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The emerging competitive payments marketplace

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On-Topic

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Current developments in the evolving U.S. payments marketplace
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Antitrust and the evolving U.S. payments marketplace
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Developments in the competitive landscape for payment systems in Europe
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ABSTRACT

This on-topic is the occasion to come back to the emerging competitive payments marketplace in the United States and in the European Union. R. C. Hunter discusses the issues surrounding this evolution and the necessity to provide an ubiquitous, convenient, fast and secure payment system in the United States. Then, R. S. Taffet and C. Rodriguez provide an overview of some of the interchange fee cases and offer thoughts regarding whether the holdings of those cases sufficiently accommodate the development of such payment systems under U.S. antitrust law. Finally, J. Quinney examines the emergence of new market players in Europe where regulatory developments took place in 2015 without closing the file on interchange.

Ce dossier donne l'occasion de revenir sur le secteur croissant des marchés de paiement concurrentiels aux Etats-Unis et au sein de l'Union européenne. R. C. Hunter analyse les problématiques liées à cette évolution et particulièrement la nécessité de fournir un système de paiement universel, pratique, rapide et sécurisé aux Etats-Unis. R. S. Taffet et C. Rodriguez offrent ensuite un aperçu de la jurisprudence en matière de commissions interbancaires et offrent leurs avis concernant la question de savoir si le traitement de ces affaires est assez satisfaisant pour soutenir le développement de tels systèmes de paiement au regard du droit antitrust américain. Enfin, J. Quinney examine l'émergence de nouveaux acteurs sur ce marché en Europe, qui a connu d'importants développements en matière de régulation en 2015 sansxavoir toutefois réglé toutes les questions sur les commissions interbancaires.

Articles gathered by Richard S. Taffet.
All views expressed are strictly those of the authors.

Current developments in the evolving U.S. payments marketplace

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I. Introduction

1. "*Technology is rapidly changing many elements that support the payment process. High-speed data networks are becoming ubiquitous, computing devices are becoming more sophisticated and mobile, and information is increasingly processed in real time. These capabilities are changing the nature of commerce and end-user expectations for payment services.*"[1] As a result, the payments marketplace in the United States has dynamically and rapidly evolved over the last several years. The changes that have occurred

1 United States Federal Reserve System, Strategies for Improving the U.S. Payment System at 1 (Jan. 26, 2015), available at https://fedpaymentsimprovement.org/wp-content/uploads/strategies-improving-us-payment-system.pdf.

are based on new technologies and innovative product offerings that afford consumers expanded payment options that are increasingly fast, simple, and more versatile. These new payment offerings are providing alternatives to cash, check, debit and credit card options, and involve online and mobile payment products being offered by companies such as Apple, Google and PayPal, as well as faster and real-time payment methods that use both traditional and new payment systems. These new offerings are dramatically changing the competitive face of the U.S. payments landscape.

2. In Part II of this paper, I discuss the current issues that are driving this evolution, namely the increasing consumer demand for safe and secure real-time, or near real-time, payment options, with accompanying informational features, as well as the increased focus by the United States Federal Reserve, including through its Faster Payments Task Force, on the development of a ubiquitous, convenient, fast and secure payment system in the U.S. In Part III, I provide an overview of the new payment options that are being introduced and developed to meet the demands of consumers and the expectations of the Federal Reserve. I conclude that the dynamic evolution of the U.S. payment system will not be abated soon, and the competitive issues the changing landscape presents will need to be fully studied and understood.

II. The demand for faster payments options in the U.S. payment space

3. As the Federal Reserve and others have observed, "*there is currently no ubiquitous, convenient and cost-effective way for U.S. consumers and businesses to make (near) real-time payments from any bank account to any other bank account*."[2] Yet, there is significant demand for such capabilities. Efforts to meet those demands are underway.

4. In October 2012, the Federal Reserve "*announced its focus on improving the speed and efficiency of the U.S. payment system from end-to-end while maintaining a high level of safety and accessibility*."[3] A year later, in a September 2013 *Consultation Paper*, the Federal Reserve announced that, to meet the current expectations and demands of consumers and close "key gaps" in the current payments environment, the *"challenge for the industry is to provide a payment system for the future that combines the valued attributes of legacy payment methods—convenience, safety, and universal reach at low cost to the end user—with new technology that enables faster processing [and] enhanced convenience*."[4]

5. Research conducted by the Federal Reserve and others confirms that consumers and businesses are increasingly demanding features that are generally lacking in existing legacy payment systems, including real-time or close to real-time availability of funds, timely payment notification, the "*ability to send payments without [the] account information of the receiver*," and "*confirmation of good funds at payment initiation*."[5] Thus, one Federal Reserve study revealed:[6]

- Among payment speeds (i.e., the speed of funds debited from the payer and credited to the payee) of instant, one hour, 12 hours, 12–24 hours or 2–3 business days, 69% of consumer payers and 75% of business payees preferred instant or one-hour payment speed.[7] Moreover, for businesses, "*fast availability of funds was the most important element of payment speed*."
- At least 70% of consumer and business payers stated that it is important to receive timely notifications when a payment has been deducted from their account and when a payment has been received by the payee.
- When making a payment, not having bank account information given to payees was important to over 80% of consumers and businesses.

2 Id. at 8–9; Capgemini, Real-Time Payments Systems in the United States: How Can U.S. Banks Prepare? at 3 (2014) (noting that the U.S. "*lacks a comprehensive nationwide real-time system for low-value payments*" and discussing the "*critical need for an RTP* [real-time payment] *system in the United States*"), available at https://www.capgemini.com/resource-file-access/resource/pdf/rtp_systems_in_the_united_states_how_can_u.s._banks_prepare.pdf; Claire Greene, et al., Federal Reserve Bank of Boston, *Costs and Benefits of Building Faster Payment Systems: The U.K. Experience and Implications for the United States* at 4 n. 9 (Feb. 24, 2015) ("*Although potential benefits for the United States were identified long ago (…), options for fast, inexpensive A2A payments and transfers still are largely lacking in the current U.S. payments landscape (…)*"), available at https://www.bostonfed.org/economic/current-policy-perspectives/2014/cpp1405.pdf.

3 Federal Reserve System, *supra* note 1, at 7.

4 Federal Reserve Banks, Payment System Improvement - Public Consultation Paper at 3–4 (Sept. 10, 2013), available at https://fedpaymentsimprovement.org/wp-content/uploads/2013/09/Payment_System_Improvement-Public_Consultation_Paper.pdf.

5 Federal Reserve System, *supra* note 1, at 7, 9, 28–29; Federal Reserve Banks, *supra* note 4, at 1, 3–4; Deloitte, Real-time payments are changing the reality of payments at 1, 8 (2015) ("[C]*onsumers have generally come to expect faster settlement periods* [and] *notifications*."), available at http://www2.deloitte.com/content/dam/Deloitte/us/Documents/strategy/us-cons-real-time-payments.pdf; Accenture Payment Services, *Immediate Payments: Seizing the Customer Opportunity* at 3 (2015) ("*The need for instant access to value is consistently underlined by customer research studies (…)*"), available at https://www.accenture.com/t20150523T024820__w__/us-en/_acnmedia/Accenture/Conversion-Assets/DotCom/Documents/Global/PDF/Dualpub_2/Accenture-Immediate-Payments.pdf.

6 Federal Reserve System, *supra* note 1, at 28–29.

7 Roughly one third of consumers and three quarters of businesses expressed willingness to pay a fee for payments that have faster availability to the payee.

The same Federal Reserve study confirmed that "ubiquity" is an "*important payment attribute*":[8] 61% of consumers and 67% of businesses agreed that they "*won't use a payment method unless it is used and accepted by most people and businesses*."[9]

6. Existing payment means are not meeting these demands. While payments by cash are immediate and ubiquitous, they are costly and inconvenient. "*Payment cards and wire transfers possess some, but not all of*" the demanded features.[10] While credit and debit cards offer a real-time guarantee of funds, they do not offer the real-time availability of funds. With credit cards, "*even though the validation process is immediate, the funds transfer is delayed until the transaction is submitted for payment by the card acceptor to the card network*."[11] In addition, credit card payments "*can be disputed through the network via chargebacks under credit card regulations for any number of reasons*," making them "*more expensive to card acceptors*."[12] With respect to debit cards, where funds are pulled from a payor's account, costs exist related to potentially unauthorized payments as well. And, with respect to both credit and debit card transactions, safety and security risks exist because of the need to transfer personal account information between issuing and acquiring financial institutions. Payment by wire transfer is expensive, and is typically only for high-value transactions. The "*notification and delivery of funds may lag by one or several days due to cumbersome routing of transactions, lags in the beneficiary's bank posting systems, or delays due to* [financial institutions'] *risk management systems*."[13]

7. "[C]*heck and ACH payments generally lack*" the desired features and they "*are not universally fast or efficient from an end-user perspective by today's standards*."[14] Indeed, checks are the slowest of all payment options. Once deposited, it can take up to three days for funds to be available, and checks have the additional inconvenience of the payee having to deposit it, leading to an extension of the total transaction time. In addition, as one observer noted, because checks need to be handled and deposited, "*counting mailing days and weekends, every day there are nearly $135 billion USD 'in flight' that cannot be used or invested by the beneficiaries of these payments—a considerable waste of capital*."[15] In addition, due to clearing times with checks, uncertainty can exist regarding whether the transfer was successful and funds are available to the receiver for use. Checks and ACH transfers also lack finality because they carry the risk of a possible return of funds.[16]

