

Background

Case of payment card schemes Vj-18/2008

Uniform and common interchange fees set by banks and used in transactions by payment cards restrict competition

On 24 September 2009 the Hungarian Competition Authority (GVH) has made its decision in the proceeding pursued in connection with interchange fees. In its decision the GVH has established that the practice of the Hungarian financial institutions, according to which they uniformly set the level of interchange fees used in transactions by payment cards of Visa and MasterCard, infringed the Competition Act. As a result of this practice competition between payment card schemes and acquiring banks has been distorted. The GVH has found that the practice of Visa and MasterCard international payment card schemes also infringed the competition provisions, since they provided explicit help for the Hungarian banks in concluding the agreements that restricted competition. The banks originally drawing the agreements and the payment card schemes concerned – besides the fact that the infringement has been established – have been fined, while in the case of the other undertakings under investigation entering the market of payment card systems and joining the agreement later, the GVH has also established the infringement, however no fines have been levied on them. The GVH has imposed a total fine amounting to HUF 954 million (approx. EUR 3,18 million) on seven banks (HUF 188 million (approx. EUR 627 thousand) on Budapest Bank Zrt., 281 million (approx. EUR 937 thousand) on OTP Bank, 84 million (approx. EUR 280 thousand) on MKB, 91 million (approx. EUR 303 thousand) on CIB, 107 million (approx. EUR 357 thousand) on Erste, 127 million (approx. EUR 423 thousand) on K&H and 90 million (approx. EUR 300 thousand) on ING); the two payment card schemes have been fined HUF 477 million (approx. EUR 1,59 million) each.

As a result of a long and thorough investigation, it has been established that competition was restricted on the market of payment card schemes (Visa and MasterCard) and in the case of the acquiring banks by the fact that the banks concerned uniformly determined the level of interchange fees (set at the same level) – already in 1996 – for both major international payment card schemes. Hereby there was no real chance for competition between Visa and MasterCard and competition between the acquiring banks was also restricted. As a result of the agreement the level of merchant service charges (that is the fee paid to the acquiring bank by the retailer) were indirectly influenced. This fee serves as one of the most important factors in competition between banks operating POS terminals.

It is clear that as a consequence of treating the two payment card schemes uniformly, competition was distorted since

- Visa and MasterCard had partly different member banks, which could normally have resulted in different interchange fees and structures
- Even fallback interchange fees applied, in lack of MIF, in cross-border payment card transactions were of different level and structure
- Prior to the inflation of fees in August 1996, the two card payment schemes applied somewhat different interchange fees
- Even after the abolishment of the agreement on MIF on 30 July 2008, the interchange fees are of different level and structure.

The calculation of the GVH has showed unequivocally that MIF meant for several years an artificial minimum price (otherwise not necessarily existing or not on the same level) retailers had to pay.

An agreement which restricts competition – even if it restricts competition by object – may be exempted from the prohibition under conditions set by law. For this aim, the parties under investigation should have proven and demonstrated that in the course of the period investigated the restriction was necessary, the concomitant advantages outweighed the disadvantages, and that allowed consumers a fair share of the resulting benefit. The GVH does not contest that collective multilateral agreements may produce substantial efficiencies. However, the GVH did not find any evidences proving that - mostly due to the distortion of competition resulting from the common treatment of both card payment schemes – the restriction has only reached the reasonable necessary level at any time, and that a due share of the benefits reached the cardholders and retailers. The following facts must be highlighted:

- the level of MIF remained unchanged for years while both parts of the market saw significant changes and the costs decreased.
- they applied uniform MIF for the debit cards and the credit cards as well, though the latter were more expensive,
- prior to the determination and later the amendments to MIF, they neither conducted any cost analysis nor took into account the changing demands of both sides of the market.

The cost studies conducted afterwards in 2005-2006 by Visa and MasterCard were not considered on the merits by the GVH. It is important to note that in the case of a bilateral market the amount of the fees charged to one of the sides of the market cannot barely be justified with the costs emerged on that side. The essential feature of bilateral markets is namely that demand and flexibility effects may divert to a great extent the level of the fees charged from the level of the costs arising on the given market. Furthermore, the GVH stated that based on the documents of the banks the intention seemed to be convincing that between 2002-2004 market players felt it was time to decrease the level of MIF, and that cross-border payment card transaction (fallback) fees in the given period were significantly lower.

