Summary of Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee

Roundtable on Competition Issues in Payment Systems

October 24, 2012

I. INTRODUCTION

1. The Business and Industry Advisory Committee (“BIAC”) to the OECD welcomes the opportunity to comment on the matter of Competition and Payments Systems at the meeting of the OECD Competition Committee on 24 October 2012. This paper follows and complements BIAC’s comments submitted to the OECD in June 2006 as part of the OECD Competition Committee’s debate on competition and efficient usage of payment cards and primarily focuses on:

   - the development of new payment instruments and increased competition in the payments sector in general;
   - the key issues relating to the payments industry that have been challenged over the last few years (namely interchange fees, no-surcharge rules and honour-all-cards obligations);
   - the costs and benefits of those features; and
   - the impact of regulating the payments industry.

2. The payments industry has seen significant changes in recent years with the development of new technologies and new entrants. Combined with the steps taken at the European Union (“EU”) level to promote integration of the payments industry (including in particular the various SEPA1 initiatives) this makes it an appropriate time to take stock and evaluate whether the industry is working effectively, the impact (or expected impact) of current regulation, and whether, and if so in what areas, policy measures could improve outcomes for consumers and market participants.

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1 SEPA (the Single Euro Payments Area) is the payments integration initiative of the EU for simplification and harmonization of bank transfers.
3. As BIAC submitted in 2006, experiences with deregulation confirm that competition should be stimulated and maximised except in cases of market failure or where other overriding public interest objectives give rise to a need for regulation. Consequently, BIAC continues to advocate the following:

- Competition authorities and sectoral regulators should exercise particular caution when considering intervention in this fast moving market with its changing consumer demand and supply patterns. Before authorities intervene it should be clear that the enforcement action is proportionate and necessary to protect consumers and that any remedy imposed will benefit consumers. This requires assessing alternatives to regulation as well as the loss of any advantages of the status quo if regulation is imposed.
- Competition authorities should proceed with particular care when considering whether to intervene in high-technology industries undergoing rapid transition. Intervening too quickly and too aggressively can inhibit innovation and future market growth. This is particularly relevant to the payments industry which has seen significant technological advances in recent years, some areas of which, such as mobile payment, are currently at an early stage.

II. THE EVOLVING FACE OF THE PAYMENTS INDUSTRY

4. There is little doubt amongst stakeholders in the payments industry that innovation has become increasingly prevalent in the sector and that, as a result, the payments industry is changing rapidly. There are a range of new and emerging products and technologies, particularly in the field of electronic payment (e-payment) and mobile payment (m-payment); these are expected to lead to both new entry and new business models by new and existing providers, many of which work in parallel with payment card schemes.

5. For example, in the UK, competition among non-card based providers is still evolving. Large online players such as PayPal and Google have entered this space while UK based operators such as The Mobile Money Network have combined with merchants to offer mobile payment services to customers. The sector has also seen a number of collaborations in the UK in the growing area of payment facilities. Chief amongst these has been between banks and mobile network operators (MNOs), either trialled or announced for forthcoming launch but other initiatives are as prominent or have the potential to impact payment methods. In addition, MNOs cooperate to offer various m-commerce models or MNOs and card companies co-operate to bring traditional cards into the mobile business. Examples of new innovations in the payments industry are set out in the box below.
6. Competition in the payments industry has become more intense in recent years as a result of these innovations, with new technology attracting further new entrants in the digital/mobile arenas. This trend is expected to continue and accelerate as existing and new payment providers use a variety of new technologies to compete with (or replace) existing card based schemes and mechanisms. The two graphs below demonstrate significant increases in both e- and m-payments over the last few years and the expected growth in the near future.