8. While "*emerging players are coming to market quickly with innovative product offerings*" designed to meet the need for faster payments, as discussed in Part III below and according to the Federal Reserve, "*these innovations, when considered in total, have not resulted in a ubiquitous near-real-time system*."[17] As a result, the U.S. payment system is lagging behind other countries around the world, which have already adopted, or are in the process of adopting, ubiquitous real-time or faster payment systems. And it has been observed that the U.S. must do the same to "*help maintain* [the U.S. payment system's] *global competitiveness*."[18]

9. In these circumstances, the Federal Reserve announced its Faster Payments Task Force in January 2015 to examine how to best achieve an improved U.S. payment system that includes a "*ubiquitous, safe, faster* [near real-time] *electronic solution(s) for making a broad variety of business and personal payments, supported by a flexible and cost-effective means for payment clearing and settlement groups to settle their positions rapidly and with finality*."[19] "*A safer, more efficient and faster payment system contributes to public confidence and economic growth*," said Federal Reserve Board Governor Jerome H. Powell at the time.[20] And, according to the Federal Reserve, "*ubiquitous, faster payments capability could improve the efficiency of the U.S. payment system*" and "*benefit at least 29 billion transactions per year, which is 12 percent of the total for the country*."[21] The Federal Reserve observed that the transactions that could benefit from a faster payment system are concentrated "*primarily within*" the person to person (P2P), business to business (B2B), person to business (P2B) and business to person (B2P) use cases, which the Federal Reserve found have a "'*need for speed' ranging from hours (intraday) to minutes, and possibly seconds*."[22]

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8 Id. at 9, 28–29. "*Ubiquitous participation refers to payment products that are broadly accessible by everyone and available to be used in a variety of different circumstances*." Id. at 9 n.9.

9 Id. at 29.

10 Federal Reserve Banks, *supra* note 4, at 3.

11 R. M. Pelegero, Retail Payments Global Consulting Group LLC, The Need for Real-Time Payments in the US, at 2 (June 10, 2013), available at http://www.merchantadvisorygroup.org/docs/default-source/webinars/the-need-for-real-time-payments-in-the-us.pdf?sfvrsn=0.

12 Id.

13 Id.

14 Federal Reserve Banks, *supra* note 4, at 3–4; *see also* Pelegero, *supra* note 11, at 2–3.

15 Pelegero, *supra* note 11, at 3; *see also* Federal Reserve System, *supra* note 1, at 13 (noting that checks also carry a "*relatively high societal cost*").

16 Pelegero, *supra* note 11, at 2–3 (discussing check returns due to NSF or fraudulent reasons, the ability of payers to dispute ACH transactions "*through the network for many reasons*," and the absence of a validation process allowing for "*ample opportunity to introduce fraudulent transactions*"); *see also* NACHA presentation, "Same Day ACH vs. Faster Payments" at 13 (Jan. 27, 2016), available at https://www.nacha.org/system/files/resources/Presentation-SDAvFP_0.pdf.

17 Federal Reserve System, *supra* note 1, at 6; Federal Reserve Banks, *supra* note 4, at 3.

18 Federal Reserve System, *supra* note 1, at 8–10; *see also* Capgemini, *supra* note 2, at 18 ("*Adoption of RTP has become a strategic necessity for the U.S. payments industry. Multiple markets across the globe have transitioned or are transitioning to real-time payments and the payments industry in the United States stands to lose a lot by further delaying its adoption*.").

19 Federal Reserve System, *supra* note 1, at 2, 8. The Faster Payments Task Force currently has 330 members, with The Clearing House, CFPB, NACHA, U.S. Bank, and Wells Fargo among the members of its steering committee.

20 Federal Reserve, Press Release, Federal Reserve Issues "Strategies for Improving the U.S. Payment System" (Jan. 26, 2015), available at http://www.federalreserve.gov/newsevents/press/other/20150126a.htm.

21 Federal Reserve System, *supra* note 1, at 9–10, 17, 38.

22 Id. at 9–10, 17.

10. "*Given the potential benefits to consumers*," the Consumer Financial Protection Bureau (CFPB) also "*has been advocating for the development of faster and safer consumer payment capabilities in both new and existing payment systems*."[23] In the July 2015 release of its "Consumer Protection in New Faster Payment Systems" core principles, the CFPB explained that "[f] *aster payment systems hold great promise for consumers*," which "*may provide them with greater utility and more effective account management, enabling* [them] *to take greater control of their financial lives*."[24]

11. Against this backdrop, the trend towards real-time or faster payments has been gaining traction in the United States, and emerging faster payments options are currently being introduced and developed.

III. The rapidly evolving U.S. payment landscape

12. Fueled by the expressed desires of the Federal Reserve and the consumer demands discussed in Part II, the competitive payments environment in the U.S. is evolving at a rapid pace.

13. Traditional payment means—including cash, checks and wire transfers—remain as available options. But, as discussed above, each lack features that consumers are currently demanding in today's fast-paced, digital economy. As a result, some observers project that a ubiquitous faster payment system will displace these traditional options, to varying degrees, over time.[25]

14. In recent years, a multitude of competitive alternatives to these traditional payment means have been introduced. They include new faster payment options that reflect an evolution of existing systems. NACHA, for example, has adopted a Same Day ACH transaction, which is intended to offer a faster alternative to standard ACH transactions—i.e., achieving settlement and clearance of payments within one day. This same day service is targeted to become available over three phases beginning in September 2016. It is not a *real-time* payment solution, but rather will be "*complementary to any new real-time payments capability*," a view shared by NACHA and the Federal Reserve.[26] NACHA's Same Day ACH will continue to be limited by the existing ACH infrastructure and will not, for example, be able to provide payment notifications to the receiver of funds, and messaging capabilities will be limited to remittance data included with the payment.[27]

15. Visa's new Original Credit Transactions ("OCTs") offer faster payments using the Visa network. Since October 2015, Visa rules have required that all recipient members accept all incoming OCT transactions and make funds available to the recipients within 30 minutes**.**[28] OCT transactions are used to "push" funds to a Visa card account (i.e., either the checking account linked to a Visa debit card or a Visa credit card account) and are primarily targeted for use in connection with P2P transfers, prepaid card loads, B2C funds disbursements, and credit card bill payments.

16. In addition to these new options provided by traditional payment providers, new offerings from non-bank alternative payment providers continue to proliferate. A key component in this space is the digital wallet. From Google to Starbucks, countless new providers continue to announce roll-outs of wallets at a significant pace. The alternative payment provider industry includes many non-bank companies that offer alternative payment solutions. These solutions range from ones offered by large tech companies, like Apple, Google and social media giant Facebook, to successful payment-focused companies offering payment systems as the core of their businesses, like Square, PayPal and Venmo.

17. These providers do not offer real-time transactions. Other than wallet-to-wallet transfers, each of these solutions leverage the ACH and card networks and so are constrained by the limitations of those systems. They do, however, provide innovative use cases for consumers, as reflected in their significant growth in recent years. Venmo, for example, processed over $2 billion in P2P payments just two years after its 2012 launch. And PayPal was valued at $47 billion following its July 2015 IPO. This growth is only expected to continue. *The Wall Street Journal* reports that in 2014 venture capitalists poured over $1.6 billion into payments technology-related companies. In addition, some reports suggest that the P2P payments market will grow from $5.2 billion in processed payments in 2014 to $17 billion in 2019. By 2017, e-wallets are projected by some to equal cards in terms of market share, with each predicted to have a 41% share of the payments market together totaling $1,656 billion in payments (as compared to $295 billion in 2012).

23 Consumer Financial Protection Bureau (CFPB), Consumer Protection Principles: CFPB's Vision of Consumer Protection in New Faster Payment Systems at 1 (July 9, 2015), available at http://files.consumerfinance.gov/f/201507_cfpb_consumer-protection-principles.pdf.

24 Id. at 3.

25 *See* Federal Reserve System, *supra* note 1, at 44 (discussing study that showed that, over a 10-year period, depending on design option, payments would migrate from cash (1%), check (27%), ACH (11%) and wire (7%) to a faster payment system); Capgemini, *supra* note 2, at 13 (opining that implementation of real-time payments is "*primarily expected*" to impact cash usage, checks and credit card transactions, and wire transfers); Pelegero, *supra* note 11, at 3 ("*Corporate Treasurers and Cash Management practitioners* (…) *have indicated that they would use some form of real-time payments* (…) [to] *replace checks* (…)").

26 Federal Reserve System, *supra* note 1, at 22 n.30; NACHA, "Same Day ACH: FAQ" at 3 (2015), available at https://www.nacha.org/system/files/resources/Same-%20Day-ACH-FAQ-2015.pdf; NACHA, *supra* note 16, at 13.

27 NACHA, *supra* note 16, at 13.

28 VISA, Visa Core Rules and Visa Product and Service Rules (Oct. 16, 2015), available at https://usa.visa.com/dam/VCOM/download/about-visa/visa-rules-public.pdf (Rule 8.4.2.1); *see also* NACHA, *supra* note 16, at 10.

18. Although the increased availability of new payments options from alternative payment providers is a positive competitive development, questions regarding their security, safety and soundness exist because these alternative providers are not subject to the same level of regulatory supervision and examination that banks and bank-related service companies are.[29] As a result of these regulatory obligations imposed on banks and bank-related service companies, unlike the non-bank alternative providers, safety and security is an overriding necessity—and cost—for banks, and consumers demand not only a fast payment system, but one that it is safe and secure.

