Summary of Commission Decision
of 3 October 2007
relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement
(Case COMP/D1/37860 — Morgan Stanley/Visa International and Visa Europe)
(Notified under document C(2007) 4471)
(Only the English text is authentic)
(Text with EEA relevance)
(2009/C 183/05)

1. On 3 October 2007, the Commission adopted a decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement. In accordance with the provisions of Article 30 of Regulation (EC) No 1/2003 (1), the Commission herewith publishes the names of the parties and the main content of the decision, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business interests. A non-confidential version of the decision is available on the Directorate-General for Competition's website at the following address: http://europa.eu.int/comm/competition/antitrust/cases/index/

I. INTRODUCTION

2. The Decision imposed a fine on Visa International Service Association and Visa Europe Limited for infringing Article 81 of the Treaty and Article 53 of the EEA Agreement. From 22 March 2000 to 21 March 2006, the said companies prevented Morgan Stanley Bank International Limited (2) from providing credit card acquiring services to merchants in the UK by refusing to admit Morgan Stanley as a member of Visa Europe.

II. CASE DESCRIPTION

1. The proceedings

3. The Decision arises out of the complaint jointly submitted by Morgan Stanley USA and Morgan Stanley Bank to the Commission (hereafter Morgan Stanley) that Morgan Stanley was refused membership of Visa Europe which prevented it from issuing Visa cards and acquiring Visa and MasterCard transactions.

4. Morgan Stanley also complained before the High Court of Justice of England and Wales on 28 September 2000. Its claim before the High Court of Justice of England and Wales is similar to its complaint submitted to the Commission, save that it also claimed damages. On 2 May 2001, following Visa’s application, the High Court of Justice of England and Wales ordered a stay of proceedings to await the outcome of the Commission’s investigation.


6. At its meeting of 17 September 2007, the Advisory Committee agreed with the terms of the draft decision.

2. The facts

7. In the USA, Morgan Stanley USA operates the Discover card network which is not operative in the EU/EEA. In 1999, it incorporated a bank in the UK — Morgan Stanley Bank — which is responsible for credit card activities in the EU. Until Morgan Stanley Bank’s admission as a Visa member in September 2006, Morgan Stanley Bank’s card operations were confined to issuing MasterCard cards in the UK (Morgan Stanley Bank does not acquire merchants for acceptance of MasterCard).

8. Visa International operates the Visa card network and incorporated Visa Europe in 2004. Visa Europe has authority to regulate matters within the EEA, in particular to decide whether to accept or reject any application for membership of Visa in the EEA.

9. The By-Laws of Visa International and the Membership Regulations of Visa Europe contain the same rule (‘the Rule’) according to which applicants deemed to be a competitor of the corporation cannot be accepted as members of the scheme.
10. In March 2000, Morgan Stanley asked for membership of Visa Europe. In 2002, Morgan Stanley prepared a strategic business plan for European merchant acquiring market entry. In 2005 it had an implementation plan for this strategy in the United Kingdom, which it claimed to be ready to launch once granted Visa membership.


III. LEGAL ASSESSMENT

12. Visa and its respective members, whether credit institutions or entities owned by credit institutions, engage in an economic activity and, hence, are undertakings within the meaning of Article 81(1) of the EC Treaty/Article 53(1) of the EEA Agreement. Thus, the rules and regulations setting out the framework for the functioning of the Visa system adopted by the Board of Directors of Visa International or Visa Europe, and the decision to apply those rules to an undertaking, can be regarded either as decisions of an association of undertakings, or as agreements between undertakings.

13. The Decision establishes that the application of the Rule to Morgan Stanley restricted competition within the meaning of Article 81(1) of the EC Treaty as:

— the Rule as applied to Morgan Stanley prevented Morgan Stanley from entering the UK credit and deferred debit/charge card acquiring market,

— such behaviour of Visa had potential anticompetitive effects in that market,

— Visa's conduct falls within the scope of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

14. As merchants demand that the contracts for card acceptance concluded with their bank are offered to them as a package for the acceptance of both Visa and MasterCard, Visa's refusal to admit Morgan Stanley as a member has not only prevented Morgan Stanley from providing services to merchants as regards Visa transactions (which represent 60% of the market), but also as regards other payment card transactions. The market is already highly concentrated and further concentration is ongoing.

