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Global Credit Card Wars: Litigation, Legislation, or Innovation as a Path to Peace?

BY DANY H. ASSAF AND REBECCA MOSKOWITZ

FROM THE EARLIEST OF TIMES, merchants have sought to sell goods to consumers and consumers have wanted to buy goods from merchants. Of course, as time rolled on and the number of players and volume of marketplace transactions increased, opportunities arose for a variety of market facilitators to bring merchants and consumers together with greater efficiency and reduced transactional risk.

In modern economies, credit card networks, issuers, and acquirers play significant roles as such market facilitators. Their role is primarily to make consumer payment—the critical component of any transaction—more convenient, expand consumer purchasing power by extending credit, and virtually eliminate credit risk as between merchants and consumers. The result is an economy that is larger and a marketplace that is more efficient than it otherwise would be.

Recently, however, merchants worldwide have challenged aspects of their relationship with these facilitators alleging that some of the fees and rules relating to their respective services are unfair and do not reflect the real value to merchants. The stakes are high: by one estimate, Visa, American Express, MasterCard, and Discover facilitated roughly $2.399 trillion in credit and charge card spending in 2013.[1] Consequently, competition authorities, governments, courts, and tribunals around the world, from the United States to South Korea, are grappling with how best to balance the essential market-facilitating role of each player with necessary protections to ensure that the credit card industry functions competitively. A recent decision by the U.S. District Court for the Eastern District of New York in *American Express v. United States* that has yet to determine a remedy, a private action by WalMart, and a precedent-setting class action in Canada indicate that these issues remain unsettled and that complete solutions remain elusive.[2] Unfortunately, despite clearly having a shared interest in the success of the credit card system, relations between the players have become so frayed that one court remarked "the vitriol and poor behavior and feigned hysteria mask complex and difficult issues on which reasonable merchants can and do disagree."[3]

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Industry Background

Players. The credit card system involves five different players: networks, issuers, acquirers, merchants, and cardholders.[4] *Networks* (e.g., Visa and MasterCard) provide credit card payment infrastructure and services for credit, such as authorization, clearance, and settlement of transactions. They do not issue cards, extend credit, or set rates and fees for cardholders. *Issuers*, which are financial institutions (e.g., banks), issue cards, extend credit, and set rates and fees for cardholders.[5] They also provide credit card rewards and benefits and handle the day-to-day management of cardholder accounts.[6] *Acquirers* (e.g., First Data, Moneris, Global Payments, and Chase Paymentech) provide a point-of-sale system to merchants to enable them to process different credit card transactions. The remaining two players are *merchants* (e.g., retailers), who accept credit card payments, and *cardholders* (e.g., consumers), who use their credit cards to pay for goods and services.[7]

Transaction Process. The transaction process begins when a cardholder presents a credit card to the merchant. The merchant uses the point-of-sale terminal to send the transaction details to the acquirer. The acquirer identifies the applicable credit card network for the transaction (e.g., Visa or MasterCard) and forwards the information to the identified network.[8] This network then routes the authorization request to the issuer of the credit card, which approves or declines the transaction based on the cardholder's account information. The issuer then sends its approval or rejection back through the same channels (i.e., through the identified credit card network and then to the acquirer). If approved, the merchant is notified through the point-of-sale system and the transaction is cleared. This process is usually completed in a matter of seconds.[9] Typically, the merchant will receive one deposit from the acquirer for all the electronic payments accepted throughout the day, irrespective of the credit card network or issuer associated with the card.[10]

Credit Card Fees. Merchants pay a *card acceptance fee*, which is a percentage of the purchase amount provided to acquirers to access the credit card network. Part of this fee, the *acquirer service fee*, is kept by the acquirer, which then pays part to the issuer and part to the network. The fee received by the issuer, which is set as a percentage of each transaction and is the largest fee paid in the system, is known as the *interchange fee* and can vary by network type, by merchant type, and by card type (regular, premium, or commercial). The networks, in turn, receive a *network service fee* from both the acquirer and the issuer, which are charged for access rights to the network.

