VU0396146

15 APR 1996

LIEDEKERKE WOLTERS WAELBROECK & KIRKPATRICK

John KIRKPATRICK
Avocat à la Cour de Cassation

Jacques de LIEDEKERKE
Philippe de CALLATAŸ
Leo STOOP
Michel WAELBROECK
Claude A. GONTHIER *
Claude VERBRAEKEN *
Martine DEMEUR
Marc van der HAEGEN
Françoise COLINET
Marc GODFROID

Dirk LINDEMANS
Simone NUDELHOLE
Bernard BEYENS
Philippe MALHERBE
Alexandre VANDENCASTELE
Pol OLIVEUR
Denis WAELBROECK
Daniel GARABEDIAN *
Magda VANDEBOTERMET
Sabine GEUBEL
Thierry TILQUIN *
Aimery de SCHOUTHEETE

Avocats associés

Jules STUYCK
Alain DE NAUW

Hélène DELPERDANGE
Myriam DENEVE
Jennifer WALDRON
Dominique LEONARD
Jean-Marc GOLLIER
Valérie SIMONART *
Paul GEEREBAERT
Michèle FAJTMANN

France WILMET
Pierre-Ph. HENDRICKX *
Philippe BAUDOUX
Dominique HUBIN
Patricia MATTON
Piet VAN OVERBEKE
Olivier SPELTDOORN
Yves DELACROIX
Catherine ADAM

Avocats

BOULEVARD DE L'EMPEREUR 3
B-1000 BRUXELLES
TÉL : (32) (2) 551.15.15
FAX : (32) (2) 551.14.14

Mr Humbert Drabbe Belgium
Director - IV/B
Directorate General for Competition
150 Avenue de Cortenberg
1040 Bruxelles

April 10, 1996

Received 12/4/96 9h50
Charles Williams

Dear Sir,

Re: Case IV/35.897 and 35.927: Visa v. American Express and Dean Witter

I have the honour of submitting herewith three copies of the comments of Visa International Service Association, Inc. concerning the complaint of American Express Travel Related Services Company, Inc. and Dean Witter, Discover & Co.

We shall send you promptly a non-confidential version of the comments.

Yours faithfully,

M. Waelbroeck

Prof. M. Waelbroeck
Michel

GOVERNMENT DEPOSITION EXHIBIT 1402

Enclosures: 3.

cc. Mrs Carol Walsh and Mrs Deborah Flack (Visa London)
Mr Bennet Katz (Visa Int. San Francisco)
Mr Lawrence Popofsky and Mr Steven Bomse (Bomse Heller Ehrman White & McAuliffe at San Francisco)

MW\en

P-0727

Paul Allen

Comments of VISA concerning the Complaints of AMEX and DEAN WITTER

Cases IV-35.897 and IV-35.927

Visa International Service Association, Inc. (hereinafter "VISA"), hereby submits its comments on the complaints filed by American Express Travel Related Services Company, Inc. (hereinafter "AMEX"), on 23rd January 1996, and by DEAN WITTER, Discover & Co. (hereinafter "DEAN WITTER"), on 29th February 1996 ("the Complaints"). AMEX and DEAN WITTER are hereinafter referred to collectively as "the Complainants".

*

* *

1. At the outset, VISA wishes to draw the Commission's attention to the fact that, for reasons that are well-known to the Commission, it has had only a very short period of time to prepare its comments. VISA understands that the Commission needs to have VISA's initial reaction to the Complaints rapidly and is herewith attempting to comply with this concern. VISA will therefore not attempt to rebut the Complaints point by point nor to correct the Complainants' statements regarding allegedly anti-competitive actions taken by VISA which have no relevance to the present case(1).

   VISA would appreciate having the opportunity to meet the Commission's services in order to provide them with further information concerning the operation of the market and the consequences that are to be expected in case the rule challenged in the Complaints is adopted.

---

(1) See, e.g., the allegations on page 17 and Annex 7 of the Amex Complaint and on pages 5-6 and 11-12 of the Dean Witter Complaint.

I. Introduction

2. The Complaints have been filed by two successful card issuers. Thus, in Annex 3 to its Complaint, DEAN WITTER describes itself as having realized "record profits" in an "increasingly competitive market place". A major part of these profits is attributable to its Credit Services Division. It is striking to note that these results were achieved in the United States, where DEAN WITTER's main business activities are situated and where the VISA By-Laws restrict VISA members from issuing DEAN WITTER's cards. Certainly, this mere fact should give the Commission cause to query DEAN WITTER's assertion that the adoption by VISA INTERNATIONAL of a similar prohibition would prevent it from entering other markets, including those of the E.U..

Similarly, it cannot be denied that AMEX's has been overall a success story, whether in the United States or in Europe(2). This success is attributed by industry experts to the "total control over all aspects of an upmarket niche product" which AMEX's system enables it to maintain(3). Certainly, AMEX is not in the situation of a small market entrant that needs to "grow its market share" to "reach a critical mass"(4). If AMEX's growth in some European countries has slowed down in recent years, this appears to be due mainly to AMEX's own market policies. Indeed, AMEX has voluntarily targeted its cards at affluent individuals and business travellers, imposing high issuing fees and merchant service charges ("MSC's"). As repeatedly indicated in the Smith Barney Shearson report attached as Annex 13 to the AMEX Complaint(5), this has led to a

(2) Smith Barney Shearson Report of 5 May 1994 on the Credit Card Industry, submitted by AMEX as Annex 13 to its Complaint (hereinafter "the S.B.S. Report"), pages 18, 30 and 117.

(3) Annex 13 to AMEX Complaint, page 29.

(4) See page 38 of the AMEX Complaint.

(5) Annex 13 to AMEX Complaint, pages 41, 57, 69, 102, 117, etc.

substantial degree of dissatisfaction on the part of cardholders and traders and to loss of market share to other, less expensive, card systems, thereby highlighting the benefits which intersystem and intrasystem competition can bring for consumers, be they cardholders or merchants.

3. The essential thrust of the Complaints is that the adoption by VISA of a rule prohibiting its members from issuing the cards of competing systems would hamper the efforts of its competitors to enter the market (in the case of DEAN WITTER) or to expand their market presence (in the case of AMEX), thereby protecting VISA's allegedly dominant position on the market.

VISA will show that the rule goes no further than what is strictly necessary to maintain the integrity of the VISA system and thereby allow it to compete successfully with other systems. Such a limited ban has been considered pro-competitive in the United States, as will be shown hereafter(6).

VISA will further show that the rule will not result in excluding competitors from entering the European market and from freely competing on it.

Finally, VISA will explain that the fact that it does not prohibit its members from issuing Eurocard/MasterCard products does not mean that it should be obliged to allow them to issue AMEX and/or DEAN WITTER cards.

II. The market

4. First of all, VISA believes it is necessary to describe the relevant market for the purposes of evaluating the effect of the possible rule. This market is not the "global general purpose card systems market", as contended by the Complainants, but the market for consumer payments, whether realised by means of card,

(6) See para. 36 below.

cheque, bank transfer, electronic debit, bank note or otherwise. VISA itself is not active in this market, since it does not itself issue payment cards, travellers cheques or any other means of payment, nor does it (save in very limited and exceptional cases) contract with merchants to accept VISA cards. VISA's role is to provide its members with the key components of a worldwide payment system, thus enabling its members to compete not only with each other but also with all other providers of payment instruments in the consumer payments market.

5. Consumers currently effect payment and obtain means for payment in many different ways. These include :

   a) traditional payment cards;
   b) travel and entertainment (T&E) cards;
   c) retailer cards and other "retailer" payment facilities;
   d) ATM cards;
   e) cheques;
   f) standing orders/direct debits/other automated payments;
   g) travellers cheques;
   h) stored value cards; and
   i) cash.

6. VISA believes that the next ten years will continue to see an increase in the proportion of retail expenditure carried out by means other than cash, and in the range of alternatives to cash which are available. There will be new members joining existing systems and new systems will become established. This expansion in the consumer payments market will be aided by technological developments which will make participation in the provision of payments services an option for companies who have not previously played any role in the market. In particular, this may make small-scale schemes financially viable. Stored value cards are one sector where a number of national and international schemes

are being developed(7), whereas the partnership between Sligos and Cybercash in France shows how commerce on the Internet is offering new opportunities in the provision of payment services.

7. While local currency is available for use in all face-to-face transactions within a single country, cheques and other consumer payment methods have evolved to meet the demands of consumers, retailers and financial institutions. The existence of competition between the different consumer payment methods is evidenced by the fluctuating shares of the different payment media in the retail sector. Annex 1 contains tables showing the changing shares of cheques, cards, credit transfers and direct debits in ten different countries.

8. The strong differences between EU countries concerning consumers' choice of payment method is also evidence of substitutability. The table in Annex 2 highlights these differences by reference to the latest available data as to number of transactions. The table also includes, where available, an indication of the proportion of expenditure by number of transactions accounted for by cash. Cash remains the overwhelmingly preferred method in every country but is under increasing assault from new developments, including the stored value card.

9. It is VISA's view that all the payment methods referred to above should be included in the relevant market since each method offers a range of characteristics which are shared to a greater or lesser extent with one or more other methods. Products do not need to be perfect substitutes in order for competition between them to constrain the activities of their respective suppliers. The ease of substitution by consumers and merchants is shown not just by the big changes year upon year in the shares of different payment methods (see Annex 1) but also by recent evidence from

---

(7) These include VISA Cash, Europay's "Express" product, Banksys's "Proton" product, Mondex, Danmont, Avant in Finland, SIBS's Multibanco Electronic Purse in Portugal, and the NETS CashCard in Singapore.

Sweden, where consumers switched payment methods following the start of surcharging by certain merchants for card payments(8).

10. In two anti-trust cases, the US courts agreed that the relevant marked is all consumer payment systems. First National Bancard Corporation v. VISA USA was concerned with the question of market definition in a case relating to the interchange fee in the VISA card system. The second case, Southtrust Corporation v. Plus System Inc., involved a challenge to the Plus rule that cardholders using Plus ATMs must not surcharge the cardholder. Extracts from the two judgments are in Annex 4.

11. On the supply side, financial institutions typically provide to their customers several different payment instruments. What is more, the traditional distinctions between financial institutions, T&E companies, retailers and other suppliers of goods and services unconnected with the financial sector are becoming increasingly blurred as the existing players increase the number and range of payment and credit possibilities they offer and gain footholds in each other's traditional sectors(9).

---

(8) Annex 3 shows that sales on Swedish VISA cards in Sweden fell at the start of surcharging but picked up as surcharging stopped. There was a corresponding pronounced increase in the use of VISA cards to obtain cash advances, strongly suggesting that consumers preferred to pay cash to avoid surcharges. Moreover press reports indicate that Swedish retailers succeeded in issuing a large number of their own retailer cards in this period - see article in Annex 3. Some explicitly advertised that they surcharged on VISA cards but not on their own cards.