19. In addition, these non-bank offerings may be best-suited for specific use cases. Venmo and Facebook Messenger, for example, focus on P2P transactions and are closed systems, meaning that both the sender and recipient have to be signed up for the service. PayPal, Square and Google Wallet similarly only allow transactions between users that have signed up for their service. According to the Federal Reserve, because many of these emerging alternatives are "*limited participation systems*" and "*do not have a broad base of members*," it is "*inconvenient or impossible*" for a "*sender in such a system to send money in near real time, with confirmation of good funds and timely notification, to a receiver outside the system.*"[30] Thus, "*these innovations, when considered in total, have not resulted in a ubiquitous near-real-time system.*"[31] On the other hand, these payment alternatives may present complementary capabilities to existing and emerging offerings by banks.

20. Banks are also moving quickly to take the lead in providing the desired ubiquitous real-time system. On October 22, 2014, for example, The Clearing House Payments Company LLC and its member banks announced plans to undertake a multi-year effort to build and deploy a new, ubiquitous, real-time payment system for the United States to better address unmet payments needs across many different use cases. This new system will be built on a new infrastructure and thus will overcome the inherent limitations of the existing legacy networks being used by the current payment alternatives and will enable consumers and businesses to securely send and receive immediate payments directly from their accounts at financial institutions.

21. Other bank-owned payments companies, like clearXchange/Early Warning, have also recently announced real-time payment solutions. In January 2016, clearXchange/Early Warning announced that their "*combined initiative's real-time platform will go live with banks during the first quarter* [2016]."[32] That platform, however, will at least initially be limited to P2P payments only, with consideration of expanded use cases reportedly underway.[33]

IV. Conclusion

22. While some of the evolving payment methods discussed in Part III will compete with one another, others offer different alternatives that will complement one another. In addition, some may have success depending on the specific targeted use cases. Some, for example, may be better suited than others for point-of-sale transactions, where the person is present with the merchant. Others may not be well suited for those types of transactions, particularly those enabled only for P2P transactions and systems that lack ubiquity or near ubiquity. Development of these emerging alternatives has also required, and will continue to require, significant investment in infrastructure—especially, for example, in efforts to build technical platforms—that will require appropriate incentives to ensure that firms are willing to make such investments, and to continue to pursue their own independent innovative efforts to take advantage of these new opportunities, and to provide consumers with the benefits they are demanding.

23. This dynamic evolution of the U.S. payment system will not be abated soon. The competitive issues presented by the continued evolution of the system, including by new entrants, need to be fully studied and understood. This is especially important with respect to understanding the competitive relationships between and among traditional and emerging payment alternatives, and with respect to the increasingly important role that technology is playing in fostering innovation in the payments marketplace. ■

29 Some alternative payment providers have faced a series of data security and privacy lapses, including notable incidents with Google Wallet, Venmo and Starbucks.

30 Federal Reserve Banks, *supra* note 4, at 2, 3, 5.

31 Id. at 3.

32 J. Adams, Early Warning, ClearXchange Tackle the Security of Faster Payments, *American Banker* (Jan. 12, 2016), available at http://www.americanbanker.com/news/bank-technology/early-warning-clearxchange-tackle-the-security-of-faster-payments-1078781-1.html.

33 Id.

Antitrust and the evolving U.S. payments marketplace

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I. Introduction

1. The current state of competition in the United States payments marketplace, in short, is dynamic. Nonetheless, in some respects, payment systems in the United States are lagging behind those in other parts of the world by not yet offering the type of ubiquitous, fast, and secure capabilities consumers are demanding. Indeed, several countries around the world have already transitioned to, or are in the process of implementing, ubiquitous faster payment systems; the same has not yet occurred in the U.S. Catching up has been recognized as a necessity to "*help maintain* [the U.S. payment system's] *global competitiveness*."[1]

2. The recognition that a ubiquitous, fast and secure payments system in the U.S. is needed is reflected in comments by others. For example, Deloitte and others have observed that "[i]*n today's internet-focused world*," "*many consumers now expect almost everything to be available in real time*," including "*the ability to send and receive payments*."[2] Thus, "*there is an emerging recognition that customers not only expect real time settlements of their payments, but wonder why they don't already have it*."[3] But, while "[h]*igh-speed data networks are becoming ubiquitous, computing devices are becoming more sophisticated and mobile, and information is increasingly processed in real time*," and "[t]*hese capabilities are changing the nature of commerce and end-user expectations for payments services*,"[4] "*there is currently no ubiquitous, convenient and cost-effective way for U.S. consumers and business to make (near) real-time payments from any bank account to any other bank account*."[5]

3. The lack of ubiquity in connection with current payment alternatives is a particular issue requiring attention. As defined by the Federal Reserve, "[u]*biquitous participation refers to payment products that are broadly accessible by everyone and available to be used in a variety of different circumstances*."[6] And, according to the Federal Reserve, 61% of consumers and 67% of businesses agreed that they "*won't use a payment method unless it is used and accepted by most people and businesses*."[7]

4. The need to develop ubiquitous real time, or near real time, payment methods presents an interesting antitrust question, namely, what is necessary to ensure broad participation by users on both sides of a payment

1 United States Federal Reserve System, Strategies for Improving the U.S. Payment System at 8-10 (Jan. 26, 2015), available at https://fedpaymentsimprovement.org/wp-content/uploads/strategies-improving-us-payment-system.pdf. *See also* Capgemini, Real-Time Payments Systems in the United States at 18 (Dec. 12, 2014) ("[A]*doption of RTP* [real-time payments] *has become a strategic necessity for the U.S. payments industry* (…) [T]*he payments industry in the United States stands to lose a lot by further delaying its adoption*."), available at https://www.capgemini.com/resource-file-access/resource/pdf/rtp_systems_in_the_united_states_how_can_u.s._banks_prepare.pdf.

2 Deloitte, Real-Time payments are changing the reality of payments at 6 (2015), available at http://www2.deloitte.com/content/dam/Deloitte/us/Documents/strategy/us-cons-real-time-payments.pdf; D. Sayer, KPMG, Is a Global Real-Time Payment System Possible?, *Banking Perspective* (Q3 2015), available at https://www.theclearinghouse.org/publications/2015/2015-q3-banking-perspective/global-real-time-payments; Capgemini, *supra* note 1, at 4.

3 J. Ginovsky, When will U.S. get real about real-time payments? (May 5, 2015), available at http://www.bankingexchange.com/blogs-3/making-sense-of-it-all/item/5453-when-will-u-s-get-real-about-real-time-payments.

4 Federal Reserve, *supra* note 1, at 1, 6.

5 Id. at 8-9; *see also* Capgemini, *supra* note 1, at 3 (the U.S. "*lacks a comprehensive nationwide real-time system for low-value payments*"); Claire Greene, et al., Federal Reserve Bank of Boston, Costs and Benefits of Building Faster Payment Systems: The U.K. Experience and Implications for the United States at 4 n.9 (Feb. 24, 2015) ("*Although potential benefits for the United States were identified long ago* (…), *options for fast inexpensive A2A payments and transfers still are largely lacking in the current U.S. payments landscape*."), available at http://www.bostonfed.org/economic/current-policy-perspectives/2014/cpp1405.pdf.

6 Federal Reserve, *supra* note 1, at 9 n.9.

7 Id. at 29.

transaction, as well as the financial institutions that will facilitate such transactions? More pointedly, what will incentivize broad participation by financial institutions in a new payment system that will require them to make potentially very significant capital investments in new infrastructure and to develop new products that will meet consumer demand? Traditionally, as exists in connection with credit and debit card transactions, interchange fees have been used to ensure a sufficient economic return for financial institutions to incentivize their participation in the credit and debit card networks. For many years, however, antitrust challenges have been directed to the use of interchange fees, and the question now exists whether the case law in this regard should be revisited.

5. In this paper we provide an overview of some of the interchange fee cases and offer thoughts regarding whether the holdings of those cases sufficiently accommodate the development of ubiquitous real-time payment systems under U.S. antitrust law. As we discuss, we believe they do.

II. Discussion

1. Interchange fees

6. In *National Bancard Corporation v. VISA U.S.A., Inc.*[8] ("*NaBanco*"), the Eleventh Circuit explained interchange fees. Generally, according to the court, credit card transactions involve four different entities: (1) cardholders who use the cards to purchase goods and services; (2) merchants who accept the cards in exchange for goods and services; (3) banks that issue cards to cardholders (issuer banks); and (4) banks that contract with merchants to accept the credit cards (acquirer banks).[9]

7. The Eleventh Circuit further explained that a typical four-party transaction works as follows: "[A] *consumer is issued a bank credit card by a card-issuing bank, Bank X. A*[n] [acquirer] *bank, Bank Y, contracts with a shopowner to join the VISA network and accept the VISA card. The cardholder then uses the card to purchase goods from the merchant, who furnishes the cardholder with the merchandise and then sends the cardholder's charge receipt (the paper) to Bank Y, the bank with which the shopowner has signed a VISA contract. Bank Y 'buys' the paper from the merchant pursuant to their contract, but at less than face value. This discounted amount is known as the 'merchant discount.' Bank Y then must 'interchange' the paper with Bank X, so that Bank X can bill the cardholder in accordance with the terms of their contract.*"[10]

8. In theory, this process allows the issuer bank to realize 100% of the purchase amount made by the cardholder. The issuer bank, however, bears all risks of loss from nonpayment by a cardholder, which may result from default, fraud and other reasons.[11] The issuer bank, therefore, transfers the monies due to the acquirer bank less a small percentage of the purchase price to be paid by the cardholder to the issuer bank. This is the "*interchange fee*," which "*ostensibly is designed to shift to the* [acquirer] *bank some of the costs—from risk of loss, lack of user fee, and convenience period expense—that fall solely on the* [issuer] *banks*."[12] For the acquirer bank to profit from the transaction, however, the amount it receives from an issuer bank must be greater than the discounted amount the acquirer bank pays the merchant.[13] Otherwise, the acquirer bank would have no incentive to participate in the payment network.