Global e-payments: number of transactions (billions) 2009-2013F

Global m-payments: number of transactions (billions) 2009-2013F

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**EXAMPLES OF RECENT PAYMENT INNOVATIONS**

**Google wallet** (available in the US and expected to launch in the UK shortly)
- Google wallet is a virtual wallet that stores your payment cards and offers on your phone and online.
- When you check out at brick-and-mortar stores that accept Google Wallet, you can pay and redeem offers quickly just by tapping your phone at the point of sale (using NFC technology). You can also pay online where retailers accept Google wallet.
- Google won’t charge users or merchants for access to Google wallet, and plans to make money by offering sponsored ads to their users.

**Merchant Customer Exchange** – in the US
- A joint venture of retailers with a combined $US 1 Trillion in annual sales (including Wal-Mart, Target, Sears, Shell, and Lowe’s) will offer a new mobile payment application.

**ISIS** – in the US
- A full joint venture joint venture of Verizon, AT&T, T-Mobile, JPMorgan Chase, Barclays, and Capital One plans to offer a mobile wallet.

**PayPal inStore** – launched May 2012 in UK and the US
- PayPal inStore is a new cashless, cardless way to pay-in-store using your mobile phone.
- In the UK, after downloading the application, you simply press ‘pay inStore’ and a unique barcode is displayed on the phone screen. The retailer scans this barcode, and your PayPal account is charged and accepted discount offers will also be applied.
- The application does not require NFC or even a mobile/WIFI signal. No personal or financial details are stored on the phone. PayPal inStore will work at more than 100,000 eligible shops across the country.
- Currently 230 fashion stores in the UK accept PayPal inStore, but more retailers are expected to sign up.
- In the US, consumers with a PayPal account can pay with a PayPal payment card or by entering their mobile number and a PIN.

**Simply Tap** – in the UK
- Simply Tap allows you to purchase goods online and in-store quickly and easily on your phone, and have them delivered to your home address.
- You register your home address and bank account details in the application and when you spot a product you want to purchase in a participating store you can either enter the special code displayed alongside it, scan a code using the phone camera, or even take a photo of the product itself which is matched against a database. The application charges your debit/credit card, and the product is delivered to your home address.
- The app does not require NFC, and can be used in an increasing number of shops in the UK

**LevelUp** - Currently available at businesses in certain cities in the US
- A mobile phone application for that allows registered users to securely link their debit or credit card to a unique QR code displayed within the application.
- To pay with LevelUp, users scan the QR code on their phone at LevelUp terminals located at local businesses who accept LevelUp as a form of payment.

**O2 Wallet** – in the UK
- Allows consumers to transfer money across any mobile phone network, make online purchases and conduct price comparisons by scanning product barcodes in shops.
- Users can also get daily discounts from retailers.
- Unlike Google Wallet, however, O2 Wallet does not currently allow users to make contactless payments using their mobile phone. The company said that the service will eventually evolve to incorporate near field communications (NFC) technology, but in the meantime users can apply for a physical O2 Money Visa Account Card that allows them to make purchases on the high street or withdraw cash from ATMs.

**GoCardless** – in the UK
- GoCardless provides merchants with a flexible tool to charge customers directly from their bank account, with no card merchant fees or credit card fees.
- Merchants can charge one-off bills or take regular payments and can even let customers pre-authorise future variable payments.
- Customers are sent a link to GoCardless where they register and input their bank account details. The customer is then charged (via a Direct Debit set up in GoCardless), and emailed a receipt. For future payments customers can use a username and password.
- GoCardless then transfers the money to the merchant’s account.
- GoCardless has no set-up or monthly fees, charging merchants 1% per transaction up to a maximum of £2.00.

**MasterCard/Everything Everywhere** – in the UK
- MasterCard recently announced a five-year deal with the UK’s biggest mobile phone operator Everything Everywhere to develop contactless mobile phone payment systems for the networks 27m customers.
- The partnership will initially include a prepaid digital wallet, allowing customers to transfer money from a bank account to a mobile phone for use in micro payments at more than 100,000 eligible shops across the country.
- The partnership is also set to roll out a variety of other services, including person-to-person money transfers and loyalty rewards at shops where payments are made.
- Plans to help boost the capability of small retailers to accept contactless payments in the future are also on the cards.