(9) For example, the eurocheque card, formerly a guarantee card for the paper-based international cheque system, eurocheque, is now, following the merger of eurocheque and Eurocard, usually a dual purpose card acting as both a cheque guarantee card and an international debit card. Retailer cards are also a significant growth area in many countries and in the U.K. some retailers now offer lines of credit not tied to the purchase of their own goods - for example, Marks & Spencer offers personal loans in the U.K.

12. VISA does not believe that it is appropriate to make a distinction between methods of payment capable of international use and methods of payment capable of domestic use only. In virtually every country in the EU, VISA cards are much more widely used for domestic transactions than international transactions - see Table 1 in Annex 5. The demand of merchants for VISA cards is not demand for a specifically "international" means of payment, but demand for a cost-effective and secure payment method which is carried by a very large number of people, thus enabling merchants to make sales to these people with the minimum of formalities. Some consumers value international acceptability but have a wide choice of payment methods when abroad. VISA thus does not agree with AMEX that cards capable of international acceptance form a separate market. Table 2 in Annex 5 shows that in many EU countries purely domestic bank cards and/or retailer cards form a very substantial proportion of total cards in issue (more than half in France, Italy, Netherlands and Spain). However, some of those cards are capable of some international use despite the fact that they do not bear the mark of one of the international card systems, since national systems are developing international utility by means of bilateral arrangements. Thus, 4B (Spain), Banksys (Belgium), SIBS (Portugal) and Bancomat (Italy) have all concluded one or more such agreements.

13. VISA also takes issue with AMEX's assertion that credit cards, charge cards and so-called "pay-later" debit cards form a separate market from other cards or, indeed, from other payment methods. AMEX's point that "a distinction needs to be made between cards which enable their users to defer payment and those which do not", is not in VISA's view a relevant distinction.

14. Many holders of credit cards do not make use of the revolving credit facility (in an omnibus survey in 1995, 65 % of credit card holders in the U.K. said they were "convenience" users i.e. always pay their monthly bills in full) and U.K. issuers saw a reduction of demand for credit cards when they introduced annual

charges for credit cards. "Rewards" programmes and additional benefits (such as purchase protection) encourage consumers to switch their expenditure from other payment methods to credit cards for reasons other than a desire to take short or long-term credit.

15. For a consumer, other payment methods offer the possibility of deferred payment : for example, a debit card linked to an overdraft facility, a purchase made with the support of hire purchase or a personal loan or a purchase made with the assistance of credit provided by a retailer. With respect to larger purchases, the mere time shift offered by a charge card gives consumers only very limited flexibility, so charge cards too may need to be used in conjunction with other credit facilities. In fact, charge cards have historically been the instrument of choice for customers who do not want credit - typically businessmen and high net worth individuals prepared to pay the high annual fees associated with charge cards.

16. Merchants are generally in ignorance of the underlying financial arrangements of the consumer and it is of no interest to them whether he is purchasing with "his own money" or money loaned to him by a third party on a short or longer term basis.

17. To conclude, VISA submits that there is no valid reason for distinguishing, as do the Complainants, a narrow "global general purpose card market" within the broader market for consumer payments. There exists a substantial degree of substituability between general purpose cards, as defined by the Complainants, and other means of payment, whether from the demand or from the supply side.

III. The importance of maintaining inter-system competition

18. The importance of maintaining inter-system competition in the field of cross-border credit transfer systems has been recognized by the Commission in its Notice on the application of the EC

Competition rules to cross-border credit transfers(10). The Commission recognized that there exists a certain inter-relationship between intra-system competition and inter-system competition, in so far as a restriction of intra-system competition can be compensated for by the existence of inter-system competition(11). The Commission also recognized that, in certain circumstances, it is legitimate to impose an obligation on members of a cross-border credit transfer system not to take part in other systems(12).

19. This is particularly true in the field of card systems. Indeed, this area is characterized by the co-existence of two broad categories of systems : "proprietary" systems such as those operated by the Complainants, in which the same entity issues cards to cardholders and acquires merchants, and "cooperative" systems, such as the system set up by VISA, which are potentially open to all members of a given category and in which the entity having issued a card to a cardholder is not necessarily the same

---

(10) O.J., n° C 251 of 27 September 1995, page 3, at paragraphs 21 and 22.

(11) Notice on the application of EC Competition rules to cross-border credit transfers, paragraph 22.

(12) Notice on the application of EC Competition rules to cross-boarder credit transfers, paragraph 29. Although the instance cited by the Commission concerns the situation where the obligation is imposed "in order to ensure adequate volume", this is not the only instance in which the imposition of exclusivity on members can be necessary to guarantee the integrity and proper functioning of an inter-bank system and should therefore be considered as benign from the point of view of competition law.

Contrary to the view taken on pages 6-7 of the Dean Witter Complaint, the Commission Recommendation on a European Code of Conduct relating to Electronic Payment does not have any bearing on the issue considered here. Indeed, as is clear from its wording, the Code of Conduct concerns relations between issuers of payment cards, on the one hand, and traders and consumers, on the other hand. VISA does not require its members to impose on traders any clauses requiring the trader to operate only the VISA system. Nor does VISA impose any restrictions on interoperability of the terminals used to accept VISA card payments.

as the entity having acquired the merchant with whom the cardholder effects a purchase.

20. The two types of systems present some important differences in the way they operate. Proprietary systems control all phases both of the issuing and of the acquisition side of the business. This allows them to target their cards to certain categories of customers and merchants, to set the issuing fee and MSC, to determine the credit limits, the interest rates applicable etc... On the contrary, cooperative systems such as VISA limit their cooperation to what is reasonably necessary for the efficient functioning of the system(13). This is pro-competitive since it allows system members to compete against each other (intra-system competition) as well as against other suppliers of payment instruments (inter-system competition).

Thus, whereas a proprietary system such as AMEX is able to aim at the upper-fringe of the market and sets its issuing fees and merchants discounts accordingly, and whereas DEAN WITTER follows the opposite strategy, adopting a "mass market" approach, VISA leaves its members free to decide how to go about the task of issuing cards and acquiring merchants(14). VISA considers this freedom to be beneficial to customers generally (whether card holders or merchants).

On the issuing side, competition between VISA members manifests

(13) Thus, while VISA sets the international interchange rate to be applied between its members, it leaves them free to agree bilaterally on domestic interchange rates.

(14) Save to the extent reasonably necessary to protect the trademarks and ensure the effective operation of the necessary procedures and services (e.g. Honour All Cards rule), VISA exercises no control over the type of service offered by its members nor over the terms on which those services are offered. Two exceptions are the VISA Gold/Premium Card and VISA Business/Corporate Card where VISA lays down minimum operating limits and/or services to be offered to card holders as an intrinsic feature of the relevant card programme. Some of these require acquirers to obtain certain data from merchants.

itself in the very different charging structures which they offer (wide choice of annual fees, interest rates, incentive programmes and other benefits). On the merchant side, members pursue different pricing policies, ranging from blended prices for all the merchant's payment requirements - cash, cards and checks - to prices differentiating between that member's VISA cards and other VISA cards. Competition also takes place in relation to payment periods, in relation to the circumstances in which transactions can be charged back to merchants and in relation to the supply of terminals.

21. It cannot be denied that the coexistence of these different types of systems is beneficial to the public. Indeed, cardholders are offered not only a clear choice between different issuers and different types of cards and offerings within, say, the VISA system, but also the choice of a proprietary card such as AMEX with its distinctive image and other conditions.

IV. Allowing VISA members to issue competing cards would reduce inter-system competition

22. Although the Complaints describe the proposed VISA rule as having as its object to prevent VISA members from "dealing with" AMEX(15) and DEAN WITTER(16), it is clear that VISA never had such an objective in mind. The proposed VISA rule would be limited to prohibiting the issuing of competing cards. VISA stresses the word "issue" : indeed, if the proposed rule is adopted, it will not restrict VISA members from acting as agents in issuing the cards of the Complainants. However, such possibility is apparently not sufficient in the Complainants' eyes : they wish VISA members to have full freedom to act as issuers of their cards.

23. This is an important difference. Indeed, when a VISA member acts

(15) AMEX Complaint, p. 41.

(16) DEAN WITTER Complaint, p. 21.

as agent for a third party issuer, it is the issuer that takes decisions concerning the territory in which, the customers to whom and the price at which a given card will be issued. This allows the issuer to keep full control over the way its cards are marketed and therefore does not impede inter-system competition. On the contrary, if the issuer of the card were to be the VISA member itself, the operator of the card system would need to impose contractual restrictions on the issuer if it wished to retain such control, e.g. in order to preserve the brand image. The compatibility of such contractual restrictions with the competition rules would be problematic - particularly where territorial and price restrictions are concerned.

24. VISA does not know whether the Complainants intend to impose such restrictions. Indeed, the AMEX Complaint is extremely discreet as to the approach which AMEX intends to pursue in its dealings with VISA members if the Commission accepts its Complaint(17); as to DEAN WITTER, its proposed strategy is contained in a confidential annex to its Complaint, of which VISA has no knowledge.

25. Assuming that the Complainants do not restrict the freedom of VISA members as regards customers, territories and prices, the result will merely be that VISA members have the possibility of issuing one more card in addition to those they had been issuing previously. It is conceivable that some VISA members may gain an economic advantage from being able to offer what may appear to the outside world as a distinctive product. In fact, however, one fails to see the benefits which would inure to the general public from such a possibility. VISA believes that these cards would not be differentiated by brand, thus blunting inter-system competition. The evidence contained in Annex 16 of the AMEX Complaint supports the view that the terms on which issuers would

(17) On page 29 of its Complaint, AMEX refers to its "plans to continue to issue cards itself, on its own terms, and to continue to function as a closed loop network", without explaining how it intends to reconcile this with the use of banks as issuers.

offer the cards of different systems would tend to converge, save where the issuer chooses to use different brands to segment his customer base.

26. VISA understands that some of the arrangements entered into by AMEX with banks are exclusive. To the extent such bank is a VISA member, such arrangements will necessarily affect that bank's willingness to promote the VISA system as against the AMEX system, since the bank will know that it will reap all the benefits of its efforts to promote the AMEX system, whereas its efforts to promote the VISA system would have to be shared with other VISA members. Such diversion to a rival system will bring no additional benefits to the public. In conferring a competitive advantage on one VISA member in a country, the exclusivity would moreover distort competition between VISA members and damage the VISA system generally.

27. Whether the VISA member is granted exclusivity by a rival system or not, the fact that the VISA member participates in a competitor's system risks giving rise to a serious conflict of interest for that member which could lead to the use or disclosure of confidential VISA information. Indeed, a VISA member issuing AMEX cards and thus having a stake in the success of AMEX who hear of a possible product enhancement well in advance of the launch may be tempted to do what it considers best for its shareholders rather than maintain confidentiality about the proposed VISA initiative. In this respect, VISA is especially vulnerable vis-a-vis a company like AMEX because AMEX can take decisions more swiftly than VISA, a membership association with a lengthy decision-making process which involves its members.

28. In their Complaints, AMEX and DEAN WITTER refer repeatedly to the Commission's practice concerning exclusive purchasing agreements, as exemplified in decisions such as <u>Liebig Spices</u>(18) and

---

(18) Decision of 21 December 1977, <u>O.J.</u>, L 53 of 24 February 1978, page 20.