In the last few years, parties under investigation were aware of the fact that

- MIF would be a common cost determining the retailers' fees, which would affect competition on the acquiring market. In 1999 one of the answers of the banks responding to the letter of the Ministry of Economics objecting high retailer fees was that the existence and the level of MIF did not allow lower retailer fees. (It must be noted that one of the groups of the banks under investigation used to run a retail fee cartel, however, the period of limitation has already elapsed...);
- due to its effect interchange fee – even in itself, in lack of distortion of competition between card payment schemes, that is in the case of their uniform treatment – is considered by the European Commission to be restricting competition (which can only be exempted under specified conditions);
- their co-operation might have a competition distortion effect, however they failed to turn to the GVH for individual exemption concerning the determination of interchange fees;
- the market becoming more mature would have required the cutting down of MIF after a while (from 2002-2004 by all means);

- in lack of a Hungarian MIF-agreement, basically lower interchange fees of international card payment schemes would have applied in Hungary too (especially in the case of debit cards).

The GVH has established that the two payment card schemes also participated in the restriction of competition since

- it was the operational rules determined by the two undertakings that enabled banks to set interchange fees uniformly, even applying for the other payment card scheme;
- though both companies claimed that they never fostered their joint treatment, one of them even denied having been aware of it, the GVH has deemed unrealistic in the world of business and thus believable that Visa and MasterCard would have not been aware of the fact that Hungarian banks set uniform interchange fees for both payment card schemes (this was later objected by VISA). This served their interest since one of the elements of competition between them was excluded this way;
- the banks admitted that in the beginning the two payment card schemes offered explicit help to them, "they held their hands";
- the payment card schemes must have been aware of the fact that the Hungarian market players determined and sustained the level of MIF without conducting a cost study, however this is one of the necessary analysis.

The agreement subject of the proceeding, dating back to 1996, violated Article 11 of PURA since its entering into force, that is since 1 January 1997, and Article 81 of EC Treaty since 1 May 2004 until its renunciation on 30 July 2008.

After 30 July 2008, after the abolishment of the MIF agreement, Visa and MasterCard have been determining interchange fees at different level and structure, which – also acknowledged by them - has contributed to the development of the market. (Milán Gauder, chief executive of MasterCard in Hungary, on 18 September 2009 gave the following interview for Inforádió: Fees have changed from several aspects. While there was a unique fee applied for everyone before, today this mechanism is much more fine-tuned in order to foster that more and more retailers can accept payment cards, in order to promote the expanding of the whole card market. The new fees that were determined last year, have contributed to that numerous retailers accept payment cards by now, even in taxis within Budapest paying by cards is often accepted for small amounts as well. Or else we have heard that in the state administration sector, in the offices of government issued documents transactions by payment card will be accepted from next spring on, or in certain police cars there are POS mobile terminals so that if caught on the highway, one can pay the fine directly. So the fact that the GVH initiated this investigation and the payment card schemes got the right to set the fees themselves, have all contributed indirectly to the above mentioned.)

The GVH deemed it reasonable to impose fine on the players who participated actively in the conclusion of the agreement distorting competition, considering that this agreement was concluded between competitors with the explicit aim to restrict competition and had a lasting impact.

When calculating the fines, the GVH took into account the total amount of domestic interchange fees between 2004-2007 received by all issuing banks, since after this period it became evident that they should have changed the level of MIF.

When calculating the fines, the GVH also took into account the 1996 and current market shares of the banks concerned.

The GVH took into consideration as important mitigating factors that the undertakings under investigation

- recognised that they should have changed the level of interchange fees
- were cooperative in the course of the proceeding, for instance they provided the documents necessary to reveal the infringement and to better understand the historical events in order to establish their own responsibilities under competition law
- were cooperative after the launching of the proceeding and elaborated a commitment proposal setting a significant financial burden on them
- certain governmental bodies were also aware of some of the elements of the agreement
- the European Commission has not yet imposed fines for similar kind of agreements.

In the case of the two payment card schemes, the GVH took the same mitigating factors into consideration when deciding on a limited fine.