**Deutsche Telekom - “myWallet”** – from H2 2012 onwards in Poland, Germany and other European countries
- The digital wallet “myWallet” by Deutsche Telekom (DT) combines means of payment with such services such loyalty cards, vouchers, tickets or entry cards on a smartphone.
- The myWallet platform will allow for integration of different partners and service providers (banks, public transport, etc.) and support various technologies, including NFC
- The myWallet portfolio will cover all customers’ payment means (e.g. online and offline payments, micro- and macro payments, etc.) and will contain a DT-branded MasterCard, issued by DT’s affiliate Click&Buy
- The myWallet initiative also supports roll-out of contactless infrastructure at the points of sale in the relevant markets

**M-commerce joint venture between Everything Everywhere, Vodafone and O2 – in the UK**
- The joint venture received competition clearance by the European Commission on 5 September 2012 and the company plans to launch its products, which include a wholesale m-payment platform, in the coming months.
- According to the commission the JV will act as a supplier on the wholesale m-wallet market (two-sided market). This market combines the attributes of the two following existing sets of services: contactless physical transactions services such as services already offered by banks through NFC-enabled debit and credit cards.
- Customers will be able to register their bank cards and loyalty cards on their mobile and use their device to pay for products (via NFC or online) and to claim rewards. They will also be able to receive relevant offers via their mobile.
- The services will be free for consumers and the JV will attempt to attract all mobile operators in the UK as its customers so that as many people as possible are able to use its services.

**Mobile Money for the Unbanked (GSMA)** – developing countries
- Mobile money is a sustainable, scalable approach to providing convenient and affordable financial services to the unbanked. More than one billion customers in developing markets have access to a mobile phone, but do not have a formal bank account.
- Through mobile money, customers can perform financial transactions where they buy airtime. How? Because typically, the largest MNO in a developing country has 100-500 times more airtime reseller outlets than banks have branches.
- Mobile money provides new channels for customers to access traditional retail financial services such as savings, remittances, credit and insurance. With mobile financial services, customers can leverage mobile money platforms to make payments, withdrawals, and cash transfers, among others.
7. The result of this high rate of innovation is expected to be a change to the increased competitive dynamic of the payments industry which will constrain the more traditional payment methods and schemes (such as cash, cheques and payment cards used in-store), thus delivering additional benefits to consumers and merchants.

8. In relation to such changes, a key factor is the industry’s ability to adopt interoperability standards and other forms of standardisation. It is therefore important that competition authorities take on board that there currently exists a certain element of legal uncertainty surrounding the application of competition law to standardisation cooperation within industry. It is in the interests of the industry and consumers that this legal uncertainty be reduced given that any new payment solution needs to be designed to be accessible to the mass market in order to be commercially viable.

III. KEY ISSUES

9. This section outlines the key issues relating to the payments industry that have in recent years been challenged by payments market stakeholders (namely interchange fees, no-surcharge rules and honour-all-cards obligations) and summarises the respective arguments in each case. Views on the extent to which regulation is considered an appropriate response to these challenges are set out in section IV below.

A. The interchange fees debate

10. BIAC’s 2006 submission to the OCED outlined the role of interchange fees in payment card systems. However, a summary of the system is set out in the box below.

**SUMMARY OF INTERCHANGE FEES**

An interchange fee is the fee charged by the bank which issued the credit card to the consumer (the issuing bank) and paid by the retailer’s bank (the acquiring bank) for processing a payment card transaction. They are either set bilaterally between individual banks or multilaterally (“MIF”). A MIF is set by a decision binding all banks participating in a particular payment card scheme relating to a brand of payment card.