9. In *NaBanco*, the plaintiff claimed that the agreement setting the interchange fee was per se unlawful price fixing. At the time, issuer and acquirer banks owned VISA, and allegedly by agreeing upon a supracompetitive interchange fee, they imposed a merchant discount that was higher than it would have been under competitive conditions.

2. The interchange fee cases

10. *NaBanco* was the first case challenging interchange fees under Section 1 of the Sherman Act. National Bancard Corporation ("NaBanco"), a merchant processor, sued VISA, claiming that the interchange fee, "and particularly the manner of its setting," was a price-fixing agreement among VISA's member banks under Section 1 of the Sherman Act, 15 U.S.C. § 1.[14] VISA prevailed in the district court after a nine-week bench trial,[15] and the Eleventh Circuit affirmed.[16]

11. In rejecting NaBanco's claim, the district court held that VISA's establishment of the interchange fee, "*whether or not it is literally 'price fixing,' is not 'price fixing' in any meaningful sense of the word or in a sense which makes it a per se violation of the Sherman Act*."[17] Instead, relying on *Broadcast Music Inc. v. Columbia Broadcasting System, Inc.* ("*BMI*"),[18] the district court found that the interchange fee "*should be analyzed under the rule of reason because it* [was] (…) *necessary for VISA*," which had characteristics of a joint venture, "*to market its product and*

8 779 F.2d 592 (11th Cir. 1986).

9 Id. at 594. The Court further explained that in some instances there may be only three parties implicated because an issuer bank may also be an acquirer bank. Id. There may also, however, be more than four parties involved where the acquirer bank does not process payments. In such instances, a fifth party—i.e., an independent processor—may be involved. In *NaBanco*, the plaintiff was such a third-party processor.

10 Id.

11 Id. at 595.

12 Id.

13 Id. at 594-95.

14 *Nat'l Bancard Corp. (NaBanco) v. Visa U.S.A., Inc.*, 596 F. Supp. 1231, 1236, 1239, 1263 (S.D. Fla. 1984).

15 Id. at 1236, 1263-65.

16 *NaBanco*, 779 F.2d at 601-05.

17 596 F. Supp. at 1264.

18 441 U.S. 1 (1979).

be an effective competitor."[19] The district court also analogized VISA's rules to cases involving challenges to the rules of sports associations, finding that "[j]*ust as there is a need to establish some 'rules of the game'* (…) *in order for there to be sports contests at all, so too there must be 'rules' to enable the efficient coordination of the otherwise disparate operations of VISA members*."[20]

12. The district court further found that even if the interchange fee "*were not necessary to market the product, it should be analyzed under the rule of reason because it is an agreement internal to a type of joint venture which yields efficiencies beneficial to competition, that its members, acting alone, could not offer, and which allows the venture to offer a product*," a universal payment service, "*which is different from, and greater than, the sum of the individual products of its members*."[21] The district court also held that the interchange fee "*is properly analyzed under the rule of reason because it is not mandatory*," and there was "*no legal, practical or conspiratorial impediment to making alternate arrangements*."[22]

13. Applying the rule of reason, the district court upheld the interchange fee on two separate and independent grounds. First, the court determined that NaBanco failed to establish "anticompetitive effects" because the relevant product market was all payment devices (including cash, checks, and all forms of credit cards) and VISA did not possess power in that market.[23] Second, the court found that VISA established that, on balance, the interchange fee is procompetitive in nature and reasonably cost-related.[24] More specifically, the district court held that the interchange fee is "*of vital import to the day-to-day functioning of the system*" because it eliminates "*the costly uncertainty and prohibitive time and expense of 'price negotiations at the time of the exchange' between the thousands of VISA members*," and "[i]*n doing so, it guarantees the universal acceptability that is at the heart of the competitive success of the produc*t."[25] The district court also found that the fee "*promotes efficiency and competitiveness*" because it "*serves to share substantial costs and risks between VISA members*" and allows parties to "*distribute the costs of the system in relation to prospective benefits so as to encourage members to engage in the appropriate balance of card-issuing and merchant-servicing*."[26] And, other alternatives, including increasing cardholder fees or private negotiation of individual interchange fees, were not realistic or feasible and "*would likely lead to the system's collapse*."[27]

14. Finally, in support of its finding that the interchange fee was reasonably cost-related, the district court noted that VISA had *"spent thousands of dollars and hundreds of hours choosing a methodology which attempt*[ed] *to 'average' out those costs associated with interchange and card issuing*," and that "*the methodology* [had] *undergone drastic changes from time to time*."[28] "[T]*he specific means used to calculate the* [interchange fee]—*the theory used to set it and the implementation of that theory—while certainly not perfect, was* (…) *careful, consistent, and within the bounds of sound business judgment*."[29]

15. Also relying on *BMI*, the Eleventh Circuit affirmed. First, as to the district court's determination that the rule of reason applied, the Eleventh Circuit reasoned that "[f]*or a payment system like VISA to function, rules must govern the interchange of the cardholder's receivable*," that the interchange fee "*represents one such rule establishing a 'necessary' term without which the system would not function*" because, "*absent prearranged interchange rules*," "*universality of acceptance—the key element to a national payment system—could not be guaranteed.*"[30] Consequently, "*the restraint is a 'necessary consequence of the integration necessary to achieve these efficiencies*,'" and "*must be weighed under the rule of reason.*"[31] The Eleventh Circuit held that evaluation under the rule of reason was further justified because the interchange fee rule was "*a potentially efficiency creating agreement among members of a joint enterprise*," and because it was "*reasonably ancillary*" to a "*procompetitive, efficiency-creating endeavor,*" it was "*not a naked restraint of trade*."[32]

16. Second, the Eleventh Circuit went on to find that "[a]*n abundance of evidence was submitted from which the district court plausibly and logically could conclude that the* [interchange fee] *on balance is procompetitive because it was necessary to achieve stability and thus ensure the one element vital to the survival of the VISA*

19 596 F. Supp. at 1253, 1264. In BMI, the Supreme Court recognized that "[j]*oint ventures and other cooperative arrangements are* (…) *not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all*." 441 U.S. at 23. The Court also noted that "*price fixing*" is not per se unlawful in joint ventures between competitors to market a product different from anything an individual competitor could sell. *See* id.

20 Id. at 1255.

21 Id. at 1254, 1264 (citing *BMI*).

22 Id. at 1254-55, 1264 (citing *BMI* and noting that "*NaBanco is and always has been free to negotiate different terms of interchange*," and some "*VISA issuers have been willing to make alternate arrangements*").

23 Id. at 1257-59, 1265.

24 Id. at 1259-63, 1265.

25 Id. at 1259-60.

26 Id. at 1253, 1260.

27 Id. at 1261.

28 Id. at 1261-62.

29 *Id*. at 1262. The court noted that the "*cost reimbursement methodology*" was "*designed and recommended*" by an accounting firm, Arthur Andersen, which was "*given free reign to design any appropriate methodology*," "*carefully considered alternative methods for computing* [the interchange fee]," and was subject to re-evaluation which led the accounting firm and VISA to agree "*that a cost-based methodology using systemwide average costs was preferable to any other*." *Id*. The methodology was based on the following process: (1) VISA first examined the results of cost "questionnaires" made available to each member bank; (2) VISA selected five or six banks "*which appear*[ed] *to be representative of all member banks based on a number of factors, most particularly whether their per-unit costs are typical of the system as a whole*"; (3) VISA's selection process was then reviewed and approved by Arthur Andersen before the banks were visited by the accounting firm for further study. Id. at 1262-63.

30 779 at 602.

31 Id. (quoting *BMI*, 441 U.S. at 21).

32 Id. at 602-03 (citations omitted).

system—universality of acceptance."[33] The Supreme Court declined to review the Eleventh Circuit's decision.

17. *NaBanco*'s holdings notwithstanding, subsequent challenges to card network interchange fees as unlawful under Section 1 of the Sherman Act, under both per se and rule of reason theories, have continued.[34] Uniformly courts have rejected *per se* treatment of interchange fees, but have provided guidance with respect to the application of the rule of reason in this context. We review some of these cases below.[35]

18. *Reyn's Pasta.* More than twenty years after *NaBanco*, in *Reyn's Pasta Bella, LLC v. Visa U.S.A., Inc.*,[36] merchant, retail and service businesses sued MasterCard and VISA, alleging price-fixing claims based on the uniform interchange fees to which all of their member banks agreed.[37] The district court cited with approval the *NaBanco* court's determination that the interchange fee was necessary to the existence of the VISA product and reiterated *NaBanco*'s central finding that "'*universality of acceptance—the key element to a national payment system—could not be guaranteed absent prearranged interchange rules.*'"[38]

19. The court, however, determined that *NaBanco* was not controlling because there, "[m]ember banks were free to negotiate interchange fees individually so long as they did not use VISA's computerized processing service."[39] By contrast, the *Reyn's Pasta* plaintiffs had alleged "an interchange fee system from which member banks agree[d] not to depart through individual negotiations."[40] Nonetheless, the court, citing *BMI* and *NaBanco*, held that the interchange fee should be evaluated under the rule of reason because credit card systems provide substantial benefits and "*fall under the class of 'joint ventures between competitors to market a product different from anything an individual competitor could sell.*'"[41] Thus, the uniform interchange fee was not "*one of the few types of restraints exhibiting a 'predictable and pernicious anticompetitive effect' without potential for procompetitive benefit*."[42]