Schöller / Langnese-Iglo(19). However, there is an essential difference between the role played by the issuer of a card and that of a retailer of spices or icecream. The issuer of a card does not "purchase" cards for resale : the issuer actually determines the main characteristics of the cards which it puts on the market (in competition with the other issuers). Indeed, it is the issuer that decides whether the card will be a debit card, a charge card or a credit card; whether the card can be used to effect withdrawals of cash from ATM's, as a payment card and/or as a guarantee for cheques; whether special terms should be attached to the card to promote usage (such as reward programmes, rebates, ...); whether and how much it wishes to charge the cardholder for the benefit of carrying the card; if applicable, what the credit limits will be; whether and at what rate interest will be charged during the period of time between the day on which the card is used and the day on which payment is made by the cardholder.

29. VISA submits that its system shows a closer analogy to a franchise network than to a distribution system. Indeed, its members offer VISA cards under one of the VISA trademarks, comply with a common set of rules and use VISA's data processing system for the authorization and clearing of international transactions. The Commission recognizes that a franchisee can be precluded from manufacturing or selling goods competing with the franchisor's goods (20).

30. Allowing the same entity to issue cards of competing systems produces anti-competitive effects at both issuer/card level and at the level of system innovation. If the issuer of a VISA card does well (issues many cards and stimulates card usage) the benefits accrue to him and to the rest of the system. However, if he also issues cards of competing systems, competition between

---

(19) Decisions of 23 December 1992, O.J., L 183; of 26 July 1993, pages 1 and 19.

(20) Regulation 4087/88, art. 2(e).

those cards - and systems - will be reduced because the issuer will not be fully committed to the promotion of either. It is important that members be committed to promote and extend the system they have jointly developed.

31. At the level of system innovation, there is likely to be a reduction in competition because issuers' desire for efficiency will militate against different technical and procedural developments and dual issuers will also have divided loyalties and may wish to delay development in one system which would put another system, currently more profitable to that issuer, at a competitive disadvantage.

In two recent instances, the VISA/MasterCard duality has led to a reduction in system innovation. Thus, when VISA developed a new VISA fraud reporting system, the U.K. members of VISA refused to change their systems until MasterCard had completed improvements to its own fraud reporting system. Similarly, in the area of secure transaction technology for open networks, although VISA and MasterCard originally developed different specifications to ensure the security of payment card transactions over open networks such as the Internet, their members put pressure on them to work together to develop a common technical standard.

`2. The question of systems innovation is particularly important now, in a period of rapid technological change, when new products, delivery methods and players are emerging and it is particularly desirable for there to be competition between different technologies and systems. If anti-duality rules are prohibited, it will be increasingly difficult for competition to develop. This is therefore an area where VISA's interest and the interests of competition authorities coincide.

33. In stating that because of the substantial overlap in membership between VISA and MasterCard competition between the two systems

is substantially reduced(21), the Complainants in effect recognize that "issuing duality" does not lead to any increase in intersystem competition but, on the contrary, decreases the intensity of such competition.

34. VISA therefore concludes that, if it were required to allow its members to issue the Complainants' cards, this would not bring any positive benefit to the public but would, on the contrary, strongly reduce the competition that now exists between its system and the AMEX system or between its system and the NOVUS system.

V. Prohibiting VISA members from issuing competing cards constitutes the minimum required to protect inter-system competition

35. Once again, it should be stressed that the rule attacked by the Complainants would only prohibit VISA members from issuing competing cards. No restriction would be imposed on their ability to advertise competing cards (e.g. by making "take one" leaflets available to their customers within or outside their branches or soliciting cardholders for competing systems by direct mail to their customers), or to act as agents for competitors in settling monthly balances or providing the line of credit associated with the competitors' card (such as in the case of the AMEX Gold Card).

VISA wishes to mention, in this connection, that the Halifax Building Society case referred to on page 19 of the AMEX Complaint concerned the imposition of a prohibition to promote competing cards rather than issuing competing cards. The prohibition therefore went considerably further than the rule which VISA is currently considering.

36. Such a limited ban has been considered to be pro-competitive in the United States. Thus, in that country not only were VISA and

(21) See pages 34-35 of the AMEX Complaint.

MasterCard precluded by the antitrust authorities of the States of New York, California, Maryland, Massachusetts and Texas from entering into an agreement to market debit cards through the "Entree/joint venture, but they were required, as part of the settlement agreement with these authorities, to notify the said authorities if they commenced a point-of-sale debit card programme that did not explicitly prohibit duality(22). When MasterCard's Maestro subsidiary (which was in charge of the MasterCard POS Debit Card Programme) adopted a resolution that would have permitted its members to participate as issuers of debit cards in competing programmes, the States concerned objected. To quote from the letter they addressed to MasterCard International on 27 October 1994, they were "concerned that a change in Maestro's rules to permit issuing duality would bring to an end the aggressive inter-system competition between the two bank card associations in the point-of-sale debit card market". It is interesting to note that they stated that these concerns were "heightened because, unlike the provision of free-standing credit, debit card services are necessarily linked to access to a financial institution's demand deposit account"(23). It should be recalled that one of the main reasons given by AMEX for objecting to VISA's proposed anti-issuing duality rule i.e. that banks are allegedly in a unique position to offer card products(24) - is used by the State antitrust authorities as an argument <u>against</u> issuing duality.

Similarly, when in 1975 National Bank AmeriCard, Inc. ("NBI")

---

(22) Duality was defined as the ability of or potential for a financial institution to "(1) issu[e] both VISA and MasterCard POS Debit Cards to persons (issuing duality) and/or (2) contract [...] with merchants for the acceptance of both VISA and MasterCard POS Debit Cards (acquiring duality)".

(23) See Annex 6.

(24) See AMEX Complaint, pages 12-25. As we shall see, although this statement may have a certain merit when dealing with debit cards, the same does not apply to credit and charge cards, as recognized by the State antitrust authorities in the letter in question.

(the predecessor of VISA USA) sought to obtain from the Department of Justice a business review letter regarding a proposed anti-duality rule, the Department did not criticize the proposed rule "to the extent its application would prohibit an NBI card-issuing bank from becoming a card-issuing bank in a competing system". It added that "a prohibition of dual affiliation appears unobjectionable to the extent it is necessary to ensure continued inter-system competition"(25).

37. As was explained above, the role played by banks when issuing cards cannot be analogized to the role of a distributor. Indeed, a distributor merely promotes and resells goods having predetermined characteristics, whereas a bank issuing a card actually determines the main characteristics of the products which it puts on the market.

Nevertheless, notwithstanding the more limited role of a distributor, the use by competitors of common distributors has on a number of occasions been regarded by the Commission as anticompetitive since its very first decisions as early back as 1968(26). The same reasoning applies a fortiori to the use of the same issuer for competing card systems.

38. It can therefore be concluded that allowing VISA members to issue AMEX and DISCOVER cards would not only fail to increase competition between VISA and other systems but would actually decrease the presently existing competition between these systems.

---

(25) See Annex 7.

(26) Decisions of 6 November 1968, Cobelaz-Usines de synthèse, Cobelaz-Cokeries and CFA, O.J., L 276 of 14 November 1968; see also Decision of 23 December 1970, Supexie, O.J., L 10 of 13 January 1971. Since then, the Commission has repeatedly condemned agreements by which competing manufacturers sold their products through the same distributor : see Annex 8.

VI. AMEX and DEAN WITTER will not be excluded from the market

39. The Complainants' claim that the adoption by VISA of an anti-issuing duality rule would hinder their efforts to expand their presence on the European market is based on the notion that it is essential for the success of a card system that banks be allowed to participate in it as issuers.

That this is not so is clearly demonstrated, as indicated above(27), by the success of both AMEX and DEAN WITTER on their respective markets. This success was obtained in spite of the fact that neither card was being issued to any substantial extent by banks. DEAN WITTER's expansion does not seem to have suffered from the adoption of Rule 2.10 (e) of the VISA By-Laws prohibiting VISA members from issuing competing cards.

40. Moreover, it should once again be stressed that the proposed rule will not prevent banks from acting as agents for competing card issuers. To the extent the fact that a cardholder has a relationship with a given bank may be of importance to induce him to accept that card, it is not necessary that such bank should be the issuer of the card. From the point of view of the cardholder, the situation is exactly the same whether his bank is acting as agent for the issuer or issuing itself.

41. Moreover, it would be wrong to believe that cooperating with a bank is essential for a card issuer to have access to the market. The S.B.S. Report, which AMEX itself has attached as Annex 13 to its Complaint, shows that the opposite is true.

Thus, Citibank is described as having been very successful in promoting its cards in several important European markets, thereby "disproving several widely held opinions about the European credit card market, by showing that Europeans will use cards issued by a bank that is not their own, that they do buy

(27) See para. 2 supra.

via direct mail and advertising, and that they do take extended credit"(28). Two-thirds of Citicorp's cardholders are not banking customers. Its "aggressive marketing" uses direct mail (contributing 30 %-40 % of cardholders), "take one" displays and magazine inserts (20 %-25 %), and it has recently found that telemarketing has been a successful approach(29). Citicorp is confident that it will succeed in countries where it has no existing branch network(30).

Affinity cards (issued through membership organizations such as automobile associations, charities, professional bodies) offer a further way of penetrating the market. In Germany, the Netherlands and the U.K., they have proved to be key elements. "Several small local banks have overcome their geographical limitations and substantially expanded their card operations beyond their natural market share through 'affinity deals'"(31). "Because affinity cards are likely to cannibalize the card base of big banks, this approach appeals most to foreign entrants that have little to lose and everything to gain(32). Examples include Banco Popular in Spain, Bank of Scotland in the U.K., Verenigde Spaarbank in the Netherlands and Berliner Bank in Germany"(33).

Co-branding of cards, although not yet developed in Europe to the same extent as in the U.S., also offers an opening for issuers wanting to penetrate on new markets. If the brand-name appeal of the co-brander is sufficiently strong, it "could revolutionize

---

(28) S.B.S. Report, page 15.

(29) S.B.S. Report, page 119.

(30) S.B.S. Report, ibid.

(31) S.B.S. Report, page 25.

(32) S.B.S. Report, page 26.

(33) S.B.S. Report, ibid.

the European market"(34). Recent examples of successful co-branding schemes include Berliner Bank's ADAC (motorists' association) programme, BFB's Sonae (supermarket) programme in Portugal, HFC's General Motors card in the UK and Instituto San Paolo Di Torino's Fiat programme.

Non-bank institutions have also been successful in developing debit and credit cards, as demonstrated by the Cetelem "success story" in France, Italy, Belgium, Spain and Portugal(35) and by VSB International's successful promotion of stand-alone VISA cards in the Netherlands(36). AMEX has itself entered into a partnership with the French non-bank consumer credit company SOVAC in France. A number of prominent non-banks feature in the list of the top 25 card issuers in Europe(37).

42. The detailed analysis of the main European markets contained in the S.B.S. Report shows that there exist considerable opportunities for new entrants such as the Complainants in each of the major European markets.