In the context of a payment card transaction, the acquiring bank charges the retailer a fixed fee (the merchant service charge (“MSC”)) for processing the transaction. This is deducted from the price that the retailer receives for the transaction with the consumer (the retail price). The issuing bank pays the acquiring bank the retail price less the agreed MIF. The MSC is used by the acquiring bank to recoup the MIF from the retailer. The costs incurred by the retailer in accepting payment cards from consumers (the MSC) may be passed on in the retail price of goods or services.

11. Critics of interchange fees continue to predominantly comprise merchants who fund the interchange fee through MSCs. In summary, merchants’ objections to interchange fees have included the following, which have led to a number of investigations by competition authorities:

- MIFs amount to a price floor, akin to price-fixing and therefore constitute a breach of competition law;
- Merchants have particularly objected to premium cards which charge them higher interchange fees and which they are compelled to accept under the honour-all-cards rule (discussed further below);
• The inclusion in the interchange fee of certain identifiable issuer costs that merchants assert cover items that do not benefit them particularly. The Visa II decision in 2002\(^4\) accepted that three categories of issuer cost could be seen to benefit merchants: the costs of the “payment guarantee”, the cost of processing and the cost of free funding. However, some merchants have disputed the relevance of certain of these costs, in particular free funding, as well as for example costs relating to the provision of rewards programmes to cardholders, and argue that they end up paying for the benefits enjoyed by cardholders;

• Merchants have no control over (or can exert no constraint over) the level of the interchange fee, yet they have to pay it, and that is it therefore akin to a tax on transactions; and

• In the past, attention has also focused on the fact that acquirers were not permitted to disclose the actual interchange fees to merchants resulting in a certain lack of transparency. The Visa II decision required Visa to change its rules so as to permit acquirers to disclose interchange to merchants where requested. Subsequently Visa and MasterCard in Europe have published cross-border EU and domestic interchange rates on their websites.

12. In response to these concerns, the payment card schemes and participating banks have argued that MIFs are in fact of net benefit to merchants and consumers thus incentivising the use of card payments, which is reflected in year on year growth in card usage in recent years. The main points historically they have raised in this regard include the following:

• MIFs are essential for the operation of a four party scheme and operate to enhance the efficiency of a payment card scheme as a whole. As an example of a two-sided market, four party payment systems provide a joint product simultaneously to both cardholders and merchants and MIFs are set at a level that optimises benefits to both sides of the market. Put differently, the four party payment system generates positive network effects whereby the more merchants accept cards the more valuable they become to cardholders, and vice-versa. Specifically, MIFs enable recovery of certain costs incurred by issuing banks (such as guaranteed payment, processing costs and funding costs) which reflect benefits not only to cardholders but also to merchants. In the absence of interchange fees, issuers would be required to recover all of the costs they incur from cardholders, and would need to adjust their activities accordingly. In these circumstances it is highly unlikely that the usage of a card payment system would be at an optimal level;

• Interchange fees have had (and continue to have) a significant positive impact in the adoption of new technology and fraud prevention measures. The successful introduction and coverage of chip and PIN anti-fraud technology and recent introduction of contactless payment terminals at merchants’ point of sale are examples of how interchange fees are being used as an incentive to merchants to invest in new technology for the benefit of the customer;

Both merchants and consumers (and therefore the economy as a whole) benefit from the near universal acceptance of payment cards and some argue that such universal acceptance could be threatened by any significant intervention in the way payment card schemes set MIF rates; and

- Interchange fees also pay for a number of consumer benefits many of which are often provided without any direct cost to cardholders for holding a card (in the US, Canada, the UK, and elsewhere). These include the convenience of making secure online purchases, interest free periods for credit cardholders who pay off their balance each month, free in-credit banking for many debit cardholders. In addition, in the US, Canada, the UK and elsewhere customers using credit cards enjoy strong insurance benefits covering the goods or services they purchase.\(^5\)

13. Some merchants have urged regulators to eliminate the interchange fee altogether, while others recommend capping it. In general, the favoured response of regulators in the EU has been the latter: in both Visa and MasterCard the European Commission accepted undertakings to reduce interchange fees and to increase transparency of interchange fees.