Interchange fees are at the center of the debate about fees in the credit card industry. They have:

> a strong influence on (i) the revenue flows associated with card transactions, (ii) the costs ultimately borne by merchants and cardholders, (iii) the incentives to use and accept debit and credit cards and (iv) the terms on which financial institutions and other providers of payment services can gain access to some card networks.[11]

Interchange fees typically range from 1 to 2.65 percent. The party responsible for setting interchange fees, usually networks,[12] is not the same party that pays those fees—i.e., merchants and/or cardholders. The end users themselves have no bearing or influence on the price-setting process. In Australia, the Reserve Bank (RBA) has argued this is "a distortion of normal market discipline which has implications for efficiency and equity, both of which need to be weighed against potential network benefits."[13] For this reason, the RBA has centrally regulated the rate of interchange fees that can be charged.

Credit Card Network Rules. Networks have rules in place to govern the ways merchants participate in the credit card system. Both case law and regulation highlight five of those rules, of which the *no-surcharge rule* is the most discussed. The no-surcharge rule prohibits merchants from adding a surcharge fee to a transaction to recover the costs (i.e., the card acceptance fees) associated with accepting different types of credit cards or payment methods from the cardholder. Thus, while the fees incurred by merchants vary depending on which credit card or payment type is used by the cardholder, merchants cannot set different prices to match the discrepancy in their costs. The *honor-all-cards rule* requires merchants to accept every type of card associated with a specific network if they choose to accept any of that network's cards. Merchants cannot, for example, accept a basic Visa card and refuse a Visa Gold—even if the latter may cost them more to process. The *no-discrimination rule* (referred to in *Amex* as the anti-steering rule) prohibits merchants from offering incentives or giving preferences to one brand or type of credit card over another.[14] The honor-all-cards rule and the no-discrimination rule prevent merchants from steering cardholders away from higher-cost credit cards. The *multi-lateral interchange fee (MIF) rule* provides for a centrally set MIF rate for the MIF fee which must be paid by an acquirer to an issuer. Finally, the *access rule* restricts those who are permitted to act as an acquirer of credit card transactions.[15]

The Debate-Disquiet Among Friends

Industry debate stems from two components of the credit card system: fees and rules, both imposed on merchants by networks. With respect to credit card fees, merchants have alleged that issuers, in conjunction with networks, have agreed to maintain or increase the interchange fee and that, in setting this fee, they are not subject to any competitive pressure.[16] Merchants have also alleged that credit card network rules, such as the no-discrimination rule, prevent them from steering cardholders away from using higher-cost payment methods and, therefore, stifle any meaningful incentive for networks (and issuers) to compete with respect to card acceptance fees.[17] Put another way, where merchants would otherwise promote or encourage the use of a competing card with lower fees, network rules prohibit this practice—allegedly unlawfully insulating the credit card networks from competition. Although it may be true that credit card processing costs are inevitable, merchants argue this is no reason to disregard competitive elements that would normally result in market-driven pricing.

The networks argue that internal incentives drive them to set interchange fees appropriately, as setting interchange fees too high would result in a loss of participating merchants and consequently participating cardholders, while too low an interchange fee would have the opposite effect, but with the same result.[18] Networks further suggest that, absent interchange fees, the overall usage rate of credit cards would decrease because either: (1) fewer cardholders would use their card due to increased account fees; or (2) the loss in revenue to the networks would result in their recruiting fewer new cardholders.[19] As for the credit card rules, the networks argue that the rules are also intended to balance the system and protect cardholders, particularly from being unnecessarily surcharged for use of their credit cards.

Antitrust Issues

Market Definition and Two-Sided Markets. In assessing the credit card industry, the courts struggle both with how to define markets as well as whether market definition is even necessary. Central to this challenge is that the credit card industry is a two-sided market.[20] In a two-sided market there are two distinct groups (e.g., merchants and cardholders), which interact through a common, multi-sided platform (e.g., networks-issuers-acquirers).[21] Multi-sided platforms need intermediaries to match both parts of the platform in a more efficient way. Intermediaries create value primarily by enabling efficient and direct interactions between the groups.[22]

One of the key elements in a two-sided market is the presence of network effects. There are both same-side and cross-side network effects in a two-sided market. These network effects can occur within a user group or across the platform,

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including that the price charged on one side of the market can affect the value of participation for users on the other side of the market.[23] Network effects "significantly complicate the measurement of any net harm."[24]

