Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Swiss Confederation

Wettbewerbskommission WEKO
Commission de la concurrence COMCO
Commissione della concorrenza COMCO
Competition Commission COMCO

Translation of the Decision of the Competition Commission from 25. January 2010

concerning

preliminary injunctions

in the case of

the investigation under Article 27 of the Federal Act on Cartels and Other Restraints of Competition (Cartels Act [ACart]; SR 251)

relating to

22-0389: Credit Cards-DMIF II

22/2009/03304/COO.2101.111.5.106655

History

On the 5th of December 2005, the Competition Commission (COMCO) concluded its investigation under Article 27 ACart[1] in the case of "Credit Cards – Interchange Fees".

The subject matter of the investigation was the domestic multilateral interchange fee (DMIF) of credit cards. The DMIF is a fee on national transactions with Visa and MasterCard credit cards, which the acquirer (a company that enters into contracts with merchants and service providers to accept credit card as a method of payment) has to pay to the issuer (a company that issues credit cards to end consumers and charges credit card transactions to the accounts of the card holders) for certain issuing services. The DMIF in Switzerland is fixed multilaterally by two bodies, the Issuer/Acquirer Forum Visa (IAFV) and the Card Committee MasterCard (CC). Due to the regulations set forth by Visa and MasterCard, the DMIF fixed by these bodies are binding for all the acquirers and issuers who operate within Switzerland.

The fixing of the DMIF in the credit card bodies was seen by the Competition Commission as a price-fixing agreement between the issuers and acquirers that led to a considerable impairment of market competition in Switzerland. Furthermore the Commission came to the conclusion that the original system of fixing the DMIF had disadvantages that couldn't be outweighed by the advantage of efficiency granted by the multilateral negotiations to fix the DMIF. The Competition Commission therefore requested that a system be found that eliminated the negative effects of the multilateral fixing of the DMIF but also simultaneously kept the advantages of such a procedure. All concerned parties thereupon signed the Amicable Settlement from the 29th of March 2005, which set out to establish a method to fix the DMIF while being in accordance with the Cartels Act of Switzerland.

The Amicable Settlement (EVR I) is made up of four components. (1) an objectified, competition-oriented and cost-based method to fix the DMIF; (2) the abolition of the non-discrimination rule (NDR); (3) disclosure of the sectoral- and transaction-specific DMIF to merchants and (4) the prohibition of the exchange of data within the card committees.

The core element of the Amicable Settlement I was the objectified and competition-oriented method to fix the DMIF. The DMIF was to be bound to the issuer-specific network-costs.

The Amicable Settlement was approved by the Competition Commission on the 5th of December 2005 and was limited to a time period of four years. This approval expired on the 1st of October 2010.

Due to the changes in the structure of network costs and the European development regarding the regulation of Interchange Fees, the Secretariat of the Competition Commission (the Secretariat) decided on the 15th of July 2010 to open a new investigation in terms of Art. 27 ACart to reassess the consequences of the Domestic Multilateral Interchange Fees (DMIF) of credit cards.

The aim of the current investigation is to examine if the considerations and results of the decision from the 5th of December 2005 is still applicable, whether the objectives of the Amicable Agreement I were able to be achieved and whether the methods of fixing the DMIF should be kept as it is or adjusted to better fit the current market situation.

[1] Federal Act on Cartels and Other Restraints of Competition (Cartels Act[ACart]; SR 251)

Findings of the Competition Commission regarding preliminary injunctions

1. Substantive requirements for issuing a preliminary injunction

The issuing of a preliminary injunction is meant to safeguard the effectiveness of a pending final ruling. The cumulative requirements for the issuing of a preliminary injunction are (1) a substantial likelihood of success on the merits of the case, (2) a threat of irreparable damage, (3) a qualified need for urgency and (4) proportionality of the decree. The fulfillment of the mentioned requirements don't need to be proved, it is enough when it seems credible all requirements are met.

2. Likelihood of success

In the case at hand, the preliminary injunctions are primarily of a securing nature. The aim of the preliminary injunction at hand is the continuation of the method for fixing the DMIF (objectified, competition-oriented and cost-based method). The status quo is to be more or less continued while a few adjustments to the original terms have been made. The preliminary injunction will implement those adjustments that appear essential due to a reevaluation of the EVR I. The pending final ruling will examine if these adjustments have proven to be enough or if another solution or alternatively more adjustments need to be made.

The likelihood of success of the preliminary injunction can be seen as favourable as a decision regarding this case already exists. On the 5th of December 2005, the Competition Commission came to the conclusion that the fixing of the DMIF was a horizontal price-fixing agreement as per Article 5 para. 3 lit. a ACart, that considerably impaired competition in the Swiss market. On the basis of the data supplied by the effects analysis carried out in the new investigation, the previous decree as precedence and the fact that there has been no change to the elements which led the Competition Commission to decide that the fixing of the DMIF in 2005 was a price-fixing agreement, it is plausible that there is presently still a price-fixing agreement that can be considered to have a considerable effect on the acquirer market as the DMIF accounts for 70-80% of the merchant service charge (MSC). The DMIF is also important in the issuer market as it is mandatory for everyone, including new market participants and accounts for a sizable portion of issuer revenue.