### B. No-discrimination/surcharging rule

14. Under the no-discrimination rule (also sometimes referred to as the no-surcharging rule) merchants are prohibited from directing their customers towards the use of the payment instrument they prefer through surcharging, offering rebates or other forms of steering, though these rules vary by scheme. For example, Visa and MasterCard permit steering by discounting or rebating other payment means (for example, cash) and MasterCard also by surcharging of its products by merchants. Critics of the rule argue that this limits the ability of merchants to signal to consumers the relative costs of different forms of payment when deciding how to pay. Although the European Commission did not challenge Visa’s no-surcharge rule in 2001 because it found that the policy had no appreciable effect on competition,\(^7\) it has more recently stated that, together with honour-all-cards rules (see below), this may act as a barrier to entry\(^8\) and lead to higher interchange fees, hence potentially increasing the cost of card payments and stifling competition.\(^9\) However, the European Commission has also noted that even where surcharging and discounting are allowed, the practices are not widespread.\(^10\)

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5. Retailer and competition authorities tend to argue that the only benefits that could justify interchange are those that accrue to merchants. Their argument would be that cardholder benefits should be paid for by cardholders.

6. MasterCard and a number of participating payment scheme banks subsequently appealed the European Commission’s decision to the European General Court, which subsequently upheld the European Commission’s decision (Case T-111/08, *MasterCard and others v Commission*, 24 May 2012). MasterCard is in the process of appealing to the European Court of Justice.


15. Payment card systems have defended these rules as output-enhancing practices that protect the goodwill associated with the entire system from opportunistic behaviour that merchant participants otherwise could undertake. Surcharging, particularly high levels of surcharging (prevalent among retailers that do not expect repeat business) impose a negative externality on a payment card system and its brand name and make the system less attractive to cardholders and to merchants that do not impose surcharges. Moreover, the payment card systems defend their no surcharge rules as consumer protection measures designed to protect cardholders who may be lured into a store by the promise of a low price only to be forced to pay a higher price at checkout.

C. Honour-all-cards rule

16. In general terms honour-all-cards rules require a merchant that agrees to accept one particular card on a system to accept all other cards issued on that system. More specifically, honour-all-cards rules can be seen as two separate rules: honour-all-issuers (for example, if a merchant accepts Visa cards issued by local banks it should also accept foreign cards); and, honour-all-products (for example, if a merchant accepts consumer credit cards it must also accept more expensive commercial cards).

17. These honour-all-cards rules have been challenged by merchants in the past as a form of tying arrangement that limit merchant choice and are therefore incompatible with competition law. Merchants’ concerns in this regard have been heightened by the increased use of “premium” credit cards\(^{11}\) that typically charge higher interchange fees than standard credit cards issued by the same payment scheme. It is of note that the European Commission has stated that, in general, it does not have any concerns with the honour-all-issuers rule\(^{12}\) but has some reservations regarding the competitive impact of the honour-all-products rule and has expressed concern that, in the absence of information as to the indirect costs associated with such usage, this is likely to lead to interchange fees rising as customers increasingly use premium cards to gain from the their direct benefits.\(^{13}\)

18. Advocates of honour-all-cards rules continue to assert that these rules offer substantial efficiency benefits that outweigh the concerns referred to above. These benefits primarily include the following, all of which help to foster further development of new card products/variants within a payment card scheme:

- customers have confidence that they will be able to use their card, regardless of type, in different geographical locations with a broad network of merchants; and
- preventing individual merchants from blocking the introduction of new cards that would increase the utility of the system as a whole to all merchants and all consumers.