In France, there is said to be "scope for new entrants". Cetelem and the savings banks have "proved that millions of French customers do want genuine credit cards and are prepared to take them from issuers other than the big banks". Moreover, France is open to an approach to affinity groups, which are as yet "undeveloped territory"(38).

Germany and the Netherlands are described as being still, to a very large extent, "Eurocard countries". This means that the possible adoption by VISA of an anti-duality rule would have

---

(34) S.B.S. Report, <u>ibid.</u>

(35) S.B.S. Report, pages 47-48.

(36) S.B.S. Report, page 110.

(37) See Annex 9.

(38) S.B.S. Report, page 51.

limited effects in those countries. The three largest German commercial banks are "still all staying faithful to the concept of Eurocard as their only credit card product"(39). The authors of the Report consider that Germany has "one of the highest numbers of genuine competitors attempting to win customers away from their existing banks".

In the United Kingdom, most cards are "genuine credit cards", which makes it possible "to succeed in the U.K. market without an existing customer base, using direct response advertising"(40). Affinity and co-branding programmes are described as a major source of potential growth available to new entrants(41). Several U.K. issuers are aggressively expanding their operations internationally and, where they do not have retail banking bridgeheads, they have the possibility to establish links with retailers, as Barclays and Bank of Scotland have done in Germany and NatWest has done in the Netherlands(42).

Spain is also described as "an attractive market from the perspective of new entrants". The reason for this is that, like the U.K., most cards in use are credit cards(43).

Italy is said "to offer the most attractive opportunities for foreign institutions to carve out a significant card business before domestic banks respond to the challenge"(44). Among the successful new entrants is Cetelem, which successfully

(39) S.B.S. Report, page 55.

(40) S.B.S. Report, page 67.

(41) S.B.S. Report, page 70.

(42) S.B.S. Report, page 79.

(43) S.B.S. Report, page 96.

(44) S.B.S. Report, page 97.

exported its "Carte Aurore" multi-retailer card concept to Italy(45).

43. It has been shown above that new entrants to the EU market have numerous opportunities other than through banks. However, even if the Complainants were correct, nothing would prevent them from agreeing with a bank which is not a VISA member to issue their cards, or reaching such an agreement with an existing VISA member. Although the bank in question would have to give up VISA membership if the rule complained of were adopted, this would not bring about for it the disastrous consequences that are portrayed by the Complainants. Indeed, the bank in question would have the possibility of retaining its membership of (or joining) the MasterCard/Eurocard organisation (which does not have a rule against duality) and enjoying all the benefits that result from participating in such organisation.

44. Another conclusion that can be gathered from the S.B.S. Report is that one of the main causes for AMEX's relative lack of success in recent years is the very high MSC's which it imposes on traders(46).

VII. <u>The "MasterCard / Eurocard exception"</u>

'5. The Complainants argue that VISA's attitude is inconsistent and discriminatory to the extent VISA does not object to its members issuing Eurocard cards.

46. This argument is without merit. Indeed, the "MasterCard/Eurocard exception" was not a decision freely taken by VISA. On the contrary, VISA believed it had no choice in the matter given the Department of Justice's (DoJ's) failure to give unconditional clearance to an anti-duality rule in the light of the substantial multi-million dollar treble damage exposure if it lost a rule of

(45) S.B.S. Report, page 102.

(46) See para. 2 <u>supra</u>.

reason trial in front of a jury. The DoJ's views were solicited because of the decision in the Worthen Bank&Trust Company v. National BankAmericard, Inc. case, which held that the by-law was to be tested under the rule of reason.

47. In any event, VISA believes that the decision to force it to agree to its members issuing MasterCard/Eurocard cards was not justified by valid competition reasons. Twenty years of experience show that the rule has not contributed any tangible benefit for the public, but has - to the contrary - on numerous occasions prevented or delayed the introduction of technological improvements which one of the parties wished to introduce to its system. Although the injury to competition has remained relatively limited in view of the fact that the number of systems subject to this regime of forced coexistence was limited to two, this should not serve as a pretext for extending this number to four, or perhaps even more.

48. A number of impartial observers have taken the view that VISA/MasterCard duality decreased inter-system competition. Thus, in their text book on "The Law of Electronic Funds Transfer Systems", Donald Baker(47) & Roland Brandel assert that "to a certain extent, the forecasts of a general "levelling" of the differences between the two programmes seem to have been borne out in practice. Apparently, the difference in interchange fees set by the two organizations was much greater before duality than since. In addition, most dual card issuers apply similar finance charges to both cards, and most merchant banks charge the same discount rates on VISA and MasterCard; yet, before duality, different issuers competed with each other in offering different cards and sometimes calculated finance charges differently, and acquirers competed with each other in servicing merchants that accepted their cards"(48). Comparing the U.S. experience with

---

(47) Former assistant attorney general in charge of the Antitrust Division.

(48) Op. cit., page 24-10 (footnotes omitted).

that of Canada (where both VISA and MasterCard impose a ban on duality), these authors conclude that "ultimately, the legal framework leading to duality has decreased intersystem network competition in the credit card market"(49). Another former assistant attorney general in the Antitrust Division, William F. Baxter, writing in 1983, described it as "regrettable" that the Antitrust Division did not give a less qualified response to VISA's request for clearance and observed that the opportunity and incentive for inter-system rivalry had greatly diminished between the VISA system and the MasterCard system(50).

49. With respect to Diners Club, it should be mentioned that this card system was owned by Citibank, one of the largest VISA members, at the time they joined the VISA organization. In view of the fact that Diners Club was a relatively weak brand and that it had been declining over the last few years, VISA did not consider that this relationship could pose a serious threat to competition with its system. Moreover, VISA will be discussing with Citibank the possibility of expanding the anti-duality rule to Diners Club.

VIII. Conclusion

50. On the basis of the foregoing observations, VISA concludes that the adoption of the proposed anti-duality rule would not result in any infringement of Article 85 or of Article 86 of the EC Treaty :

- the purpose of the proposed rule is not to restrict competition; on the contrary, its purpose is to maintain and preserve inter-system competition;
- the proposed rule does not have the effect of restricting competition, as shown by the fact that the

(49) Op. cit., page 24-11.

(50) Bank Interchange of Transactional Paper : Legal and Economic Perspectives, Journal of Law and Economics, vol. XXVI (October 1983).

adoption of a similar rule in the United States did not prevent DEAN WITTER from dramatically expanding its market presence in that country;

- to the extent the rule could be perceived as restrictive in competition, it is entitled to an exemption in accordance with Article 85(3) in view of the following considerations :
  - the rule will contribute to improving the operation of cards, as one of the instruments in the consumer payments market;
  - it will benefit consumers by ensuring that they continue to have the possibility of clearly distinguishing the card offerings of competing systems and choosing the system that corresponds best to their needs;
  - the restriction imposed is limited to the minimum necessary, since it concerns only the issuing of cards, not the solicitation of card holders for competing systems;
  - numerous other possibilities are available and will continue to be available for competing systems seeking access to the market;
- VISA does not have a dominant position, whether the market is defined as "global general purpose card systems" (as the Complainants argue) or as "all means by which consumer payments can be effected" (as contended by VISA);
- in any event, adoption of the rule would not result in any abuse of a dominant position since it constitutes the minimum obligation necessary to maintain inter-system competition and, in any event, will not materially affect the ability of the Complainants (and of other potential third party entrants) to increase their presence on the European market.

Annex 1

Annex 1

Changing Volumes of Cashless Payments by Payment Method

Cashless Payments in Belgium
(number of transactions in millions)

Payment Instrument	1989	1990	1991	1992	1993	Proportion (1993)
Cheques	230.5	206.6	193.8	174.2	163.1	15.6%
Card payments	78.7	95.5	119.3	144.7	169.2	16.2%
Credit transfers (paper based)	6.0	5.6	5.2	4.6	3.4	0.3%
Credit transfers (paperless)	460.6	495.9	506.6	524.0	595.7	57.2%
Direct debits[1]	57.3	65.9	73.2	81.3	92.8	8.9%
Total	833.1	869.5	898.1	928.8	1,042.2	100%

Source: Bank for International Settlements, December 1994

Note:
[1]Revised figures.

Cashless Payments in Denmark
(number of transactions in millions)

Payment Instrument	1989	1990	1991	1992	1993	Proportion (1993)
Cheques	174.5	156.3	134.6	124.3	117.6	17%
Card payments	58.5	85.1	115.6	147.1	177.8	26%
Credit transfers (paper based)	0	0	0	0	0	0%
Credit transfers (paperless)	283.8	294.7	290.5	304.7	310.0	46%
Direct debits	51.6	56.9	58.3	65.3	71.8	11%
Total	568.4	595.7	599.0	641.5	677.2	100%

Sources: Bank for International Settlements 1995 and RBR estimates

Cashless Payments in Finland
(number of transactions in millions)

Payment Instrument	1990	1991	1992	1993	1994	Proportion (1994)
Cheques	66	46	38	32	26	4%
Card payments	83	110	120	118	132	23%
Credit transfers (paper based)	210	207	199	183	172	29%
Credit transfers (paperless)	128	155	177	205	244	41%
Direct debits	4	8	10	15	18	3%
Total	491	526	544	553	592	100%

Source: Finnish Bankers' Association, 1994

Cashless Payments[1] in France
(number of transactions in millions)

Payment Instrument	1989	1990	1991	1992	1993	Proportion (1993)
Cheques	4,627	4,877	4,776	4,869	4,909	54%
Card payments	1,036	1,178	1,328	1,443	1,565	17%
Credit transfers (paper based)	113	98	88	77	66	1%
Credit transfers (paperless)	1,160	1,244	1,303	1,404	1,473	16%
Direct debits	767	845	854	980	1,058	12%
Total	7,703	8,242	8,349	8,773	9,071	100%

Source: Bank for International Settlements, December 1994

Note:
[1] Excluding bills of exchange.

Cashless Payments in Germany
(number of transactions in millions) [1]

Payment Instrument	1989[2]	1990	1991	1992	1993	Proportion (1993)
Cheques	661	784	880	902	934	8.3%
Card payments[3]	83	122	170	214	294	2.6%
Credit transfers (paper based)	1,684	1,835	2,012	1,991	1,959	17.3%
Credit transfers (paperless)	1,872	2,265	2,697	3,092	3,294	29.2%
Direct debits[4]	2,589	2,939	3,420	4,016	4,811	42.6%
Total	6,889	7,945	9,179	10,215	11,292	100%

Source: Bank for International Settlements, December 1994

Notes:
[1] Partly estimated;
[2] Old Länder only;
[3] Excluding retailer cards. Credit cards: the card companies' settlements with retailers (normally by credit transfer) and payment of the monthly totals by cardholders to card issuers by credit transfer, direct debit or cheque are contained in the corresponding items. Debit cards: not included in item "direct debits";
[4] Including cash dispenser/ATM withdrawals made with eurocheque cards at banks other than that issuing the card.