3. Justification due to reasons of efficiency

   a. The evaluation of the reasons of efficiency in the Decision by the Competition Commission from the 5th of December 2005

   In the decision from the 5th of December 2005, the Competition Commission determined that the original form for fixing the DMIF couldn't be justified due to reasons of efficiency even though there were indications that a multilateral approach to determining the fees had certain advantages (lower transaction costs, avoiding hold-up problems, lower market entrance barriers). Because of these considerations the Competition Commission decided that the fixing of the DMIF could be justified – as an exception - if a system could be found that compensated for the negative effects of multilateral negotiations while simultaneously preserving its advantages. This was to be achieved by the first Amicable Settlement (EVR I).

   In the summer of 2008 the Secretariat undertook an effects analysis of the "Credit Cards" decision. One of the decisive elements for the evaluation of the EVR I was the development of network costs because thus the effectiveness of the competition-based mechanism introduced by the EVR I could be measured. On the 1st of May 2009, the recalculation of network costs resulted in a new dDIF of 1.282%. This meant that since the first calculation of the dDIF in 2004 within the framework of the "Credit Card" decision the dDIF had gone down marginally from 1.313% to 1.282%. At the same time, the Secretariat ob-

served that there were large differences in the development of costs in the case of the issuers. On the one hand there were considerable to high escalations of the absolute network- costs of individual issuers, which in part lead to a considerable increase of the ISDIF. On the other hand there were limited to strong declines of the ISDIF. Due to the diverging developments of the ISDIF and the fact that the dDIF was only levied once since the EVR I came into effect, it isn't possible to make a final measurement on how well the intended competition-oriented mechanism has worked so far.

b. The second Amicable Settlement (EVR II)

The EVR II is primarily a continuation of the EVR I. Three out of the four elements of the EVR I have been carried over without change (prohibition of non discrimination clauses, disclosure of the sectoral- and transaction-specific DMIF to merchants and the prohibition of the exchange of data within the card committees). In addition the cost-based and competition oriented procedure which was the core of the EVR I has to a large extent been left unchanged.

The adjustments to the EVR I are as follows:

- Changes to the weighting of the ISDIF of individual issuers in regards to the calculation of the dDIF. In the current formula the highest and lowest ISDIF are counted once while the rest are counted threefold. In the EVR II the most inefficient issuer (highest ISDIF) will not be incorporated into the calculation of costs. The two most efficient issuers (lowest two ISDIF) will taken into account more. The values of each of the remaining issuers will be counted once. This new calculation method will prevent the excessive impact to the overall result by an individual anomalous ISDIF value as was observed to be the case when using the current formula as stipulated by the EVR I. Cancelling the highest outlying ISDIF value will also minimize the incentive for issuers to strategically allocate costs and the cost positions within the cost grid so that the ISDIF value during a survey year is at an especially high level. The increased emphasis on the companies with the lowest ISDIF is intended to create an incentive to invest in additional cost reductions. At the same time, the incentives for cost reduction induced by the cost-based approach of the EVR I is left unchanged.

  All parties affected by the new measure are of the opinion that it is an attempt to force them into offering services below production costs and that the Swiss cartel laws don't allow this. It is true that the Cartels Act doesn't include any provisions that could be used to force companies into offering products or services at below production cost. However it is false to deduce that this means that the DMIF has to be constructed in such a way that all issuers can cover all their costs at all times. That wasn't the case under the EVR I and such an approach doesn't conform to the theory of "yardstick competition" which is based on the premise that the calculation formula will pressure companies that have a higher ISDIF than the dDIF into implementing measures for cost efficiency. The DMIF isn't meant to serve as a measure for preserving existing business structures wherein a certain amount of revenue is guaranteed. Rather the competition-oriented approach is intended to usher in a similar pressure to efficiency as is to be found within a functioning and free market. Finally it has to be pointed out that the DMIF in the credit card sector is one of many sources of income for issuers. Thus they have the ability to compensate the reductions of the DMIF through the use of other income streams, through improvements of cost efficiency or through entering into bilateral agreements. Therefore the lowering of the DMIF doesn't "force" any issuer into offering services under production cost. In the worst case scenario, the issuer could cover its costs by charging the cardholder.

  The adjustments to the weighting of the ISDIF of the individual issuers will result in a reduction of the dDIF to 1.058% for the year 2010. This appears to be justified in the

face of the results of the effects analysis that indicate that the level of the DMIF in Switzerland is still too high when compared with the DMIFs in other Western European countries. As already mentioned, all involved parties (issuers and acquirers) are against this change.

- The dDIF will be calculated each year based on the cost figures of the previous year as opposed to every three years as required in the EVR I.