15. While there is scope for further competition, within the rather narrow circle of banks identified by Visa as potential entrants, the Commission has evidence that no bank other than Morgan Stanley would have contemplated entry to the UK acquiring market. Morgan Stanley continuously intended to enter the European acquiring market and has all the qualifications of an efficient acquirer. In contrast, only two other banks have got merchant acquiring experience and these banks are not considering entry to the UK merchant acquiring market. Consequently, Morgan Stanley's entry into the UK acquiring market could be reasonably expected to contribute towards more efficient competition in the UK and have a positive effect on prices and the quality of acquiring services.

16. There are no realistic possibilities that Discover, Morgan Stanley's card network in the USA, is expanded to the EEA as, inter alia (i) there are very high barriers to entry into the card networks market in the EEA; (ii) Discover was launched in the USA with the cooperation of the largest USA retailer (Sears), but Morgan Stanley has no equivalent of Sears for launching Discover in Europe; and (iii) Discover is a proprietary card system operating primarily in the US with a relatively small market share with limited international card acceptance.

17. The application of the Rule to Morgan Stanley would not fall under Article 81(1) EC/Article 53(1) EEA if it were directly related and necessary (proportionate and non-discriminatory) for the proper functioning of Visa's four-party payment card network. According to Visa such would be the case as its card network would be threatened if Morgan Stanley were not prevented from free-riding on allegedly confidential information to the benefit of Morgan Stanley's Discover network.

18. However the risk of free-riding is very doubtful as:

(i) the owners or shareholders of other payment networks have been admitted as Visa members; and

(ii) information, which Visa claims could not be disclosed to Morgan Stanley because of the alleged risk of free-riding, would in any case be accessible to Morgan Stanley if it were acquiring under a 'fronting' arrangement (to which Visa claims to have no objection), or is specific to the Visa Europe Region and therefore not relevant for Discover in the USA, or such information has become industry standard;

(iii) Morgan Stanley is not a competitor of Visa, i.e. there are no realistic possibilities that Discover expands to the EEA.

19. Furthermore, the application of the Rule to Morgan Stanley was not necessary as (i) less restrictive measures could be used to safeguard Visa's concerns, such as confidentiality undertakings; and (ii) admission occurred on 22 September 2006 without any explanation as to why the causes of concern Visa had invoked throughout the procedure in order to justify its refusal to admit Morgan Stanley as a member of Visa Europe would have changed.
20. Morgan Stanley was prevented from providing credit and deferred/charge card acquiring services to merchants in the UK and Visa thereby infringed Article 81(1) EC/Article 53(1) EEA.

21. The first three conditions to the legal exception of Article 81(3) EC/Article 53(3) EEA are not fulfilled inter alia because the application of the rule to Morgan Stanley was not necessary to prevent any alleged free-riding.

IV. FINES

22. Although the infringement lasted six years and six months (from 22 March 2000, when Visa informed orally Morgan Stanley that it was not eligible for Visa membership and that it refused to supply it with an application form, until 22 September 2006, with the admission of Morgan Stanley as a member of Visa Europe), for the purpose of calculating the amount of the fine the period to be taken into account is the period between 2 August 2004 — date of the Statement of Objections — and 22 September 2006 (1).

23. In view of its impact on the market and the size of the relevant geographic market, the infringement is qualified as serious.

24. In the present case there are no aggravating or mitigating circumstances.

25. Taking into account the above considerations, the basic amount of the fine to be imposed in this case should be EUR 10 200 000.

V. DECISION


27. For the infringement referred to above a fine of EUR 10 200 000 is imposed on Visa International Service Association and Visa Europe Limited, for which they are jointly and severally liable.

(1) The Rule was notified and covered by immunity from fines until 1 May 2004.