Cashless Payments in Italy
(number of transactions in millions)

Payment Instrument	1989	1990	1991	1992	1993	Proportion (1993)
Cheques	688.9	729.7	689.3	674.5	621.6	37.6%
Card payments	30.4	47.6	63.5	74.8	81.7	4.9%
Credit transfers (paper based)[1]	583.7	617.2	631.3	660.9	697.7	42.2%
Credit transfers (paperless)[2]	135.9	159.0	168.7	172.5	178.5	10.8%
Direct debits	38.7	49.9	62.6	69.0	73.2	4.5%
Total	1,477.6	1,603.4	1,615.4	1,651.7	1,652.7	100%

Sources: Bank for International Settlements, 1994 and Banca d'Italia

Notes:
[1] Does not include bills of exchange and paper based bank receipts;
[2] Does not include electronic bank receipts.

Cashless Payments in the Netherlands
(number of transactions in millions)

Payment Instrument	1989	1990	1991	1992	1993	Proportion (1993)
Cheques	267	260	247	222	181	8%
Card payments	17	27	32	47	92	4%
Credit transfers (paper based)	101	102	98	105	101	5%
Credit transfers (paperless)	965	956	963	1,003	1,382	62%
Direct debits	329	360	392	431	480	21%
Total	1,679	1,705	1,732	1,808	2,236	100%

Source: Bank for International Settlements, December 1994

Cashless Payments in Norway
(number of transactions in millions)

Payment Instrument	1989	1990	1991	1992	1993	Proportion (1993)
Cheques	60.5	50.0	46.2	38.1	31.6	7.0%
Card payments	40.8	53.8	66.0	85.0	108.2	24.0%
Credit transfers (paper based)	231.2	226.3	223.0	220.0	219.4	49.0%
Credit transfers (paperless)	43.5	47.2	55.4	65.5	78.1	17.5%
Direct debits	4.4	6.0	8.6	10.5	11.8	2.5%
Total	380.4	383.3	399.2	419.1	449.1	100%

Sources: Bank for International Settlements, 1994 and Norges Bank

Cashless Payments in Sweden
(number of transactions in millions)

Payment Instrument	1989	1990	1991	1992	1993	Proportion (1993)
Cheques	170	120	77	71	51	6%
Card payments	50	55	68	70	94	12%
Credit transfers (paper based)	204	276	210	165	161	20%
Credit transfers (paperless)	378	326	380	456	462	57%
Direct debits	27	30	34	37	40	5%
Total	829	807	777	799	808	100%

Source: Bank for International Settlements, 1994

Cashless Payments in Switzerland
(number of transactions in millions)

Payment Instrument	1989	1990	1991	1992	1993	Proportion (1993)
Cheques[1]	26.0	24.1	22.0	19.2	15.4	3.2%
Card payments[2]	19.7	26.1	39.5	51.5	65.3	13.8%
PTT transfers[3]	206.8	223.1	236.0	245.6	258.7	54.8%
Credit transfers (paperless)[4]	84.8	93.2	101.8	110.0	119.8	25.4%
Direct debits	6.9	8.1	9.3	11.0	13.2	2.8%
Total[5]	344.2	374.6	408.6	437.3	472.4	100%

Source: Bank for International Settlements, December 1994

Notes:

[1] Eurocheques, bank cheques and Swiss Bankers Travellers Cheques;
[2] Eurocheque card, American Express, Eurocard, Visa, Diners Club and Postcard: partly estimated;
[3] This includes paper-based and paperless credit transfers and direct debits made through the PTT. Detailed figures were no longer published by the PTT after 1992;
[4] Swiss Interbank Clearing (SIC) and banks' data media exchange system;
[5] Intrabank payments are not included.

Cashless Payments in the UK
(number of transactions in millions)

Payment Instrument	1989	1990	1991	1992	1993	1994	Proportion (1993)
Cheques	3,321	3,401	3,310	3,186	3,017	2,926	41%
Card payments	774	930	1,096	1,286	1,453	1,674	23%
Credit transfers (paper based)	490	489	472	455	426	408	6%
Credit transfers (paperless)	788	840	869	901	936	1,049	14%
Direct debits	709	846	916	1,001	1,046	1,148	16%
Total	6,141	6,562	6,727	6,889	6,942	7,205	100%

Source: APACS, 1995

Annex 2

Distribution of Cashless Payment Methods in EU Countries

Country	Cheques	Plastic	Credit Transfers	Direct Debits	Others	Source	Cash as % of consumer payments	Source
Austria	66.0%	7.0%	23.0%			****		
Belgium	11.7%	18.0%	60.9%	9.4%		*		
Denmark	26.2%	14.3%	50.0%	9.5%		**		
Finland	4.0%	23.0%	70.0%	3.0%		***		
France	46.9%	16.3%	15.7%	11.7%	9.4%	*		
Germany	7.9%	3.1%	48.7%	40.3%		*		
Greece	66.0%	10.0%	24.0%			****		
Ireland	70.3%	7.8%	16.8%	5.1%		**		
Italy	34.0%	5.2%	46.8%	4.7%	9.3%	*	96%	aa
. embourg	10.9%	23.1%	43.3%	22.7%		**		
Netherlands	6.0%	7.9%	64.2%	21.9%		*		
Portugal	80.6%	3.2%	11.5%	4.7%		**		
Spain	29.7%	8.7%	6.4%	55.2%		**		
Sweden	9.3%	8.2%	77.6%	4.9%		* 1992 data		
UK	40.3%	23.1%	20.1%	16.5%		*	81%	bb
EC (excluding Greece)	37.0%	9.0%	34.0%	20.0%		**		

Data is based upon number of transactions

Sources:

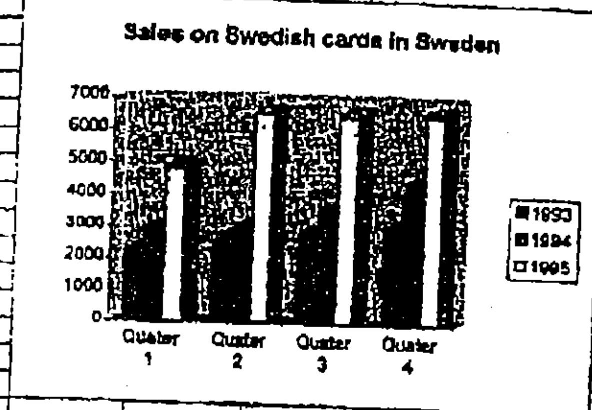
- * Bank for Intl Settlements 1995 (1994 data)
- ** Payment Systems in EC Member States 1992 (1990 data)
- *** Retail Banking Research
- **** Visa Internal (1994 data)
- aa ABI/McKinsey report (1994)
- bb APACs (1994 data), percentage of total number of consumer payments of a value of £1 or more, excluding payments for regular commitments such as rent.

Annex 3

20

Sales on Swedish carqds in Sweden

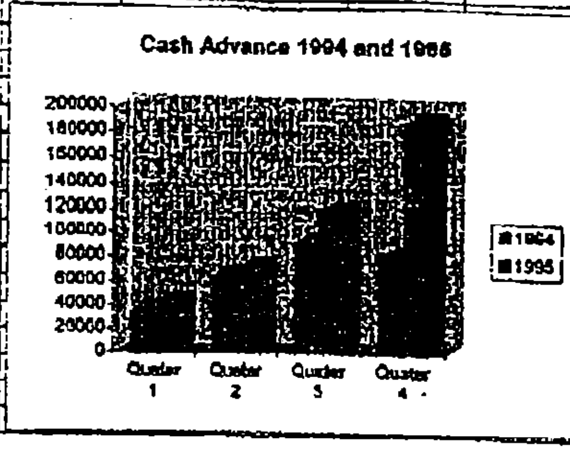
	1993	1994	1886
Quater 1	2198,1	2908,2	4842,4
Quater 2	2588,6	3008,7	6597,7
Quater 3	2825,7	3593,3	6549,6
Quater 4	3043,7	4469,1	6594,4



Blad11

21

Cash advance 1994 and 1995		
	1994	1995
Quater 1	33447	39472
Quater 2	62854	68048
Quater 3	89771	116151
Quater 4	79529	187415



0171-375 2750 FAX: 0171-375 2750 EUROPEAN PRESS CUTTING

Ref: 0308SCI.VISA/IC/K
Date: 02/08/95
Publication: DAGENS INDUSTRI
Country: SWEDEN
Headline: THE WINNERS OF THE CARD CONTROVERSY

22

The KF and ICA food store chains are the winners in the card controversy between banks and shops, which means that the customers are being charged for their use of direct debit cards.

In July 20,000 people applied for a KF in-store card, compared to the normal number of 5,000 to 8,000 applicants a month. ICA has issued almost 30% more cards since the card charges were introduced on July 1.

"It could be much more than this when people come back from holidays and start planning the domestic budget for the autumn," says Juergen Thelander, head of KF Card, KF Kort.

Kortbråkets vinnare

Trinius Johansson

Di

KF och ICA är vinnare i kortbråket mellan banker och butiker som innebär att kunderna får betala för att handla med bankernas plastkort.

Under juli ansökte 20 000 personer om att få KFs Med mera-kort mot normalt 5 000-8 000 personer. ICAs kontokort ökade med nästan 30 procent jämfört med månaden innan kortavgifterna infördes i handeln den 1 juli.

"Det kan bli mycket mer än så när folk kommer tillbaka från semestern och ska börja planera hushållet för hösten", säger Juergen Thelander, chef för KF Kort.

[illegible] planer på en kampanj [illegible] semestrarna [illegible] kort [illegible] på att [illegible]

Vi har [illegible] korten och det är [illegible] säger Juergen Thelander.

Ulf Nyström, försäljningsdirektör på ICA och VD för ICA Kort, räknar också med att nya ansökningar strömmar in i augusti "då folk har kommit tillbaka från semestern och börjar komma i ordning".

"Men jag tror att det ännu är för tidigt att säga något om siffrorna", säger Ulf Nyström.

Även försäljningen av Vivo-kortet går framåt, enligt uppgifter från kedjan. Någon utvärdering av kortförsäljningen är dock ännu inte gjord.

Vivo är den enda affärskedjan inom butikskoncernen D-gruppen (Vivo, Billhälls m fl) som har kort; men enligt gruppens marknadsdirektör Patrik Andréa kan de andra kedjorna tänka sig att skaffa egna kort inom ett år.

Enligt ICA-handlarna har användandet av externa plastkort (alltså inte ICA-kort) minskat med 35 procent sedan avgiften infördes. Omsättningen minskade dock inte, vilket tyder på att kunderna har valt andra betalningssätt i stället.

Lägst kostnad

En undersökning som har gjorts av Handelns utredningsinstitut (HUI) visar att kortköp har den lägsta transaktionskostnaden om butikerna har s k PIN-kodterminaler. De fungerar ungefär som en bankomat där man slår in sin kod och på så sätt får köpet registrerat.

Det näst billigaste systemet är att betala med kontanter. För bankerna innebär det dock en stor kostnad att åka runt och fylla på bankomaterna med pengar.

Vill ha betalt

Bankernas motivation till att ta ut avgifter är att de vill ha betalt för korthanteringen. Alla banker tar dock inte ut avgifterna. Helkunder i S-E Banken och Handelsbanken betalar inget för bankkorten.