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\(^{11}\) Premium cards in this regard are credit cards that offer additional customer benefits (usually for an annual fee) such as cash back, air miles and other forms of discounts or additional benefits

\(^{12}\) This was subject to negative clearance in Visa’s 2001 decision

IV. TO REGULATE OR NOT TO REGULATE ... AND IF SO, HOW?

19. As explained in Section II above, competition in the payments industry has become more intense in recent years with new technology attracting new entrants in the digital/mobile arenas. However, it is important to note that these new payment systems have by no means replaced cash, cheques and in-store card payment use, nor it is expected that they will do so in the near future. This is partly because many consumers will always have a preference for cash or in-store card payment use and partly because much of the newer payment technology (such as contactless m-payments) is still evolving and not yet accepted by merchants. However, similar to the meteoric growth of online shopping over the last two decades, it is expected that these newer payment technologies will rapidly become more prevalent over time. In fact, newer innovative payment technologies will increase competition in the payment sector. It is therefore important that authorities proceed with particular care when considering whether and, if so, how to intervene. As BIAC submitted in 2006, intervening too quickly and too aggressively can inhibit innovation and future market growth. This consideration applies in particular to proposals to regulate more traditional payment card schemes only, given that many of the new electronic and mobile payment innovations work in conjunction with payment card schemes meaning that over regulation of the former may still stifle the latter.

20. In this regard, BIAC therefore continues to recommend that competition authorities and sectoral regulators should only intervene when it is absolutely clear that the enforcement action is proportionate and necessary to protect consumers and that any remedy imposed will produce net benefits for consumers. This requires assessing alternatives to regulation and assessing the loss of any advantages of the status quo that may be lost if regulation is imposed.

21. Outlined below are some of the regulatory intervention options considered recently by competition authorities, particularly in the context of payment card schemes.

   A. ‘Fee’ regulation

22. Various jurisdictions have intervened to set the level of interchange fees either under competition law (in the EU the remedies offered by Visa and MasterCard) or under legislation (such as in the US and Australia).

23. On one hand, regulation may to a certain extent help to alleviate certain merchant’s concerns regarding the level of interchange fees and remove what was considered by some as an anti-competitive price-fixing element of the fee structure. On the other hand, there is a concern amongst stakeholders that regulation may not lead to clear and substantial benefits to customers. Regulatory intervention to lower interchange fees will not benefit customers if merchants do not pass the full benefits back to customers through lower prices and if card issuers have to raise fees to consumers, reduce benefits or introduce new fees to achieve an economic return. It is not yet clear from the evidence from the US and Australia, where some form of regulation have been introduced, that merchants do pass lower merchant fees to customers.
24. There is also a risk that regulation is likely to deter new entry from the likes of mobile phone providers, technology companies and to deter innovation by existing payment card schemes and providers to exploit the opportunities created by new technology. This would reduce competition amongst existing providers and risk consumer harm by preventing or slowing the adoption of new payment mechanisms and innovative charging models.

25. Regulation of this nature would also pose significant practical difficulties. First, it is difficult to determine what the correct/fair fee level should be, particularly given that the market is constantly innovating. Second, it is unclear whether regulation would operate at the cross-border or national level and it’s equally unclear how regulation, if applied across the EU for example, would apply universally across all 27 EU member states. The scale of this challenge becomes clear when one considers that national systems within the EU are at different points in their development and this is reflected in different levels of product penetration and significantly different levels of fees. These differences mean there are very significant challenges in imposing a single regulatory regime. On the one hand these differences in payment scheme fee levels across the EU are could be viewed as a problem leading to internal market distortions or, on the other hand, a reflection of the different level of development of payment systems and other relevant conditions in various national territories.

26. The final point often raised in the context of regulation of payment systems is that of proportionality. Notwithstanding the dramatic growth of card, electronic and mobile payments in recent times, such payment methods still account for only a very small amount of total value of payments compared to cash and even cheque, as illustrated by the figures below regarding the UK payments market. Regulators should therefore consider the extent to which price regulation of payments systems are proportionate in a market when cash is still very much the key payment method.

