagraphs of Point 1.A of the 1998 Guidelines read as follows :

"Within each of these categories, and in particular as far as serious and very serious infringements are concerned, the proposed scale of fines will make it possible to apply differential treatment to undertakings according to the nature of the infringement committed.

It will also be necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect.

Generally speaking, account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognize that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law.'

292 Accordingly, since the applicants do not call into question the lawfulness of the 1998 Guidelines, the question whether or not the starting amount fixed by the Commission is proportionate should be considered in the light of the criteria referred to in paragraph 291 above.

293 Having regard, on the one hand, to the applicants' economic significance and, on the other, to the need to ensure that the fine has a deterrent effect, an amount of EUR 8.5 million, in the lower half of the bracket envisaged by the 1998 Guidelines for serious infringements, does not appear to be manifestly disproportionate.

294 In the light of the above, the first part of the plea must be rejected.

(b) The second part of the plea in law, relating to mitigating circumstances

Arguments of the parties

295 The applicants maintain that the uncertainty as to whether the conduct at issue was an infringement should, at the very least, have been considered to be a mitigating factor. For that reason, the Commission should also not have increased the fine on

account of the duration of the infringement. The applicants also complain that the Commission did not take into account the fact that they (i) offered to amend and indeed did amend the Rule and (ii) reached a settlement with Morgan Stanley in the course of the administrative procedure. Lastly, the delay by the Commission in dealing with the case justified, at the very least, a reduction in the fine.

296 The Commission considers that it was justified in holding that there were no mitigating circumstances. The Commission denies that the amendment made to the Rule had any substance, since it consisted merely of adding evaluation criteria which were not, in any event, applied to Morgan Stanley.

Findings of the Court

297 As regards, first, the complaint that the view should have been taken that the uncertainty as to whether the conduct at issue was an infringement was a mitigating circumstance, that complaint must be rejected for the reasons set out in paragraphs 250 to 255 above. It must be recalled that the basis for the Commission's calculation of the fine was the period that commenced upon the date of the statement of objections. On that date, the applicants could no longer entertain a reasonable doubt that the conduct at issue was an infringement.

298 As regards, secondly, the complaint that the Commission's delay in dealing with the case also justified a reduction in the fine, that complaint cannot succeed for the reasons set out fully in paragraphs 231 to 238 above, in that the interval between the

cessation of the infringement and the contested decision was shorter than the limitation period in Article 25 of Regulation No 1/2003.

299 As regards, third, the reference to the settlement reached with Morgan Stanley and its admission to Visa membership, it must be observed that, by proceeding in that way, the infringement complained of was brought to an end by the applicants several years after they had been given notice by the Commission that their conduct constituted an infringement. Accordingly, the Commission acted correctly in not granting any reduction in the fine to the applicants for that reason.

300 Fourth, the applicants are also wrong to claim that the Commission should have taken account of the fact that the applicants amended the Rule during the administrative procedure.

301 It is indeed the case that the applicants amended the Rule on 24 May 2006. That amendment could be considered to be a response to one of the criticisms addressed by the Commission to the applicants in its statement of objections which, in paragraphs 247 and 248, stated that the wording of the Rule gave scope for discriminatory application, having regard, in particular to the fact that the concept of 'competitor' in the Rule was insufficiently objective and precise. It must also be recognised that the contested decision, adopted after that amendment of the Rule, did not repeat that criticism.

302 However, the Commission was not obliged to treat that amendment of the Rule as a mitigating circumstance and to grant to the applicants a reduction in the fine.

303 Whether it is appropriate to grant a reduction of the fine on grounds of attenuating circumstances in accordance with Point 3 of the 1998 Guidelines must be determined on the basis of a global assessment which takes account of all the relevant circumstances. In the absence of a mandatory indication in the Guidelines of the attenuating circumstances which may be taken into account, it must be held that the Commission

has retained a certain discretion when making a global assessment of the size of any reduction in the fines to reflect attenuating circumstances (*Mannesmannröhren-Werke* v *Commission*, paragraph 182 above, paragraph 275).