Einar Fridén, informationschef på Sparbanken Sverige, säger att banken räknade med att det skulle bli turbulens när avgifterna gentemot butikerna ändrades.

"Visst hade vi en föraning om att en del butiker skulle tycka att vi gjorde fel. Men vi hoppades att de sedan skulle föra avgifterna vidare till konsumenten."

Han tror inte att det kommer att ligga Sparbanken till last att banken, som den klart största kortoperatören, har gått i bräschen för att införa de nya avgifterna.

"Jag tror att det kan ge en negativ effekt, men jag bedömer att vi inte kommer att förlora pengar på det. Det är en riktig och rättvis åtgärd, som jag tror är nödvändig på sikt. Någon måste ju betala kostnaderna för transaktionerna till slut."

Bestämmer själva

Det är de enskilda handlarna som bestämmer hur de gör med avgifterna de vill ta ut av kunderna. Det finns handlare inom alla tre affärskedjorna som valt att inte ta ut någon avgift. En del av dem är knutna till banker som inte tar ut någon avgift.

KF är den enda kedja som tar ut samma avgifter för alla externa kort. Bankerna vill tvärtom att avgifterna ska skilja sig mellan korten.

Det gillar inte Juergen Thelander.

"Vi vill inte att avgifterna ska bli en konkurrensfråga mellan butikerna eftersom vi tycker att det är en branschfråga", säger han.

KF har börjat ta ut avgifter från American Express och Diners Club också, vilket har retat upp de båda kortbolagen. I avtalen med butikerna hindras nämligen butikerna från att ta ut avgifter för dessa kort.

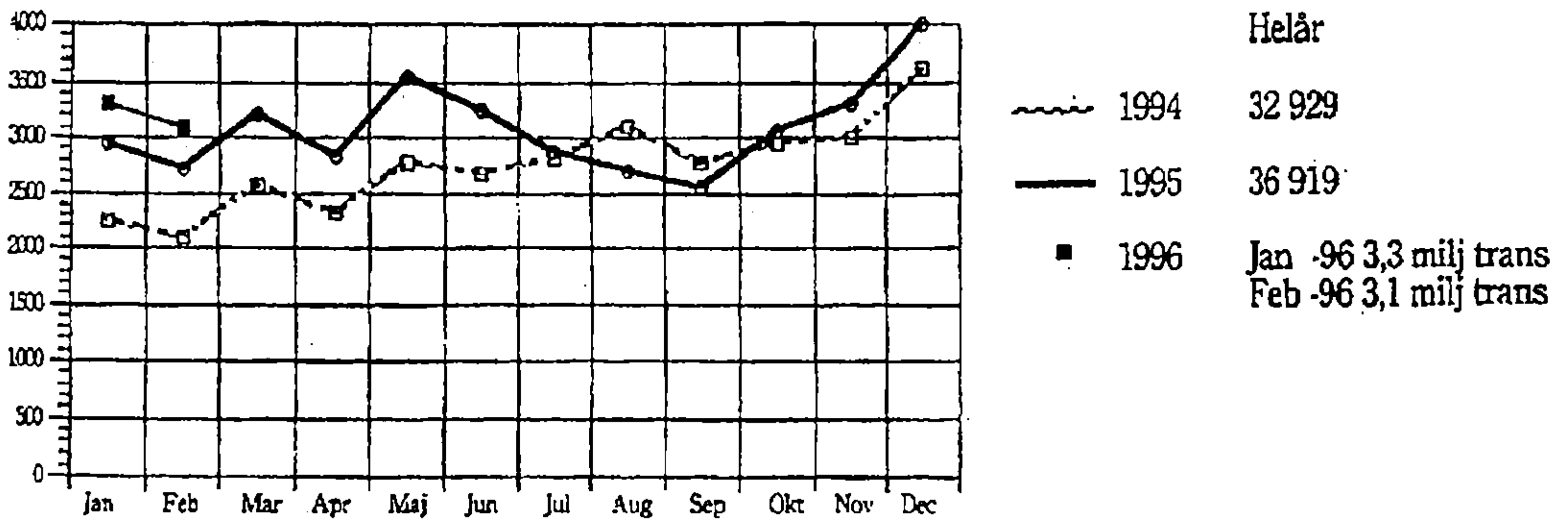
"Vi tycker att det är fel att styra över folk till att betala med American Express eller Diners Club. De korten är absolut dyrast för oss. Vi har dem som en ren service för utländska kunder", säger Juergen Thelander. □

continues.

FIGURES FROM ONE OF THE LARGEST MEMBERS OF VISA SWEDEN

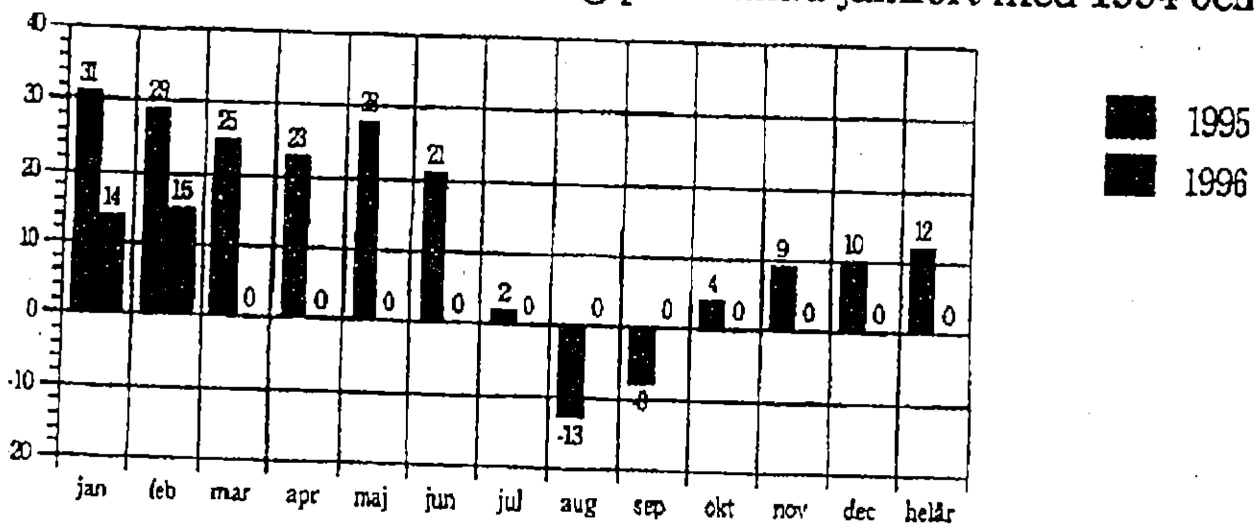
NUMBER OF VISA CARD TRANSACTIONS

Antal transaktioner (tusental)



FIGURES FROM ONE OF THE LARGEST MEMBERS OF VISA SWEDEN

Procentuell ökning/minskning per månad jämfört med 1994 och 1995



Annex 4

6

Annex 4

1. In the USA, the question of market definition arose in an anti-trust case relating to the interchange fee in the Visa card system (National Bancard Corporation v Visa USA, 596F. Supp. 1231 (S.D. Fla. 1980), aff.d 770F. 2d 592 (11th Cir. 1986)). Visa argued that Visa cards compete in a market made up of all consumer payment devices, and the District Court agreed:

   "[T]he relevant market in this case consists of the market for payment systems as VISA contends. Not only did the testimony at trial suggest that VISA developed as the result of Bank of America's determination to provide and promote a payment system of nationwide proportions to compete with other payment systems then in existence, the evidence also indicated considerable success. The cross-elasticity of both demand for and supply of VISA and other payment devices is quite high. Both cardholders and merchants who testified at trial considered the VISA services equivalent or sufficiently close to a variety of other payment systems used in retail sales, including other credit cards, travelers cheques, cash, ATM cards, personal cheques and cheque guarantee cards... While each of these different payment service devices was not considered to be a close substitute for a VISA card for purchases of every possible product at every possible price, all payment services taken together were sufficient to provide, at the least, several close substitutes for a VISA card in any possible context. Cash, for example, might be a good substitute for face-to-face transactions involving small dollar amounts, while cheques would be better for larger transactions involving long-distance exchanges."

   This determination of the relevant product market was upheld on appeal.

2. This finding was endorsed by another US District Court in a recent case in which the plaintiffs were attacking the no surcharging rule of the Plus ATM system (SouthTrust Corporation v Plus System Inc., et al. §71, 219 (N.D. Ala 1995)):

   "Although the plaintiff in *NaBanco* argued that only VISA card transactions constituted the relevant market, the Eleventh Circuit upheld the district court's finding that the relevant market consisted of all nationwide payment services used in retail sales, including "VISA, Mastercard, T & E cards, merchants' proprietary cards, merchants' open book credit, cash, travelers cheques, ATM cards, personal checks and check guarantee cards." *National Bancard Corp. (NaBanco) v. Visa U.S.A.*, 596 F. Supp. 1231, 1259, *aff'd, NaBanco*, 770 F.2d 592 (11th Cir. 1986). The same reasoning applies in the present case, and the relevant market in this case is thus all payment systems. Consumers can easily shift to using personal checks, credit cards, or obtaining cash by means other than ATMs. Since the relevant market in the present case then includes all payment devices, Plus clearly does not have market power in the market so defined."

Annex 5

TABLE 1

Domestic and International Cardholder Expenditure on Visa Cards year ending September 1995