**UK personal spending payment volumes in 2011 (billions)**

![Graph showing payment volumes](Image)

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B. Increasing transparency: permitting surcharging

27. The second feature of the payments market outlined above and which has been the focus of some concern in the recent past is the no-surcharging/no-discrimination rule incorporated into some payment card schemes. As a result, customers are largely unaware of the indirect cost of using different payment systems and this may reduce the effectiveness of competition. In this context regulatory intervention aimed at increasing consumer awareness of such costs at the point of transaction may be a potential alternative to the fee regulation method outlined above. Advocates of this approach suggest allowing merchants, through the use of surcharging and other methods, to indicate to consumers the costs of using different payment methods at the point of sale. This would bring the added benefit to the merchant of managing the costs associated with accepting different payment methods.

28. In this regard a number of EU member states, for example, have permitted surcharging.\(^15\) On the other hand, other EU member states have banned surcharges altogether.\(^16\) Regarding the stance of the two leading payment systems, BIAC understands that:

- In some jurisdictions, MasterCard’s global rules prohibit merchants from surcharging cardholders for a card transaction. However, in other jurisdictions, such as in Europe, MasterCard’s rules have, for a number of years, allowed merchants not to discount other means of payment (for example, cash), but also to surcharge its products.\(^17\) The merchant may even apply different surcharges for MasterCard consumer cards, MasterCard commercial cards and/or Maestro debit cards and
- Visa’s rules worldwide prohibit a merchant from surcharging unless expressly permitted by local law, but permit merchants to offer discounts for the use of non-Visa payment systems.

29. It is important to stress, however, that proponents of permitted surcharging have argued that in order to achieve the full benefits of such an approach, and to allow consumers to compare accurately the real costs of different payment methods, efforts at improving transparency should be directed at all providers in the payments industry and not just card schemes and issuers.

30. While greater transparency and surcharging may provide a solution to this problem, critics have argued that it can lead to other potential problems, as has been seen in the UK over excessive surcharging by merchants for the use of credit cards even in highly competitive

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\(^15\) In the European Union, as at mid-2011, national legislation of the following countries permits surcharging: Belgium, the Czech Republic, Denmark (with limitations), Estonia, Hungary (with limitations), Ireland, Malta, the Netherlands, Norway, Slovenia, Spain (with limitations) and the UK. In Germany and Poland the law is silent on whether contractual clauses prohibiting surcharging are permitted or not.

\(^16\) In the European Union, as at mid-2011, national legislation of the following countries prohibits surcharging: Austria, Bulgaria, Cyprus, France, Greece, Iceland, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovakia and Sweden.

\(^17\) Such surcharging is permitted subject to two requirements under MasterCard’s European rules: (a) the surcharge must be clearly indicated to the cardholder at the time of purchase; and (b) must bear reasonable relationship to the merchant’s cost of accepting cards.
markets such as budget airlines, prompting investigation by competition authorities.\textsuperscript{18} This has lead to the UK Government implementing early the consumer protections in the Consumer Rights Directive that restrict the level of surcharges. The Reserve Bank of Australia has likewise expressed concern about excessive surcharging that has occurred since the RBA required payment schemes to permit surcharging and permitted card scheme rules to limit surcharges to the reasonable cost of card acceptance.\textsuperscript{19} In Canada, the Competition Bureau has challenged Visa and MasterCard’s no surcharge rule under the Competition Act’s price maintenance provision. A hearing before the Competition Tribunal was concluded in June and the Tribunal’s decision is pending.