Further complicating the process of market definition is the dearth of precedents for guidance on two-sided markets. For example, there was no Canadian jurisprudence dealing with two-sided markets for the Competition Tribunal to consider in its 2013 decision, *Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*.[25] Similarly, in *Visa International Service Association v. Reserve Bank of Australia*, the Federal Court of Australia opined that there is a "scarcity of material which refers to any comprehensive formulation of a methodology to obtain useful economic data in the area of payment systems."[26]

These complications are layered on another more basic question regarding the necessary role market definition should even play in these cases in any event. For example, in *Visa International Service Association*, the court concluded that market definition was not necessary to enable the relevant regulatory body to properly consider competition.[27]

In other cases where market definition was deemed important, there were challenges defining the proper breadth of the relevant product market. For example, there are cases recognizing that the relevant product market should include all forms of cardholder payment methods (such as debit and cash).[28] However, there are also cases that have defined the relevant product market more narrowly.[29] For example, in the United States, the court in *Amex* decided that the relevant product market consisted of general purpose credit and charge card (GPCC) network services, excluding debit network services.[30] Here, the court chose to follow the conclusions in *United States v. Visa*,[31] where it was found that debit cards were not sufficiently reasonably interchangeable with credit card network services to be included as one product market.[32] In coming to this conclusion, the court highlighted that in choosing a market definition, "the court must account for the two-sided features of the credit card industry in its market definition inquiry, as well as its antitrust analysis . . . [but] that rote application of the standard mechanical market definition exercises—which were developed for single-sided markets—risks significantly overstating or understating . . . the relevant market."[33]

In addition to the importance of addressing two-sided markets in coming to a market definition, the court also recognized that the relevant product market in an industry as dynamic as the credit card industry will not always be informed by precedent and, therefore, encouraged future courts to "remain sensitive" to the current market conditions when considering the relevant market.[34]

Market Efficiency and Competition. All players benefit from an efficient industry, and efficiencies are at the forefront of the global discussion of what steps, if any, should be taken to regulate the credit card industry.[35] Merchants derive greater benefit from accepting credit cards the more cardholders choose to pay by credit, and credit cards have more value for cardholders when more merchants accept them.[36] Intervention that throws this equation out of balance can cause inefficiencies that negatively affect all the parties in the system. For example, if regulation permits merchants to apply surcharges to purchases, cardholders may be "held up" at the cash register, and expectations about the ubiquity of credit card acceptance may be undermined, leading to decreased credit card use and merchant sales volume.[37] Decreased credit card use, in turn, undermines the original efficiency created by facilitators extending credit, protecting against credit risk, and providing clearance and settlement services through one integrated system.

Efficiency in a Two-Sided Market—The Determination of Procompetitive v. Anticompetitive. Determining efficiencies—and, therefore, what enhances competition—is further complicated by the two-sided market paradigm. Analysis of efficiency in a two-sided market is more complex than in a one-sided market,[38] especially because of the difficulty of quantifying the harm. What initially appears harmful could be mutually beneficial. There are actions that may, prima facie, look to be anticompetitive but that create such efficiency in the market that they become procompetitive. Put simply, although the practices may be theoretically anticompetitive, the net benefit provided may render the negative consequences moot. In recognition of this point, the Tribunal noted in *Visa Canada Corporation* that "conduct that is procompetitive under one set of market circumstances can be anticompetitive under another."[39]

Fees. Determining whether something is truly anticompetitive is especially challenging with respect to interchange fees. As previously discussed, these fees are the largest in the system; the party that sets them is not the same as the party that pays them, and, therefore, the end users have no influence on the process by which they are set. Yet, despite these factors, it is not clear that interchange fees are necessarily anticompetitive, as discussed by the British Columbia Supreme Court in *Watson v Bank of America Corporation*:[40]

> In a typical price-fixing case, where a one-sided market exists, a price increase is inherently harmful to consumers as the product or service they receive in return for that price remains unchanged. . . . [T]hat rule does not apply directly to two-sided markets. It is conceivable that an increase in the