20. *Kendall.* In *Kendall v. Visa U.S.A., Inc.*,[43] merchants asserted antitrust claims against the credit card networks and three of their member/owner banks alleging that the networks and the banks conspired to fix the interchange fees as the minimum fee that the banks would charge merchants.[44] *Kendall*, however, did not address whether the rule of reason or per se rule applied to the plaintiffs' claims. Instead, the district court dismissed plaintiffs' Section 1 claims against the bank defendants on the ground that the plaintiffs failed to allege any facts to support their theory that the bank defendants conspired with each other or the card networks to restrain trade.[45] The Ninth Circuit affirmed, holding that "*merely charging, adopting or following the fees set by a Consortium is insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act*," since "*membership in an association does render an association's members automatically liable for antitrust violations committed by the association.*"[46] "*Even participation on the association's board of directors is not enough by itself.*"[47]

21. Whether *Kendall* is significant beyond the specific allegations by the plaintiffs in that case is open for question, especially with respect to the Ninth Circuit's treatment of the card networks as a single entity that established the interchange fees to which its member/owner banks adhered.[48]

22. *ATM Fee.* *In re ATM Fee Antitrust Litigation*[49] is another case rejecting *per se* treatment of conduct establishing interchange fees in favor of a rule of reason analysis. In *ATM Fee*, the court held that the rule of reason applied to a challenge to fixed "interchange" fees, this time with respect to fees that ATM card issuers were required to pay foreign ATM owners, pursuant to their participation in the Star network, when the issuer's customers used a foreign-owned ATM.[50] Citing *Dagher*, the district court observed that setting the fees was properly subject to a rule of reason analysis if such conduct was a "core activity" of the Star network.[51] But even if not, the court commented that the rule of reason would apply "*in a situation—like the one presented by this case—involving a complex network joint venture in which horizontal restraints are necessary if the product is to be marketed 'at all,'*" so long as the alleged restraint is "*reasonably ancillary to the legitimate cooperative functions of the venture*."[52] The court found that setting the interchange fees was both a "core" activity of the

33 Id. at 605.

34 Cases involving card network rules other than as related to interchange fees are beyond the scope of this paper. *See*, e.g., *United States v. Visa*, 344 F.3d 229 (2d Cir. 2003); *SCFC ILC, Inc.v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994).

35 This is not intended to be an exhaustive discussion of all interchange fee cases, but simply a sampling of cases to reflect the trends in this area.

36 259 F. Supp. 2d 992 (N.D. Cal. 2003).

37 Id. at 996-97.

38 Id. at 999 (quoting *NaBanco*, 799 F.2d at 602).

39 Id.

40 Id.

41 Id. at 1000 (quoting *BMI*, 441 U.S. at 23).

42 Id. at 1000 (citation omitted). The court declined to dismiss the plaintiffs' complaint, concluding that the defendants' challenges to the plaintiffs' theories were not properly considered on a motion to dismiss. Id. at 1001.

43 518 F.3d 1042 (9th Cir. 2008).

44 Id. at 1045-46, 1048.

45 Id. at 1046, 1048.

46 Id. at 1048 (citation omitted).

47 Id.

48 cf. *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010); *Texaco v. Dagher*, 547 U.S. 1 (2006).

49 554 F. Supp. 2d 1003 (N.D. Cal. 2008).

50 Id. at 1007-08.

51 Id. at 1013.

52 Id.

Star network, and the agreement to do so was reasonably ancillary to the legitimate cooperative functions of the network, thus providing two independent bases for applying the rule of reason.[53]

23. Regarding the second condition—a reasonably ancillary restraint—the court held that there was "*no doubt that for a joint venture such as the Star network to survive, it 'must collectively adopt and enforce uniform rules' to operate*."[54] Citing *NaBanco*, the court then specifically stated that "'[f]*or a payment system like* [the Star network] *to function, rules must govern' how the transaction between the cardholder, the cardholder's bank and the ATM owner will proceed*" and the "*interchange fee represents one such rule*."[55] Moreover, even if the "*interchange fee* [was] *higher than it need*[ed] *to be for the Star network to survive*," "*the fee promotes cooperation between the venture's members and cannot be set individually*."[56] Thus, like in *NaBanco*, there were "*too many potential entities involved in the transaction*" such that "*all efficiencies would be lost if the cardholder's bank and the ATM owner were required to engage in bi-lateral negotiations every time a cardholder attempted to get money from a foreign ATM*."[57]

24. The court further found that the "*fixing of the interchange fee is reasonably ancillary to the Star network's legitimate cooperative aspects*," as it "'*achieve*[s] *purposes unrelated to price formation.*'"[58] The fee served to "*apportion*[] *the costs of using the ATM among the ATM owner and the cardholder's bank*," which was "*undoubtedly a legitimate purpose*" that was "*ancillary to the operation of the Star network.*"[59] The interchange fee also served "*not just to generate profits for the recipient, but to promote deployment of additional ATMs and to compensate ATM owners for allowing consumers to use their product. By promoting additional ATMs, the interchange fee actually promotes, rather than diminishes, competition*."[60]

25. In a subsequent decision in the same case, however, the district court put some limits on its prior opinion.[61] The district court explained that its prior decision "*should not be read to say that the interchange fee set by the network is necessarily permissible under the rule of reason analysis*."[62] The court made clear that it "*held only that fixing of the interchange fee did not per se violate the Sherman Act*" because "*there are procompetitive reasons in favor of setting an interchange fee*."[63] The court stated that "*it is not altogether clear that a set network-level interchange fee is necessary to the operation of the Star network*," and "*by opining that it is perhaps necessary to apportion costs among members of an ATM network, the Court did not consider the interchange fee itself under the rule of reason analysis*," and had not yet determined whether the fee's "*anticompetitive effects outweigh the procompetitive justifications identified by the Court.*"[64]

26. ***Payment Card Interchange Fee***. In *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*,[65] merchants and affiliated trade organizations challenged VISA's and MasterCard's interchange-related rules. Plaintiffs' allegations focused on the setting of default interchange fees, the Honor-all-Cards rule, and various other "anti-steering" rules that plaintiffs claimed "*discourage*[d] *merchants from encouraging or requiring consumers to use less expensive payment mechanisms*."[66]

27. In 2013, a class settlement was reached. In approving the settlement, the court noted that "[a] *wide range of outstanding issues*" affected the plaintiffs' "*ultimate likelihood of establishing liability, including the legal characterization of the challenged practices of Visa and MasterCard, and whether those practices on balance would be deemed anticompetitive under the Rule of Reason*."[67]

28. Specifically, the court discussed the difficulty the plaintiffs would have had establishing that the default interchange fees, as well as the Honor-all-Cards rule, should fail under the rule of reason. The plaintiffs did not dispute that the default interchange rules had procompetitive benefits, but instead argued that the fees had "*become obsolete because the Visa and MasterCard networks have 'matured' over time*."[68] In response to this argument, however, the court commented that "*given that these practices are at the core of the defendants' successful business model, it would be difficult for plaintiffs to show that these practices have become antitrust violations by virtue of industry maturation*."[69] Citing *NaBanco* and *Kendall*, the court found that "[w]*hile it is true that the factual underpinning of NaBanco—that issuing banks need interchange fees to have adequate incentives to participate in networks—has eroded,*" "*the default interchange rules played an essential role in the construction of the*

53 Id. at 1015-17.

54 Id. at 1015 (citation omitted).

55 Id. at 1016 (citing *NaBanco*, 779 F.2d at 602).

56 Id.

57 Id. (citing *NaBanco*, 779 F.2d at 602).

58 Id. at 1015 (quoting *NaBanco*, 779 F.2d at 599).

59 Id. at 1016.

60 Id. at 1015.

61 *See In re ATM Fee Antitrust Litig*., 768 F. Supp. 2d 984, 999 (N.D. Cal. 2009).

62 Id.

63 Id.

64 Id.

65 986 F. Supp. 2d 207 (E.D.N.Y. 2013).

66 Id. at 220, 224-25. At the time this case was filed, VISA and MasterCard were associations owned by member banks. In 2006 and 2008, respectively, MasterCard and VISA completed IPOs that resulted in each organization becoming a standalone publicly-traded company "*with no bank governance*." Id. at 215. Plaintiffs filed amended complaints in January 2009 alleging that even post-IPOs the organizations continued to function as conspiracies among the former owner banks and each of the networks. Id. at 220-21.

67 Id. at 224. The settlement is on appeal to the Second Circuit and various opt-out plaintiffs are proceeding with their own claims (many others have settled).

68 Id. at 226.

69 Id. at 226-27.

networks at issue here, and those networks provide substantial benefit to both merchants and consumers."[70] And "[w]*hile the plaintiffs contend that the rules have outlived their procompetitive effects now that the networks have matured, the setting of default interchange fees would almost certainly be evaluated under the Rule of Reason, and the prospect that its anticompetitive effects remain outweighed by its procompetitive ones is real.*"[71]

3. Guidance for emerging payment systems

29. As commented earlier, cases involving interchange fees decided to date should provide guidance for achieving goals of ubiquity for emerging real-time (or near real-time) payments systems. These cases provide a solid track record for using a rule of reason analysis for determining the appropriateness of any interchange fees (or fees analogous to interchange) as necessary for achieving the procompetitive outcomes of payments systems now under development, and for assessing the extent to which such fees are reasonably ancillary to such outcomes.

30. Indeed, it may even be the case that new real-time payments networks can consider approaching interchange fees in ways different than those involved in the credit and debit card cases. For example, real-time payments may have greater applicability to some use cases—e.g., business to consumer (B2C) and business to business (B2B)—but not others—e.g., consumer to business (C2B), especially for point-of-sale transactions. If so, then it may be possible to assess the necessity of an interchange or other interparty fee on a use-case-by-use-case basis. It may also be possible to rely on market-driven performance with respect to specific use cases, with the dynamic ability to adjust fees as marketplace performance is observed.