\textbf{C. Relaxing the honour-all-cards rule}

31. With respect to the concerns regarding honour-all-cards rules, the complexity of issues raised by potential regulatory intervention are reflected by the fact that different jurisdictions have taken very different approaches in this field. In the US, for example, both Visa and MasterCard have modified their honour-all-cards rules following a legal settlement with merchants in 2003, allowing merchants to decline acceptance of debit or credit cards, but maintaining other aspects of honour all products and the honour all issuers requirement.\textsuperscript{20} However, even in this case the claimants agreed there were significant benefits to the honour-all-cards rule and did not challenge its necessity. Some honour-call-cards rules are also prohibited (in particular where debit cards are concerned) in a number of other jurisdictions such as Canada, South Africa and New Zealand, for example. In the EU the European Commission has recognized the value of the honour-all-cards rule, upholding the Visa honour-all-cards rule in 2001 and concluding that abolishing the rule would not increase competition substantially.\textsuperscript{21} In the MasterCard decision, however, it did not specifically oppose the rule but held that aspects of it may reinforce the alleged restrictive aspects of the interchange fee.\textsuperscript{22}

32. Regarding the stance of the two leading payment systems, BIAC understands that:

- MasterCard’s global rules require that merchants honour all valid cards without discrimination when properly presented for payment. However, as with surcharging, there are variations to this rule in countries where the honour-all-cards rule is prohibited. In Europe, MasterCard has essentially separate honour-all-cards rules for the MasterCard brand, the Maestro brand and the Debit MasterCard brand. A merchant can therefore decide, for example, to accept Maestro but not MasterCard, or vice versa;

\textsuperscript{18} See the UK’s Office of Fair Trading’s investigation into retailers’ surcharges conducted in 2011 (www.of.t.gov.uk/OFTwork/markets-work/super-complaints/which-payment-surcharges).
\textsuperscript{21} Commission Decision Case No COMP/29.373, Visa International.
\textsuperscript{22} Commission Decision Case No COMP/34.579, MasterCard.
Visa’s general position is also that merchants must accept all cards properly presented for payment. However, there are variances of this rule in the US and Canada.23

33. It is important to appreciate the impact any changes to scheme rules may have on the customer experience – especially the convenience factor of knowing that their card will be accepted, something that most consumers almost unconsciously assume when making a card payment. It is important to ensure that if changes are suggested, altering or removing any of the scheme rules will not damage the customer’s purchasing experience.

V. CONCLUSIONS

34. The payments industry has seen significant changes in recent years with the development of new technologies and market entry which compete directly with the more traditional forms of payment such as cash, cheques and card payments. This has added to the already complex debate as to the relative costs and benefits of each payment system and how the payments industry operates and the extent to which it should be regulated.

35. Experiences with deregulation confirm that competition should be stimulated and maximised with limited intervention except in cases of market failure or where other overriding public interest objectives give rise to a need for regulation. Consequently, BIAC advocates that:

- competition authorities and sectoral regulators should exercise caution when considering intervention. Existing or potential competition by new and innovative products should be encouraged. Before authorities intervene it should be clear that the enforcement action is proportionate and necessary to protect consumers and that any remedy imposed will result in net benefits for consumers. This requires assessing alternatives to regulation and assessing any advantages of the status quo that may be lost if regulation is imposed;
- competition authorities proceed with particular care when considering whether to intervene in high-technology industries undergoing rapid transition. Intervening too quickly and too aggressively can inhibit innovation and future market growth. This is particularly relevant to the payments industry which has seen significant technological advances and recent years. What would help innovation in this industry, however, would be greater clarity on the application of competition law to the adoption of industry-agreed interoperability standards and other forms of standardisation; and
- where intervention is deemed appropriate, it is of note that some regulators have often favoured fee regulation, but it is often accompanied by material practical difficulties. Other alternatives approaches, such as increasing transparency to enable

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23 The US variance permits merchants to opt for “limited acceptance” (for which they must register) but they are still obliged to accept Visa cards issued outside the US. The US limited acceptance allows merchants to choose to accept either Visa Credit and Business cards or Visa Debit cards. The Canada variance allows merchants to opt out of accepting Canadian-issued Visa Debit or Visa Credit but still requires merchants to accept all Visa cards issued outside Canada.
customers to make more informed choices about which payment methods to use, should therefore also be considered.