Country		Total	Int share		Total	Int share	Total expenditure	Int share
AUSTRIA	Total sales	$1,123m		Total cash	$208m		$1,332m	
	International sales	$489m	44%	International cash	$81m	39%	$570m	43%
	Domestic sales	$634m		Domestic cash	$128m		$762m	
BELGIUM	Total sales	$3,095m		Total cash	$898m		$3,992m	
	International sales	$1,309m	42%	International cash	$168m	19%	$1,477m	37%
	Domestic sales	$1,785m		Domestic cash	$730m		$2,515m	
FINLAND	Total sales	$1,961m		Total cash	$103m		$2,063m	
	International sales	$235m	12%	International cash	$98m	95%	$333m	16%
	Domestic sales	$1,726m		Domestic cash	$5m		$1,731m	
FRANCE	Total sales	$61,487m		Total cash	$26,676m		$88,163m	
	International sales	$2,886m	5%	International cash	$1,087m	4%	$3,973m	5%
	Domestic sales	$58,601m		Domestic cash	$25,589m		$84,190m	
GERMANY	Total sales	$5,204m		Total cash	$1,216m		$6,420m	
	International sales	$1,663m	32%	International cash	$241m	20%	$1,905m	30%
	Domestic sales	$3,541m		Domestic cash	$975m		$4,516m	
GREECE	Total sales	$590m		Total cash	$68m		$658m	
	International sales	$104m	18%	International cash	$5m	7%	$109m	17%
	Domestic sales	$485m		Domestic cash	$64m		$549m	
IRELAND	Total sales	$1,261m		Total cash	$86m		$1,347m	
	International sales	$323m	26%	International cash	$28m	33%	$351m	26%
	Domestic sales	$939m		Domestic cash	$58m		$996m	
ITALY	Total sales	$6,744m		Total cash	$820m		$7,564m	
	International sales	$1,202m	18%	International cash	$171m	21%	$1,374m	18%
	Domestic sales	$5,541m		Domestic cash	$649m		$6,190m	
LUXEMBOURG	Total sales	$687m		Total cash	$62m		$749m	
	International sales	$259m	38%	International cash	$30m	49%	$289m	39%
	Domestic sales	$428m		Domestic cash	$32m		$460m	
NETHERLANDS	Total sales	$600m		Total cash	$135m		$735m	
	International sales	$312m	52%	International cash	$51m	37%	$363m	49%
	Domestic sales	$287m		Domestic cash	$84m		$372m	
PORTUGAL	Total sales	$2,201m		Total cash	$864m		$3,065m	
	International sales	$398m	18%	International cash	$61m	7%	$459m	15%
	Domestic sales	$1,803m		Domestic cash	$802m		$2,606m	
SPAIN	Total sales	$11,876m		Total cash	$18,961m		$30,838m	
	International sales	$931m	8%	International cash	$186m	1%	$1,117m	4%
	Domestic sales	$10,945m		Domestic cash	$18,775m		$29,720m	
SWEDEN	Total sales	$3,110m		Total cash	$329m		$3,439m	
	International sales	$371m	12%	International cash	$285m	87%	$655m	19%
	Domestic sales	$2,740m		Domestic cash	$44m		$2,784m	
UK	Total sales	$59,861m		Total cash	$26,285m		$86,146m	
	International sales	$3,826m	6%	International cash	$894m	3%	$4,719m	5%
	Domestic sales	$56,036m		Domestic cash	$25,391m		$81,427m	
TOTAL	Total sales	$159,800m		Total cash	$76,712m		$236,512m	
	International sales	$14,310m	9%	International cash	$3,385m	4%	$17,695m	7%
	Domestic sales	$145,490m		Domestic cash	$73,327m		$218,817m	

Cardholder Expenditure includes all purchases and cash withdrawals where a Visa card is used.
Source: Visa Members' Quarterly Operating Certificate (Total volumes), VisaVue (International volumes).

Denmark do not report domestic Cardholder Expenditure on their Quarterly Operating Certificate.

4

TABLE 2

Number of cards in issue, by brand of card

Brand	Amex definition	Debit &/or ATM cards	Cheque gtee only cards	Retailer cards
AUSTRIA				
Visa	0.5	0.0		
EC/MC	0.5	2.7		
Amex	0.0	0.0		
Diners	0.1	0.0		
Domestic brand only		3.4		0.3
Total	*1.1*	*6.1*	*0.0*	*0.3*
BELGIUM				
Visa	1.7	0.0		
EC/MC	0.3	3.7	0.6	
Amex	0.2	0.0		
Diners	0.1	0.0		
Domestic brand only		3.6		1.6
Total	*2.3*	*7.3*	*0.6*	*1.6*
DENMARK				
Visa		0.6		
EC/MC	0.2	0.1		
Amex	0.0	0.0		
Diners	0.1	0.0		
Domestic brand only		0.0		2.0
Total	*0.4*	*0.7*	*0.0*	*2.0*
FINLAND				
Visa	0.8	0.1		
EC/MC	0.0	0.0		
Amex	0.0	0.0		
Diners	0.1	0.0		
Domestic brand only		1.2		2.0
Total	*0.9*	*1.3*	*0.0*	*2.0*
FRANCE				
Visa	10.7	0.0		
EC/MC	6.3	0.8		
Amex	0.5	0.0		
Diners	0.1	0.0		
Domestic brand only		6.7		22.0
Total	*17.6*	*7.5*	*0.0*	*22.0*

VU0396191

16

TABLE 2

Number of cards in issue, by brand of card

Brand	Amex definition	Debit &/or ATM cards	Cheque gtee only cards	Retailer cards
GERMANY				
Visa	2.9	0.0		
EC/MC	6.9	55.7		
Amex	1.2	0.0		
Diners	0.4	0.0		
Domestic brand only		20.0		2.4
Total	*11.4*	*75.7*	*0.0*	*2.4*
GREECE				
Visa	0.6	0.0		
EC/MC	0.3	0.6		
Amex	0.0	0.0		
Diners	0.1	0.0		
Domestic brand only		0.8		0.1
Total	*1.0*	*1.4*	*0.0*	*0.1*
IRELAND				
Visa	0.6	0.0		
EC/MC	0.4	0.1		
Amex	0.0	0.0		
Diners	0.0	0.0		
Domestic brand only		2.0		
Total	*1.1*	*2.1*	*0.0*	*0.0*
ITALY				
Visa	4.8	0.0		
EC/MC	0.8	3.5		
Amex	0.7	0.0		
Diners	0.3	0.0		
Domestic brand only		8.5	1.7	1.5
Total	*6.6*	*12.0*	*1.7*	*1.5*
LUXEMBOURG				
Visa	0.2	0.0		
EC/MC	0.1	0.2		
Amex	0.0	0.0		
Diners	0.0	0.0		
Domestic brand only		0.0		
Total	*0.2*	*0.2*	*0.0*	*0.0*

TABLE 2

Number of cards in issue by brand of card

Brand	Amex definition	Debit &/or ATM cards	Cheque gtee only cards	Retailer cards
NETHERLANDS				
Visa	1.3	0.0		
EC/MC	1.6	12.1		
Amex	0.2	0.0		
Diners	0.1	0.0		
Domestic brand only		4.6		1.7
	3.3	*16.8*	*0.0*	*1.7*
PORTUGAL				
Visa	0.9	0.7		
EC/MC	0.2	0.6		
Amex	0.0	0.0		
Diners		0.0		
Domestic brand only		3.9	0.3	
Total	*1.1*	*5.2*	*0.3*	*0.0*
SPAIN				
Visa	9.2	8.0		
EC/MC	0.2	0.0		
Amex	0.3	0.0		
Diners	0.1	0.0		
Domestic brand only		18.1		8.0
	9.8	*26.1*	*0.0*	*8.0*
SWEDEN				
Visa	0.5	1.4		
EC/MC	1.1	0.0		
Amex	0.1	0.0		
Diners	0.2	0.0		
Domestic brand only		4.8		1.1
Total	*1.9*	*6.2*	*0.0*	*1.1*
UK				
Visa	17.9	12.9		
EC/MC	10.5	7.4		
Amex	1.1	0.0		
Diners	0.3	0.0		
Domestic brand only		6.4		18.0
Total	*29.8*	*26.7*	*0.0*	*18.0*

TABLE 2

Brand	Amex definition	Debit &/or ATM cards	Cheque gtee only cards	Retailer cards
Number of cards in issue by brand of card				
TOTAL EU COUNTRIES				
Visa	52.4	23.7	0.0	0.0
EC/MC	29.5	87.4	0.6	0.0
Amex	4.5	0.0	0.0	0.0
Diners	1.9	0.0	0.0	0.0
Domestic brand only	-	84.0	2.0	60.6
Total	*88.4*	*195.1*	*2.6*	*60.6*

All data are in millions of cards

Sources:
Visa and Europay - EFMA
Amex/Diners/Domestic etc - Retail Banking Research
Visa and Europay data as at September 1995
Other data as at December 1994

Notes:
Retailer cards include deferred debit and charge cards

Annex 6

(6)

STATE OF NEW YORK
DEPARTMENT OF LAW
120 BROADWAY
NEW YORK, N.Y. 10271

Suite 2601
(212) 416-8275
FAX (212) 416-6015

OLIVER KOPPELL
Attorney General

GEORGE SAMPSON
Assistant Attorney General in Charge
Antitrust Bureau

October 27, 1994

Carl J. Munson, Jr.
Senior Vice President
Debit Card Counsel and
Asst. General Counsel
MasterCard International
888 Seventh Avenue
New York, New York 10106

Dear Mr. Munson:

On April 20, 1994, you notified the plaintiff States in The States of New York et al., v. Visa U.S.A., Inc., and MasterCard International, Inc. ("Entree Litigation"), that the Board of Directors of Maestro U.S.A. Inc. ("Maestro") had adopted a resolution to permit members of Maestro to participate as issuers of debit cards in competing, national, on-line, point-of-sale debit card programs (issuing duality). While you maintain that MasterCard, which owns Maestro, was not required to provide such notice pursuant to the terms of the Settlement Agreement and Order in the Entree Litigation ("Entree Settlement Agreement"), a position with which the States disagree, you provided all information and materials the States requested. Your cooperation in this matter is greatly appreciated.

As you know, in the Entree Litigation the States challenged the joint debit card venture between Visa and MasterCard because we believed the venture would stifle competition in the emerging point-of-sale debit card market. The Entree Settlement Agreement required the defendants to terminate the Entree program, but left each bankcard association free to develop its own independent debit card program. If either Visa or MasterCard commenced a point-of-sale debit card program that did not explicitly prohibit duality, however, the Entree Settlement Agreement required the defendants to notify the States. The agreement defined "duality" as the ability of or potential for a financial institution to "(1) issu[e] both Visa and MasterCard POS Debit Cards to persons (issuing duality) and/or (2) contract[ ] with merchants for the acceptance of both Visa and MasterCard POS Debit Cards (acquiring duality)."

Following the entry of the Entree Settlement Agreement in May 1990, both bankcard associations launched their own independent point-of-sale debit card programs. In 1991, Visa formally acquired 100% ownership and control of Interlink and announced its plan to make Interlink a national point-of-sale debit card program. Similarly, MasterCard launched the Maestro program, which was affiliated with several regional ATM and POS networks. The States viewed the launch of these two highly competitive independent point-of-sale debit card programs as extremely pro-competitive.[1]

The benefits of aggressive intersystem competition are evident from the different pricing and marketing strategies the two bankcard associations have adopted. Maestro announced a flat interchange fee of \$.095. Interlink adopted a \$.10 interchange fee on supermarket transactions and a 45 basis point fee on all other transactions. Both associations adopted different switch fees. Interlink imposed annual card service fees and merchant location fees while Maestro did not. Of particular significance, Interlink initially charged a "transaction service fee" of \$.02 on each transaction conducted by an Interlink cardholder at an Interlink merchant, even if the POS transaction were regional. Maestro imposed no such "bypass" fee. Soon after Maestro announced its pricing, Interlink eliminated its "transaction service fee."

Both associations have also aggressively and independently promoted their programs. For example, last spring Maestro launched a major promotional effort in the Boston area. Interlink countered with similar promotional activity in the North Carolina market. Additional regional debit promotions in multiple markets have reportedly been planned by both associations.

Both Interlink and Maestro appear to be doing well. Card membership, merchant participation and transaction volumes are growing at ever increasing rates for both programs. While Interlink currently enjoys a larger share of the market, which may be due in part to the substantial number of regional Interlink transactions, there is nothing to suggest that Maestro is not or cannot remain a viable and effective competitor. Indeed, Visa's present focus on promoting its off-line debit product may provide

[1]While neither program prohibited acquiring duality, both explicitly prohibited issuing duality. After analyzing the competitive effects of permitting acquiring duality, the States concluded that a competitive problem was unlikely. In fact, the States recognized that acquiring duality might well stimulate POS debit development and deployment of POS terminals.