III. Conclusion

31. There is a demonstrated need and end-user demand for ubiquitous real (or near real) time payment systems in the U.S. To incentivize the investments and broad participation necessary to achieve the procompetitive outcomes, and overall success, of any payment system being developed to meet that demand, several possible alternative approaches to interchange (or analogous) fees exist.

32. Each possible approach requires further consideration, but as a bottom line, developing ubiquitous real (or near real) time payments systems, even if they require some form of interchange fee, should be possible consistent with the antitrust law as it has evolved concerning interchange issues. ■

70 Id. at 227.

71 Id.

Developments in the competitive landscape for payment systems in Europe

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I. Introduction

1. The competitive landscape for payment systems has undergone significant changes during the last decade. Established operators have faced increasing competition from new players who offer novel and more cost-efficient payment systems underpinned by technological innovation. At the same time, vigorous competition law enforcement and regulatory activity by the European Commission (the "Commission") as well as national regulators have been reshaping the competitive environment for payment systems. These developments are in line with the Commission's vision of a single European market for payments.

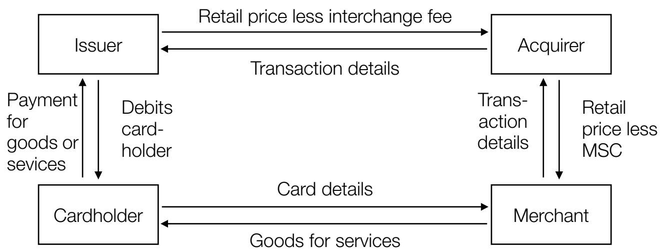
2. 2015 was a milestone in terms of regulatory developments, with two hotly anticipated pieces of European legislation passed—the Interchange Fee Regulation (the "IFR")[1] and the revised Payment Services Directive.[2] Both pieces of legislation introduce major changes to the regulatory framework for payment systems, the most highly debated of which were the introduction of caps on interchange fees and the regulation of third-party payment providers. This article focuses on these two core issues and outlines their impact on the stakeholders concerned.

II. Interchange fees

1. Definition and competition issues

1.1 What are interchange fees?

3. Interchange fees are fees that are paid between banks or other payment service providers for the acceptance of card payment transactions. The most common type of card scheme, such as those operated by Visa and MasterCard, typically involves four parties: the cardholder/consumer, the cardholder's bank (the "issuing bank"), the merchant and the merchant's bank (the "acquiring bank"). For each transaction made by card, the merchant's bank pays a fee to the consumer's bank (the multilateral interchange fee ("MIF")). In payment schemes such as Visa and MasterCard, which constitute associations of banks, these fees are multilaterally agreed by member banks. The merchant in turn pays a "merchant service charge" ("MSC") to its bank for each transaction made by card. Therefore, when a consumer chooses to pay by card, the merchant does not receive the whole purchase price from its bank but rather the purchase price minus the MSC. The MIF makes up the largest part of the MSC. This structure is summarised by the diagram below:



1 Regulation (EU) 2015/751 on interchange fees for card-based payment transactions, [2015] OJ L 123/1, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0751&from=EN.

2 Directive (EU) 2015/233 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, [2015] OJ L 337/35, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2366&from=EN.

There are also "three-party" schemes, in which the same organisation carries out the issuing and acquiring functions (e.g. American Express).

1.2 The Commission's investigations into MIFs

4. MIFs have been under close scrutiny by the Commission for well over a decade, both through investigation of individual undertakings' practices and through general investigation of the payments sector.

5. In 2007, the Commission adopted its first decision against MasterCard, challenging MasterCard's MIFs applicable to cross-border payment card transactions with MasterCard branded consumer credit and charge cards and MasterCard and Maestro branded debit cards in the European Economic Area ("EEA").[3] The Commission found that MasterCard's MIFs restricted competition between acquiring banks and inflated the cost of card acceptance by merchants. In light of the Commission's findings, MasterCard committed to reduce its cross-border MIFs to 0.30% of the transaction value for consumer credit cards and to 0.20% for consumer debit cards. The Commission's decision was upheld by the European Court of Justice in 2014.[4]

6. In 2008 the Commission also launched an investigation into Visa's MIFs. Following the Commission's statement of objections, Visa entered into binding commitments to reduce the maximum weighted average MIF for consumer debit cards for cross-border transactions and domestic MIFs that are directly set by Visa to 0.20%.[5] In 2014 Visa undertook further commitments including, inter alia, to reduce to 0.30% the maximum weighted average MIF for consumer credit cards for cross-border transactions and domestic MIFs that were directly set by Visa.[6]

1.3 Competition issues

7. The Commission identified several key competition concerns with regard to MIFs in its investigations. In both the MasterCard and Visa investigations, the Commission found that the framework operated by the schemes whereby the level of MIFs is set by the card scheme and applied across all relevant transactions restricted competition between acquiring banks. As a result of the uniform application of MIFs, banks were unable to compete at the acquiring level by offering a lower MSC. According to the Commission, this practice created a minimum price level that artificially inflated merchants' costs for accepting cards and led merchants to raise their retail prices in order to compensate for the revenue lost through the MSC. The MIF ultimately led to a price rise across the board for all consumers and therefore had a direct impact on consumer prices.

8. In the Visa investigation, the Commission also raised concerns with regard to the card schemes' rules on cross-border acquiring, which prohibited merchants from using acquiring services from a bank situated in another Member State. With levels of MIFs varying significantly between different Member States, this practice prevented merchants from seeking better deals in other Member States, contrary to the EU's single market objective.

9. Finally, the Commission also raised concerns in the Visa investigation with regard to:

- the "Honour-all-Cards" rule, which obliged merchants to accept all cards of the same brand without discrimination and regardless of the identity of the issuing bank or the type of card within that brand;
- the "No Discrimination" rule, which prevented merchants from adding surcharges to transactions with Visa branded cards; and
- the practice of blending (i.e. acquirers charging merchants the same MSC for the acceptance of different payment cards belonging to the same payment scheme, or for acceptance of payment cards belong to different payment card schemes).

10. The Commission found that the combination of these rules and practices reduced merchants' capacity to constrain the collective exercise of market power of Visa's members through the MIF.

2. Adoption of the Interchange Fee Regulation

2.1 Background

11. In addition to the investigations carried out by the Commission, MIFs have also been under scrutiny by national regulators in several EU Member States (including the UK, Germany, Italy, France and

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3 Cases COMP/34.579 *Mastercard*, COMP/36.518 *EuroCommerce* and COMP/38.580 *Commercial Cards*, Commission Decision of 19 December 2007, http://ec.europa.eu/competition/antitrust/cases/dec_docs/34579/34579_1889_2.pdf.

4 Case C-382/12P, *MasterCard and Others v. European Commission*, judgment of 11 September 2014.

5 Case COMP/39.398, *Visa MIF*, Commission decision of 8 December 2010, http://ec.europa.eu/competition/antitrust/cases/dec_docs/39398/39398_6930_6.pdf.

6 Case COMP/39.398, *Visa MIF*, Commission decision of 26 February 2014, http://ec.europa.eu/competition/antitrust/cases/dec_docs/39398/39398_9728_3.pdf.

Hungary).[7] Some EU Member States had also started to launch proposals for adopting national legislation to govern MIFs.

12. In light of this development, the Commission expressed concerns that diverging administrative decisions and national legislation would significantly contribute to a further fragmentation of the internal market for card-based payments and internet and mobile payments based on cards. The Commission also noted that the existing discrepancy in the levels of MIFs across Europe prevented the emergence of new pan-European players with the potential to offer models with lower or no MIFs.

13. Against this background, the Commission proposed regulation on a European level with the final text of the IFR adopted on 29 April 2015. The primary objective of the IFR is to address the problem of high and divergent MIFs and to foster cross-border services. At the same time, the IFR will guarantee a uniform application of interchange fee caps, restoring a level playing field between the card schemes.

14. The IFR is controversial as many stakeholders, especially banks and card schemes, view the imposition of fixed caps as unnecessarily intrusive and far-reaching. In particular the Commission's calculation of the caps using the "Merchant Indifference Test"[8] has been criticised for not generating representative results. It has also been suggested that price caps might not have the pro-competitive and efficiency-enhancing effects sought by the Commission as they will reduce funds available for improving the operation of payment systems and might raise fees for cardholders. The caps on interchange fees are equally expected to render the issuing and promotion of premium cards more difficult.

2.2 Overall scheme of the IFR

15. With the aim of reducing the level of MIFs, the IFR introduces caps on the level of MIFs paid per transaction for cross-border transactions (i.e. between two Member States of the EEA) as well as domestic transactions. MIFs are capped at 0.3% of the transaction value for consumer credit cards and 0.2% of the transaction value for consumer debit cards.

16. For domestic transactions, the IFR provides for a more flexible regime, allowing Member States to set a lower cap.[9] Member States may also choose to apply a weighted average interchange fee for domestic debit card transactions, instead of a per transaction fee, for a transitional period until December 2020 (as the UK has done). This approach will allow payment institutions and card schemes more time to assess their fee and revenue structure and implement the necessary changes.

17. The caps generally apply to four-party schemes while three-party schemes benefit from an exemption. This exemption, however, does not apply where a three-party scheme licenses other payment service providers for issuing or acquiring.[10] This approach was taken in an attempt to create a level playing field between four-party schemes and those three-party schemes that operate in similar ways to four-party schemes. As a consequence, three-party schemes may only benefit from the exemption to the extent that they are providing issuing and acquiring services themselves.[11]

18. Interchange fees applicable to EU transactions paid for by an international (i.e. non-EEA issued) card are not covered by the IFR.

