General Court of the European Union
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Press and Information

Judgment in Case T-461/07
Visa Europe and Visa International Service v Commission

The General Court upholds the fine of €10.2 million imposed on Visa for its refusal to admit Morgan Stanley to membership of its network

By decision of 3 October 2007[1] the Commission imposed a fine of €10.2 million on Visa International and Visa Europe, companies which manage and coordinate the Visa international payment card network, for their anti-competitive conduct in the 'acquiring' market, namely that for the provision, to merchants, of services enabling them to accept credit card and deferred debit charge card transactions.

The conduct at issue involved the refusal, between March 2000 and September 2006, to accept the European subsidiary of Morgan Stanley to Visa International membership and then to Visa Europe membership in their 'European Union' region, on the ground that Morgan Stanley then owned the Discover Card network, considered to be a competitor of the Visa network.

In September 2006 agreement was reached between Morgan Stanley and Visa Europe, recognising Morgan Stanley as a member of the network. Consequently, Morgan Stanley withdrew the complaint it had made to the Commission. Although the infringement had ended, the Commission decided to fine Visa International and Visa Europe given that Morgan Stanley had been excluded from the UK acquiring market for six and a half years.

According to the Commission, the effect of the conduct at issue was to prevent a potential competitor from entering a market marked by a high degree of concentration. The Commission relied in particular on the fact that the refusal to admit Morgan Stanley not only prevented it from providing services for the acceptance of Visa cards but also excluded it from transactions effected using MasterCard cards, since merchants prefer to conclude a single contract covering all their transactions.

Thereafter, Visa International and Visa Europe brought an action before the General Court for the annulment of the Commission's decision and, alternatively, cancellation or reduction of the fine.

First, in order to show that their refusal to admit Morgan Stanley to membership of the network did not have the effect of excluding it from the acquiring market, Visa International and Visa Europe claimed that Morgan Stanley could have entered that market by concluding a 'fronting arrangement' with a Visa member financial institution, capable of acting as an interface between the network and Morgan Stanley.

The General Court states that **entering into such an arrangement is one factor of the economic and legal context which should have been taken into account in the event that it represented a real concrete possibility for Morgan Stanley to enter the market concerned and compete with established undertakings**. However, in the circumstances of this case, the General Court considers that the Commission could justifiably reject such a possibility given, in particular, the difficulty Morgan Stanley would have had in finding a fronting partner.

[1] Commission Decision C (2007) 4471 final of 3 October 2007 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (COMP/D1/37860 – Morgan Stanley/Visa International and Visa Europe)

Next, the General Court rejects the argument of Visa International and Visa Europe that the Commission underestimated the degree of competition actually existing in the acquiring market.

First, the General Court states that to accept such an argument would amount to making the analysis of the effects of the conduct at issue on potential competition dependent on the examination of the level of competition currently existing in the market in question, which is incompatible with case-law which requires that the examination of conditions of competition in a given market be based not only on the existing competition between undertakings already present in the market in question, but also on potential competition.

Secondly, the General Court states that the acquiring market was, at the material time, characterised by a high degree of concentration and there was a trend to consolidation, since large banks and processing companies tended to take over the business of smaller acquirers who wanted to leave that market. In that context, **the Commission could justifiably take the view that the entry of a new player would have created scope for further competition**.

Lastly, consideration of whether the description of Morgan Stanley as a potential competitor was well founded gave the General Court the opportunity to restate the criteria relevant to determining that matter. While the intention of an undertaking to enter the market concerned may be a relevant consideration**, the essential factor on which such a description must be based is its ability to enter that market**. In this case, the General Court concludes that since Morgan Stanley's ability to enter the market in question was not challenged and the hypothesis that Morgan Stanley might enter the market in question was not merely theoretical, the Commission did not err in law by describing Morgan Stanley as a potential competitor.

The General Court also rejects all the other arguments relied on by Visa International and Visa Europe. Consequently, the fine of €10.2 million imposed on the companies is upheld.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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