Maestro with an opportunity to gain market share with its on-line product.

Consequently, we are concerned that a change in Maestro's rules to permit issuing duality would bring to an end the aggressive intersystem competition between the two bankcard associations in the point-of-sale debit card market. Our concerns are heightened because, unlike the provision of free-standing credit, debit card services are necessarily linked to access to a financial institution's demand deposit account. It is very unlikely that a competitor such as American Express, Discover or any other viable competitor could enter the debit card market and provide additional intersystem competition to the bankcard programs.

In sum, based on the information now available to us, the undersigned cannot state that the State they represent would not institute a civil enforcement action if Maestro adopted or sought to implement its proposed rule permitting issuing duality. We realize that a financial institution could not issue both Interlink and Maestro cards unless Interlink also eliminated its prohibition against issuing duality. Accordingly, the fact that the States represented by the undersigned have not filed suit to challenge the proposed rule change should not be interpreted as an assurance by the undersigned that their respective States would not file suit in the future. We also recognize, however, that the debit card market is evolving and that the relevant facts may change so that the position we have reached may have to be re-examined.

We again wish to thank you for your courtesy and cooperation in this matter.

Very truly yours,

Joseph Opper
Assistant Attorney General
and on behalf of:

Thomas Greene
Sr. Assistant Attorney General
Chief, Antitrust Section
State of California

Ellen S. Cooper
Assistant Attorney General
Chief, Antitrust Division
State of Maryland

George K. Weber
Assistant Attorney General
Chief, Consumer Protection
Antitrust Division
Commonwealth of Massachusetts

Thomas P. Perkins, Jr.
Assistant Attorney General
Chief,
Consumer Protection Division
State of Texas

ma\JO\mcdualty.ltz

TOTAL P.05

Annex 7

Antitrust Division

Department of Justice
Washington, D.C. 20530

October 7, 1975

Francis R. Kirkham, Esquire
Allan N. Littman, Esquire
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California 94104

Dear Messrs. Kirkham and Littman:

This is in response to your request of November 11, 1974, as supplemented by additional submissions, for a statement of the Division's enforcement intentions with respect to proposed by-law 2.16 of National BankAmericard, Inc. ("NBI"), pursuant to the Department's Business Review Procedure (28 C.F.R. 50.6)

Although the full scope, application and implications of proposed by-law 2.16 are not entirely clear, as we understand it the by-law would prohibit banks belonging to NBI from participating in any other bank credit card system. This prohibition would be applicable to both card-issuing banks and banks which accept merchants' deposits (agent banks). The by-law is applicable to joint participation by banks, not only in both NBI and Interbank Card Association (Master Charge), but also any other program presently existing or which may develop.

Proposed by-law 2.16, as originally presented to the staff, related solely to bank credit card systems, and the primary focus of our investigation and analysis of by-law 2.16 was on its likely impact on the bank credit card business. However, you have advised us that proposed by-law 2.16 will be further amended so as to become applicable to the so-called debit (or asset) card system which NBI has recently announced. It is our understanding that a debit card system consists essentially of an electronic funds transfer system (EFTS) in which the bank card is capable not only of effecting credit transactions but also can activate electronic point-of-sale terminals (or similar such devices) so as to accomplish withdrawals from deposits and similar basic banking functions. As you know, the debit card system is in an early stage of its evolution and only its general outlines can be perceived

Defendant's Exhibit
Exh# DX 102
Case# 2:91-CV-047B

DEPOSITION EXHIBIT
75
Katz 8-26-92

this juncture. Though the debit card concept is in its infancy, it undoubtedly will have a substantial impact on the existing bank credit card systems. Consequently, the applicability of proposed by-law 2.16 to debit cards compels us to move considerably beyond analysis of the bank credit card business into the dynamic, rapidly evolving world of EFTS, about which little can be said categorically and which involves issues beyond those involved in an analysis of the traditional bank credit card business.

We propose, therefore, to address your request for a business review letter regarding proposed by-law 2.16 in two parts. First, we have reached several conclusions with respect to the antitrust implications of proposed by-law 2.16 insofar as it relates to bank credit card systems as they presently exist. As noted earlier, the proposed by-law flatly prohibits banks in the NBI system from any affiliation with any other national bank credit card system. The by-law extends well beyond separation of electronic delivery and terminal systems, and automatically precludes every NBI agent bank in any market from being an agent bank in any other credit card system. We believe such a restriction might well handicap efforts to create new bank credit card systems and may also diminish competition among the banks in various markets. The same pertains to the operation of the by-law to prevent an NBI card-issuing bank from becoming an agent bank in a competing bank credit card system and to prevent an NBI agent bank from becoming a card-issuing bank in another system.

We do not have the same criticism of the proposed rule to the extent its application would prohibit an NBI card-issuing bank from becoming a card-issuing bank in a competing system. We believe that the existing competition between NBI and Interbank has been pro-competitive, and a prohibition of dual affiliation appears unobjectionable to the extent it is necessary to insure continued intersystem competition. It should be emphasized, however, that our views in this regard are based on an analysis of the bank credit card system as it presently exists and on the general impact of such a prohibition. We have not undertaken a detailed analysis of the impact of such a prohibition in particular markets. It is conceivable that unique competitive problems exist in particular markets which would be compounded by application of the prohibition of dual affiliation at the card-issuing bank level. As previously indicated, however, we have not undertaken the type of market by market analysis which would be necessary to determine if, in fact, any such situations presently exist. In addition, we note that subsection 2.16(c) permits multi-bank holding companies to be card-issuing members of more than one system. On its face, this appears inconsistent with the basic rationale of the argument in support of a ban on duality.

As noted earlier, you intend to amend the proposed by-law so as to encompass "debit cards" as well as bank credit cards, which superimposes another level of analysis upon that which is relevant in the traditional bank credit card context. Thus, in order to intelligently evaluate proposed by-law 2.16 insofar as it relates to debit cards, it is necessary to have some fairly precise notion of what the EFTS phenomenon will ultimately consist of; how many EFTS systems there may be and whether they will be nationwide, regional, or local, or some combination thereof; what the impact of EFTS will be upon the banking industry; and what the role of the banking regulatory agencies in EFTS will be -- to mention only some of the pertinent areas. As you well know, at this point one can only conjecture what the future holds in store in the EFTS area. Consequently, it is impossible for us at this juncture to reach any firm conclusions concerning the competitive implications of proposed by-law 2.16 insofar as it relates to debit card systems and EFTS.

We are of the view that preservation of maximum flexibility and competitive opportunities in the EFTS field is of the utmost importance if EFTS is to develop in a way which provides consumers with a wide range of useful and competitive services. Thus, we are concerned that application of the proposed by-law to debit cards might unnecessarily limit the opportunities available to NBI member banks to participate in alternative debit card and EFTS developments.

In sum, on the basis of the information presently available to us, we cannot state that the Department of Justice would not institute a civil enforcement action should NBI adopt proposed by-law 2.16. As noted, we recognize that the credit and debit card businesses are rapidly evolving. Consequently, the relevant facts may change and the conclusions we have reached at the present time may have to be re-examined.

Your courtesy in presenting this matter to the Department and your cooperation in providing the information requested is appreciated.

Sincerely yours,

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

Annex 8

Annex 8

"EC Competition cases relating to common distributorships"

In SCPA / Kali & Salz[1], the Commission stated that the appointment by two producers of fertilizers of the same distributor "has the effect of unifying prices and conditions of sale".

In United Reprocessors GmbH[2], the Commission considered that an agreement to provide reprocessing services for nuclear fuels via a joint subsidiary would necessarily result in the joint fixing of prices and marketing policies.

In CSV[3], the Commission condemned an agreement between two manufacturers of fertilizers to sell their products in the Netherlands through a joint subsidiary. The Commission considered that the consequence of the agreement was "that buyers in the relevant markets can no longer approach two independent suppliers, but must deal exclusively with CSV, which charges uniform prices and applies the same terms of business for deliveries ...". The Commission recognized that the products were "still separately identifiable to some extent and customers may voice a preference for one or the other when placing an order with CSV"; nevertheless, it considered "this has no appreciable effect on competition because the same prices and conditions apply to the products of both firms ...".

In Floral[4], the Commission imposed a fine on three French producers of fertilizers who had set up a joint venture to export

---

1 Decision of 11 May 1973, O.J., L 217 of 6 August 1973.

2 Decision of 23 December 1975, O.J., L 51 of 26 February 1976, page 7.

3 Decision of 20 July 1978, O.J., L 242 of 4 September 1978, page 15.

4 Decision of 28 November 1979, O.J., L 39 of 15 February 1980, page 51.

to Germany. Here too, the Commission considered that the cooperation restricted competition between the producers and prevented German customers from being able to choose the prices and conditions most advantageous to them.

These cases did not only involve joint selling subsidiaries - where the potential to eliminate price competition is particularly great - but regarded as equally prohibited sales through independent distributors[5].

---

5 See, e.g., the <u>SCPA / Kali & Salz</u> Decision.

Annex 9

Top 25 Issuers in Western Europe
by number of cards, as at start 1995

Issuer	Country	Type of Organisation	Number of Cards Issued (thousands)
Barclays Bank	UK	Commercial Bank	15,164
National Westminster Bank	UK	Commercial Bank	9,154
Midland Bank	UK	Commercial Bank	7,797
Lloyds Bank	UK	Commercial Bank	*7,662*
ING Group (Postbank)	Netherlands	Commercial Bank	7,000
Crédit Agricole	France	Commercial Bank	6,070
TSB Bank	UK	Savings Bank	5,768
Cetelem	France, Italy and Belgium	Private Label Issuer	5,700
Rabobank	Netherlands	Cooperative Bank	5,000
American Express	All European Countries	T&E Company	*4,815*
Marks & Spencer	UK	Private Label Issuer	4,230
Abbey National	UK	Commercial Bank	4,200
El Corte Inglés	Spain	Private Label Issuer	4,000
Deutsche Bank Group	Germany and Italy	Commercial Bank	3,844
La Redoute	France	Private Label Issuer	3,700
Cofinoga	France	Private Label Issuer	3,460
Servizi Interbancari	Italy	National Card Organisation	3,300
Banco Bilbao Vizcaya	Spain	Commercial Bank	3,000
The Royal Bank of Scotland	UK	Commercial Bank	2,984
La Caixa	Spain	Savings Bank	*2,800*
Caja de Madrid	Spain	Savings Bank	2,717
ABN-AMRO	Netherlands	Commercial Bank	2,700
CENCEP	France	Savings Bank	2,656
Banco Central Hispano	Spain	Commercial Bank	*2,600*
Banque Nationale de Paris	France	Commercial Bank	2,295

Source: Retail Banking Research Ltd. "Payment Cards in Europe, 1995"

Notes:

1. Figures in italics are estimates made by Retail Banking Research, with the aid of experts from the relevant countries.
2. The countries covered are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, UK.