19. The IFR also prohibits territorial restrictions on cross-border acquiring and any restrictions that hinder or prevent co-badging[12] in licensing agreements and payment card scheme rules. It includes a number of other provisions regarding the separation of payment card schemes and processing entities, limitations to the "Honour-all-Cards" rule and information transparency.

20. The IFR entered into force on 8 June 2015. The interchange fee caps, prohibitions on territorial restrictions in licensing agreements and provisions regarding information to customers entered into force on 9 December 2015.[13]

7 Many of these investigations have been closed, either because the schemes under scrutiny committed to lower their interchange fees or in view of the anticipated adoption of the IFR. *See* for example the German FCO investigation into domestic interchange fees, http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/AktuelleMeldungen/2015/15_06_2015_Fallbericht_Interbankenentgelte.html. Similarly, the UK CMA closed its investigation into domestic interchange fees in May 2015 on the grounds of administrative priorities, https://www.gov.uk/cma-cases/investigation-into-interchange-fees-mastercard-visa-mifs. In France, MasterCard and Visa committed to lower their interchange fees, *see* http://ec.europa.eu/competition/ecn/brief/05_2013/card_fr.pdf. The Hungarian investigation into interchange fees was closed in 2009 with an infringement decision against Visa and MasterCard (amongst others) imposing a fine of €1.75 million each, *see* http://www.gvh.hu/en/press_room/press_releases/press_ releases_2009/6071_en_anticompetitive_uniform_interchange_fees.html.

8 The "Merchant Indifference Test" is a methodology developed in economic literature. The test is used to determine the value of the transactional benefits that card use generates for merchants.

9 *See* Art. 3(2) IFR regarding debit cards and Art. 4 IFR regarding credit cards.

10 *See* Art. 1(5) IFR. Nor does the exemption apply where a three-party scheme issues card-based payment instruments with a co-branding partner or through an agent.

11 Art. 1(5) IFR, however, allows Member States to grant a temporary exemption until 9 December 2018 to such three-party schemes in relation to domestic payments provided that the card-based payment transactions made in a Member State under that scheme do not exceed 3% of the annual value of all card-based payment transactions made in that Member State. The UK has chosen to make use of this opt-out.

12 Co-badging is a practice whereby two or more payment brands or applications are included in the same payment instrument.

13 The remaining provisions regarding separation of payment card schemes and processing entities, co-badging, information to merchants and the "Honour-all-Cards" provisions will apply from 9 June 2016.

3. Implementation of the IFR: The challenges of ensuring compliance in practice

3.1 Uncertainties regarding the interpretation of the IFR

21. The caps provided for in the IFR reflect the caps already applied by Visa and MasterCard following their settlements with the Commission. However, the IFR goes beyond the original commitments by Visa and MasterCard. While the caps implemented by Visa and MasterCard were calculated on the basis of an average across all transactions, the caps under the framework of the IFR will be calculated on a per transaction basis. In addition, the caps will also apply to domestic MIFs. As a result, the level of MIFs is expected to be even lower after the implementation of the requirements set out in the IFR, significantly reducing revenue for issuing banks and card schemes.[14]

22. It is precisely the exact calculation of the interchange fee under the new framework of the IFR that causes difficulties for market participants in practice. These difficulties largely stem from the broad definition of the term "interchange fee" and uncertainty regarding the scope of the anti-circumvention provisions.

23. For the purpose of defining the interchange fee, the IFR stipulates that the "*net compensation or other agreed remuneration*" is also considered to be part of the interchange fee.[15] "Net compensation" is defined as the total amount of payments, rebates or incentives received by an issuer in relation to card-based payment transactions or related activities.[16] The anti-circumvention provision in Art. 5 of the IFR further stipulates (in a way that seems somewhat circular, in light of these definitions) that any agreed remuneration, including net compensation, with an equivalent object or effect of the interchange fee which is received by the issuer in relation to payment transactions or related activities shall be treated as part of the interchange fee.[17]

24. While it is clear that the "pure" interchange fee will have to comply with the cap, uncertainties remain as to which other payments will have to be included when operators are calculating the exact level of the interchange fee in practice. A large part of the uncertainty arises because the IFR does not define the object or effect of interchange fees, but then requires other income to be brought into account if it has an equivalent object or effect. For example, it is not clear how marketing support and rebates given by the card scheme to the issuer in order to promote the payment card should be treated. Recital 31 of the IFR explains that for the purpose of checking whether circumvention is taking place, the total amount of payments or incentives received by an issuer from a payment card scheme with respect to the regulated transactions less the fees paid by the issuer to the payment card scheme should be taken into account. Those payments not only include transaction-specific fees but also "indirect payments" such as marketing incentives, bonuses and rebates for meeting certain transaction values. However, it is not clear from Recital 31 whether "indirect payments" received by an issuer from a card scheme are relevant only if they are indirectly referable to transactions in form of an incentive targeted at increasing transaction volumes or whether this term should be read much more broadly to include all payment flows between the card scheme and the issuer in relation to card payments (for example, marketing incentives to recruit new cardholders).

25. Neither is it clear whether processing fees (i.e. the fees paid by the issuer to the card scheme for processing the payment transaction) can be taken into account in calculating the interchange fee. On one view, such fees are only the price paid by the issuer for a service provided by the card scheme, and are not related per se to interchange fees. On the other hand, excluding such fees from the calculation could arguably be at odds with the definition of "net" compensation in the IFR and the wording of Recital 31. Similar questions arise in relation to the treatment of payments by a card scheme to an issuer in return for services.

26. In light of the guidance issued by the UK Payment Systems Regulator (the "PSR") (on which see further below), it appears that—at least in the eyes of the PSR—the IFR is intended to take the wide approach on the calculation of "net compensation." If the interchange fee is already at the level of the cap, it appears that issuers cannot receive any further payments from the card scheme without running the risk of infringing the anti-circumvention provision in the IFR. This may make the marketing and promotion of specific cards increasingly difficult for card schemes, as they will not be able to provide any additional marketing support or volume bonuses to issuers other than those incorporated in the interchange fee (if the interchange fee is already at the level of the cap).

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14 According to the UK Financial Conduct Authority (the "FCA"), banks expect revenue on the credit card market to decrease between 5% and 10% following the implementation of the IFR; *see* FCA Credit card market study: interim report (November 2015), https://www.fca.org.uk/static/documents/market-studies/ms14-6-2-ccms-interim-report.pdf.

15 *See* Art. 2(10) IFR.

16 *See* Art. 2(11) IFR.

17 *See* Art. 5 IFR.

3.2 Uncertainties regarding the enforcement of the IFR

27. Enforcement of the IFR is left to the Member States, who are required to designate a competent authority that will be granted investigation and enforcement powers. In the UK the designated body for enforcing the IFR is the PSR, which became fully operational on 1 April 2015.[18] In March 2016 the PSR published guidance on how it will monitor and enforce compliance with certain provisions of the IFR (the "PSR Guidance").[19] The PSR Guidance addresses issues such as to whom the IFR applies, the interchange fee caps and who may be exempt, the PSR's approach to monitoring compliance with the IFR, the PSR's powers and procedures under the IFR and the penalties that may be applied upon non-compliance with the IFR.

28. With regard to the calculation of the interchange fee, the PSR Guidance provides little additional guidance on the provisions of the IFR and the accompanying recitals. The PSR Guidance limits itself to stating that for the purpose of complying with the interchange fee cap, the issuer must take into account all sources of agreed remuneration (including net compensation) that it receives from acquirers, and from third parties who might themselves receive fees from acquirers (mainly but not exclusively referring to the card schemes themselves).[20] According to the PSR Guidance, an issuer who already receives an interchange fee at the level of the cap should not receive any additional remuneration on a net basis from the acquirer, card scheme or other intermediary for that transaction, directly or indirectly.

29. It is interesting to note that the PSR appears to task not only the issuer but also the acquirer with ensuring compliance with the IFR. According to the PSR Guidance, "*acquirers should also be proactive in ascertaining whether any fees that they pay to other parties (such as the scheme or another intermediary) are being passed back to issuers (whether in full or in part).*"[21] It is difficult to see how acquirers would, in practice, be able to assess whether parts of the network fees paid to a card scheme would be passed on to the issuer without a thorough investigation that would potentially be both intrusive and commercially unattractive.

30. Furthermore, the PSR Guidance provides for relevant parties to submit evidence to the PSR on an annual basis so that the PSR can monitor compliance with Articles 3, 4 and 5 of the IFR.[22] The PSR intends to engage with relevant parties to discuss its information and data requirements. Depending on the extent of the evidence required by the PSR, both issuers and acquirers as well as card schemes may need to be prepared to undertake regular compliance exercises which could take up considerable management time and resources.

4. Outlook

31. While the file on cross-border EEA MIFs appears to be closed for now with the entry into force of the IFR, the Commission continues to investigate rules on cross-border acquiring and "inter-regional" MIFs. These are interchange fees applied to payments in the EU made with cards that have been issued outside the EU (for instance an American tourist paying in a restaurant in Paris with a credit card issued by his American bank). In July 2015 the Commission sent a statement of objections to MasterCard expressing its concerns in relation to MasterCard's rules on cross-border acquiring and inter-regional MIFs.[23] According to the Commission, inter-regional MIFs—which it found to be up to five times higher than fees paid for a transaction with an EU-issued card—are setting an artificially high minimum price level for processing these transactions, ultimately leading to higher prices for consumers.

32. If the MasterCard case develops along similar lines as the Commission's previous investigation into Visa Europe's inter-regional MIFs,[24] the Commission may well be seeking a commitment for MasterCard to lower its inter-regional MIFs. This in turn would have significant impact on the revenue of non-EU banks generated by the interchange fee.