4. Forecast of the final decision in view of the justifications due to reasons of efficiency

The decision "Credit Cards" from the 5th of December 2005 observed that reasons of efficiency could only be used to justify the DMIF if a system was established whereby the disadvantages of the DMIF (e.g. rent seeking) could be avoided. It appears to be very probable that any further fixing the DMIF will incorporate such a system. It is also improbable that the final ruling in this case will do without such a method as the risks of letting the acquirers and issuers fix the DMIF at their own discretion (high fees, rent seeking) still exist.

The effects analysis has provided clues that the mechanisms of the EVR I (cost- and competition-oriented mechanisms) could be such a system. The question whether this system is the best one cannot at the moment be answered but it is credible that the measures of the EVR II is an improvement over those from the EVR I. If the cost-based and competition-oriented model is incorporated in the final ruling then there is a high likelihood of success for the adjustments made within the EVR II.

5. Conclusion regarding the likelihood of success of the EVR II

As already determined in the decision "Credit Cards" from the 5th of December 2005, the DMIF was a serious price-fixing agreement with considerable impact for the Swiss market. It is credible that this estimation is still valid today. Furthermore it appears to be very probable that the pending final ruling – provided that a justification due to reasons of efficiency is still allowed – will require a system that regulates the DMIF with an eye towards efficiency. With the background of the experiences collected in this particular business field and due to the adjustments to the original Amicable Settlement, the new Amicable Settlement (EVR II) seems to be the best available model and a realistic option for the final ruling. It remains open whether there are further optimizations that can be made to the system or whether there are better models for fixing the DMIF. The likelihood of success is hereby sufficiently high enough to continue with the use of the cost-based and competition-oriented approach as undertaken in the improvements made to the EVR II.

6. Threat of irreparable damage

Regarding the question of a threat of irreparable damage, it has to be examined whether the Competition Commission considers it plausible whether effective competition within the Swiss market will suffer irreparable damage if it waits on a final ruling instead of granting a preliminary injunction. According to legal doctrine, it's enough when legally protected rights are threatened with considerable negative impact through a certain measure. In the context of cartel laws this would be a threat of a serious distortion of effective market competition due to a price-fixing agreement. There has to be a causal connection between the negative impact and the restriction of competition.

Waiting on a final ruling on this issue could threaten effective competition within the Swiss market due to the following reasons:

- According to the "Credit Card" ruling, the system of the EVR I led to the justification of the DMIF on grounds of efficiency. Without such a system the DMIF represents a price-fixing agreement. Such agreements belong to the category of competition violations which are particularly harmful for consumers, companies and the economy and due to this, they are statutorily presumed to eliminate effective market competition un-

der Article 5 para. 3 ACart and can be sanctioned directly under Article 49a Acart. Therefore a price-fixing agreement that cannot be justified due to reasons of efficiency constitutes a serious distortion of effective market competition. The negative impact of a price-fixing agreement such as the DMIF can only be eliminated if the EVR I is replaced by a system such as the EVR II which is legally binding. If not, the issuers could use the DMIF to engage in so called “rent seeking” measures which will lead to excessive interchange fees and in turn to excessive merchant service charges. Recovering these fees through the use of civil courts isn’t a realistic option because of the atomistic market and merchant structure and the limited significance of the possible damages to the individual merchants. Letting the EVR I continue unchanged isn’t a realistic option either since it lacks incentives for cost efficiency.

- Not clarifying the legal ramifications of the DMIF through the use of preliminary injunctions puts the issuers and acquirers at risk of being sanctioned heavily under Article 49a ACart if they continue using it due to the high revenues obtained in the relevant markets.

- Summing up, it can be said without the preliminary injunctions, there is danger of irreparable damage to effective market competition.

7. Urgency

It is assumed that a matter is urgent when irreparable damage is to set in before a final ruling can be made. In this case, the damage will occur as of the 1st of February 2010. It is impossible for the investigation which was opened on the 15th of July 2009 to be concluded before that date since the previous investigation showed that such cases have many complex problems that need to be solved and can lead to laborious procedures. The developments regarding the “tourist test” in the EU (the EU has not yet come to a conclusion regarding this matter) also have to be factored into any future ruling. Lengthy proceedings are therefore to be expected. In addition the reductions foreseen in the EVR II for the year 2010 need to be implemented within the designated time frame so that the interchange fee can reach a level at which a justification due to reasons of efficiency seem plausible. It is therefore indeed urgent that the issue of the DMIF be temporarily settled through the use of preliminary injunctions.

8. Proportionality

The EVR II which is implemented by the preliminary injunction primarily safeguards the status quo as set forth in the EVR I. Insofar as the EVR II is to be seen as a continuation of the EVR I, it is without question that the measures are appropriate, necessary and proportional. Regarding the proportionality of the new measures in the EVR II, they are the result of multiple rounds of negotiations with issuers and acquirers wherein there were many compromises and concessions made by all those involved so that a solution could be found that is acceptable to all parties. The terms of the preliminary injunctions are therefore to be seen as proportionate.

9. Final conclusions

Due to the findings above, the Competition Commission concludes that the requirements for the issuing of preliminary injunctions are met.