304 However, since the conduct at issue concerned not so much the Rule itself as its application to Morgan Stanley, as the applicants themselves acknowledge, and since the non-admission persisted more than two years after the statement of objections, the Commission was entitled not to take into account the amendment made by the applicants to the Rule, an amendment which, moreover, occurred only at a very advanced stage of the administrative procedure.

305 The second part of the plea must therefore be rejected.

(c) The third part of the plea in law, relating to the duration of the infringement

Arguments of the parties

306 The applicants do not accept the Commission's determination of when the infringement began and ended. They consider that the infringement lasted, at most, for seven months from August 2005 until February 2006. Consequently, the Commission should not have increased the fine on account of the duration.

307 First, the applicants consider that the infringement did not begin before August 2005. They rely on the fact that entry into the market in question requires a concrete implementation plan. Since the first evidence of an implementation plan is dated 20 May 2005 and the actual realisation of such a plan generally takes at least three months, Morgan Stanley could not have entered the market in question before August 2005.

308 The Commission was therefore wrong to take the view that the commencement of the infringement was the foreclosure on 22 March 2000. The applicants also deny that Morgan Stanley genuinely intended to enter the acquiring market from 1998 onwards. The supposed evidence of the existence of such an intention relates in fact only to the card issuing market. The applicants further complain that the Commission did not analyse the evidence put forward by the applicants, although that evidence demonstrated that Morgan Stanley did not intend to enter the market in question.

309 Secondly, to the extent that in order to determine the duration of the infringement the Commission relies on the supposed continuing intention of Morgan Stanley to carry out acquiring, the applicants claim that the Commission was under a duty to prove the reality of that intention throughout the duration of the infringement. The contested decision offers no evidence whatsoever of that intention for the period between May 2005 and 22 September 2006. Consequently, the Commission failed to comply with its obligations, as set out in Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraphs 79 and 80. In any event, the Commission should have held that the infringement came to an end in February 2006, when the negotiations in respect of Morgan Stanley's membership commenced and when Morgan Stanley did not demonstrate any intention to join the acquiring market.

310 As to the Commission's response that Visa membership alone suffices to confer the right to acquire, the applicants state that that reasoning is misguided. The fundamental question is whether or not Morgan Stanley intended to enter the market in question. Consequently, the fact that Morgan Stanley did not want to respond to the applicants' questions on that point during the membership negotiations is a very relevant factor. The applicants further point out that Morgan Stanley did not enter the market in question after its admission.

311 The Commission considers that it did not err in its determination of the dates when the infringement commenced and ended.

Findings of the Court

312 The applicants claim, in essence, that the determination of the duration of the infringement is incorrect because Morgan Stanley's intention to enter the market in question did not persist throughout the period chosen by the Commission. The applicants also complain that the Commission did not deduct the period of time inevitably required in order to enter the market in question.

313 However, as stated in the context of consideration of the claim for annulment, the Commission was justified in taking the view that Morgan Stanley was a potential competitor in the market in question. Consequently, the conduct at issue produced effects which were restrictive of competition by Morgan Stanley for as long as it was excluded from that market. The Commission was correct therefore to hold that the duration of the infringement was equivalent to that of the refusal to admit Morgan Stanley to membership of Visa. Since that refusal persisted from 22 March 2000 until Morgan Stanley's admission on 22 September 2006, there was therefore a continuing

infringement of the competition rules between those two dates. The Commission therefore did not err in its determination of the dates when the infringement commenced and ended.

314 Consequently, there is no doubt on the exact duration of the infringement. In that respect, this case can be distinguished from *Dunlop Slazenger* v *Commission*, paragraph 309 above (paragraphs 79 and 80), to which reference is made by the applicants.

315 The third part of the plea and, consequently, the plea in its entirety must be rejected.

316 In the light of all the foregoing considerations, all the claims made in of the present action must be dismissed.

Costs

317 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the pleadings of the successful party. Since the applicants have been unsuccessful, they must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders Visa Europe Ltd and Visa International Service to pay the costs.

Jaeger Vadapalas Prek

Delivered in open court in Luxembourg on 14 April 2011.

[Signatures]

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