33. Whilst the regulatory pressure on card schemes will ease up in due course as operators get to grips with the IFR, private litigation for damages will continue to take its course and is likely to give rise to very significant costs for the card schemes. In the UK alone Visa and MasterCard together are facing more than a dozen private damages actions from merchants claiming that they incurred hundreds of millions of pounds in losses due to high interchange fees.[25]

18 *See* Regulation 3 of the UK Payment Card Interchange Fee Regulations 2015, http://www.legislation.gov.uk/uksi/2015/1911/pdfs/uksi_20151911_en.pdf.

19 *See* Policy Statement 16/1: The application of the Interchange Fee Regulation in the UK - Phase 1, https://www.psr.org.uk/sites/default/files/media/PDF/PS161-application-of-IFR-in-UK-phase-1.pdf. In accordance with the timetable provided for in the IFR, the PSR is issuing guidance on the IFR in two phases. The guidance already published by the PSR deals with the provisions of the IFR that have come into effect as from 9 December 2015. Phase 2 (on which the PSR plans to consult in summer 2016) will concern all provisions that come into effect on 9 June 2016.

20 *See* pt 3.20 of the PSR Guidance.

21 *See* pt 3.21 of the PSR Guidance.

22 *See* pt 6.2 of the PSR Guidance. The PSR Guidance also states that card schemes and acquirers will be expected to provide "initial compliance reports" for the purposes of monitoring compliance with certain other provisions of the IFR.

23 *See* Commission press release (IP/15/5323) of 9 July 2015. In 2014, Visa Europe already committed to reducing its inter-regional MIFs (*see* commitments in Case COMP/39.398, http://ec.europa.eu/competition/antitrust/cases/dec_docs/39398/39398_9729_3.pdf). A similar investigation into inter-regional MIFs applied by Visa Inc. is still ongoing.

24 *See* Case COMP/39.398.

25 *See* for example *Sainsbury's Supermarkets Ltd v. MasterCard Incorporated and Others* (Case No 1241/5/7/15 (T) in the UK Competition Appeal Tribunal).

III. Innovative payment systems

1. Definition and market development

34. Under the influence of technological innovation, the payment services market has undergone significant changes. With the rise of new payment systems, traditional card schemes face increasing competition from non-bank payment service providers offering innovative solutions to customers. In this section, we focus on newer payment systems that operate without a link to a credit or debit card but connect instead to the payer's bank account. From a competition and market development perspective these models are particularly interesting as they compete directly with traditional card schemes.

35. Innovative payment systems that create a link to the payer's bank account are available for online payments as well as mobile payments and are generally referred to as "payment initiation services." Payment initiation service providers ("PISPs") create an interface between the bank accounts of the merchant and the customer, with the customer entering his/her online banking information, including his/her PIN (personal identification number) and TAN (transaction authentication number) on a screen provided by the PISP. The payment is effected immediately without the merchant gaining access to the customer's banking information. Saving on (credit) card surcharges as well as interchange fees, the model has gained increasing popularity with consumers and merchants, becoming a cheap alternative to card payments in e-commerce. It has been successfully implemented in Germany (Sofort),[26] Scandinavia (Trustly)[27] and the Netherlands (iDEAL)[28] and has recently expanded into other European countries.[29] In the UK, VocaLink has recently launched a mobile app that operates on the same model.

26 https://www.sofort.com/ger-DE/kaeufer/su/so-funktioniert-sofort-ueberweisung.

27 https://trustly.com/en.

28 iDEAL is currently generating on average 140 million payments per annum https://www.ideal.nl/en/actueel/online-payment-method-ideal-reaches-new-milestonex.

29 In 2015 Trustly announced its expansion into 21 new European markets, https://trustly.com/en/press/posts/2015-10-13-trustly-expands-into-21-new-european-markets.

2. Competition issues

36. Specific competition issues have arisen in the area of payment initiation services. PISPs rely on the ability to access a customer's bank account using the credentials provided by the account holder. The use of an account holder's confidential credentials such as password and transaction codes by a third party has not been universally welcomed by banking institutions. Numerous banks prohibit their account holders from revealing their confidential credentials to third parties in their general terms and conditions. This led to a lawsuit by Giropay—an online payment system created and supported by banking institutions in Germany—against Sofort Banking, a PISP operating in Germany. During the civil law proceedings, the German Federal Cartel Office (the "FCO") submitted a legal opinion to the court in which it took the view that the banks' general terms and conditions were void in so far as they have the potential to foreclose the market for independent payment messenger services.[30]

37. At the same time, third party providers face difficulties stemming from industry recommendations and standardisation efforts. Following a complaint lodged by Sofort in 2011, the European Commission launched an investigation into the European Payments Council's ("EPC") standardisation process for payments over the internet. The Commission had concerns that, through its e-Payments Framework, the EPC could exclude new entrants not linked to a bank from the e-payments market. The investigation was closed in 2013 following an announcement by the EPC that it would abandon further development of the e-Payments Framework.[31] Similarly, third-party payment providers have seen their position in the market being challenged by industry body recommendations. In 2014 the European Banking Authority (the "EBA") published guidelines on internet payments security, recommending that banks should (among other things) advise their customers to use the genuine internet payment website of the payment service provider (i.e. the bank itself).[32] The Commission has already expressed the view that compliance with the EBA guidelines should not be used to justify the obstruction or blocking of third-party payment providers.[33]

30 *See* statements by Payment Network available in English at http://www.prnewswire.co.uk/news-releases/court-action-giropay-vs-sofortuberweisung dedirectebankingcom-156118355.html. Parallel to the civil proceedings, the FCO launched a competition investigation into the German banks' general terms and conditions in order to assess to what extent they constitute a restraint of competition in relation to independent online services such as Sofort (*see* FCO Annual Report of 2014).

31 *See* Commission press release http://europa.eu/rapid/press-release_MEMO-13-553_en.htm.

32 *See* pt 12.4 of the EBA Final guidelines on the security of internet payments, 19 December 2014, https://www.eba.europa.eu/documents/10180/934179/EBA-GL-2014-12+%28Guidelines+on+the+security+of+internet+payments%29.pdf/f27bf266-580a-4ad0-aaec-59ce52286af0.

33 *See* European Commission Fact Sheet on the Payment Services Directive, 8 October 2015, http://europa.eu/rapid/press-release_MEMO-15-5793_en.htm. It also appears that the Commission recently sent an informal letter to the EBA expressing its concerns that the EBA guidelines might be used by banks as an excuse to block new competitors in online payments.

3. Regulatory framework

38. The legal framework for payment services was initially laid out in the Payment Services Directive 2007 ("PSD 1")[34] which acted as a first step towards a single market for payments. However, in a fast-moving technology market, PSD 1 soon proved insufficient to address the issues surrounding the emergence of new types of payment services. Such payment services did not fall within the scope of PSD 1 and therefore remained entirely unregulated, creating legal uncertainty, potential security risks and a lack of consumer protection in certain areas. Taking note of the changing landscape in the payments market and at the same time acknowledging the difficulties surrounding market access for third-party payment providers, the Commission launched a review of the regulatory framework governing payment systems in 2012.[35] Following a lengthy consultation process, the final text of the revised Payment Services Directive ("PSD 2") was adopted on 25 November 2015, with Member States expected to transpose the measures by 13 January 2018.

39. PSD 2 updates and complements the existing legal framework for payment services in an attempt to increase payment security while opening the market for new entrants. PSD 2 widens the scope of its predecessor by covering new services and players including PISPs. Furthermore, under PSD 2, banks will no longer be able to prevent PISPs from accessing their customers' bank accounts.[36] PSD 2 also addresses the question of liability and refunding in case of an unauthorised payment transaction, which was one of the major concerns raised by banks during the consultation process. However, while PSD 2 provides that the PISP will be liable for any fault in its part of the transaction process, the account holding bank will still have to refund the account holder in the first instance.[37] The burden then lies upon the account holding bank to recover the funds from the PISP.[38] While this approach is favourable to consumers, it puts account holding banks at risk in the event of an unauthorised transaction until the question of liability is determined and funds can be recouped from the PISP (if the PISP was at fault). Although PSD 2 puts the burden on the PISP to prove that the fault did not stem from its part of the process it is likely that, in practice, reimbursement of the account holding bank will be subject to protracted discussions with the PISP.

IV. Conclusion

40. The IFR has set out the framework for substantial changes in the market for card payments. With its implementation still at an early stage, the long-term effects on the market for card payments are yet to be seen. It is clear, however, that issuing banks and card schemes in particular will need to consider their commercial strategy with regard to card payments and their fee structures carefully. Whether any changes in strategy necessitated by the IFR will affect consumer charges for card subscriptions is uncertain at this stage, although it is likely that any such development will be monitored very closely by regulators. At the same time card schemes are likely to face increased competition from novel forms of payments that operate independently of a credit or debit card. This development is fostered and encouraged under the new framework of PSD 2 which will facilitate market entry for providers of new payment services such as PISPs.

41. Established payment service providers will therefore need to invest considerable time and resources into ensuring compliance with both the IFR and PSD 2. In facing the twin pressures of greater regulation and increased competition, they (and their advisers) will no doubt welcome any further guidance that may be forthcoming from either the Commission or national authorities as to the interpretation and enforcement of these rules in practice. ■

34 Directive 2007/64/EC on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, [2007] OJ L319/1, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:319:0001:0036:en:PDF.

35 *See* Commission Green Paper, Towards an integrated European market for card, internet and mobile payments, COM (2011) 941 final.

36 *See* Art. 66 PSD 2.

37 *See* Art. 73(2) PSD 2.

38 *See* Art. 73(2) PSD 2.

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