> rate of a two-sided market subsidy, like Interchange, could actually benefit both sides of the market through network effects. For example, it may be that an increase in cardholder rewards programs, funded by Interchange Fees, causes more consumers to acquire a credit card and thereby causes those consumers to make purchases from merchants they might not otherwise have made.[41]

To further make the point about the difficulty of determining the true competitive impact of interchange fees, one need only look at the analyses conducted in Europe. In 2002, the Commission first concluded that MIF agreements are not restrictions of competition by object, even though they did distort competition.[42] The Commission viewed the agreements as valuable for stability and efficiency, and, therefore, not anticompetitive. More recently, however, first in 2012, and then affirmed in 2014, the Commission found that the procompetitive aspects did not outweigh the impact of the restraints on competition.[43]

Courts in the United States have also addressed this discussion. In *National Bancard Corp. v. Visa U.S.A., Inc.*,[44] a federal court in Florida concluded that interchange fees were procompetitive because they "[permit] the public to utilize the service with such benefits as it may yield."[45] More recently, in the 2013 settlement of an eight-year class action against major credit card networks, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*,[46] the U.S. District Court for the Eastern District of New York highlighted that default interchange fees "undeniably have significant procompetitive effects, and they lay at the heart of Visa's and MasterCard's efforts to build the successful networks they now have."[47]

Further, academic literature suggests that credit card networks' current fee structures maximize transaction volumes, and that shifting the burden of fees from merchants to cardholders, who are not equally responsive to price changes in the credit card industry, would decrease sales volume and profits.[48] Thus, permitting networks to set fees that apply to everyone, rather than requiring each party to negotiate individually, actually creates efficiency in the system.

Rules. The credit card rules have also featured in the discussion. In *Amex*, the court highlighted that the "most searching form" of antitrust analysis (i.e., rule of reason) was required to determine whether American Express's no-discrimination rule should, in the end, be viewed as anticompetitive.[49] In so doing, the court recognized that an antitrust analysis, especially in an industry as complex as the credit card industry,[50] needs to ensure that the effect is an "unreasonable restraint"[51] which cannot be justified by procompetitive effects.[52]

American Express's arguments that the no-discrimination rule was reasonably necessary to: (a) drive competition in the network services industry, and (b) prevent merchants from "free-riding" on its investments in merchant and cardholder value propositions,[53] were not accepted by the court as enough to justify the impact of the no-discrimination rule.[54] However, it remains the case that acquirers maintain networks supported by extensive infrastructure that interfaces with over a dozen different credit card networks and numerous payment systems and technologies that support private label, gift, and loyalty cards. In turn, credit card networks supply authorization, clearance, and settlement services that facilitate transactions which would be difficult and inefficient if primarily left to merchants and cardholders. As such, it is essential to look at the practical consequences of credit card fees and rules on the market, rather than just considering them at face value.

In some sense, a rough analogy may be drawn back to the logic of *Broadcast Music, Inc. v. CBS*, where the U.S. Supreme Court held that blanket licenses to copyrighted material are not "naked restrain[ts] of trade with no purpose except stifling of competition," but accompany the integration of sales, monitoring, and enforcement which would be difficult and inefficient if left to individual users and copyright owners.[55]

Different Minds, Different Conclusions. Experts disagree about how best to approach efficiency when regulating the credit card industry, as discussed by the court in *Visa International Service Assocation*:

> [T]he promotion of efficiency of the payments system and promoting competition in the market for payment services, consistent with overall stability of the financial system, are matters in respect of which different minds can reach different conclusions. . . . There is no particular method by which the general body or a majority of economists would measure the concepts of competition and efficiency in the context of the regulation of credit card schemes.[56]

This discord extends to the most basic economic foundation underlying allegations of anticompetitive behavior in the credit card industry, such as an accepted method of quantifying economic data relating to payment systems.[57]

Finding a Middle Ground—A Move Toward Transparency and Away from Extremism. An argument can be made that efficiency in the credit card industry can be best derived by promoting transparency, rather than imposing radical changes on the structure of the industry. For example, a more transparent system would permit cardholders to be directly informed of what it costs the merchant to accept a particular card and of any surcharge the merchant may charge to cover that cost. The cardholder would retain the option to use a premium card for which they will have to pay a surcharge; and, if the rewards provided to the cardholder for using that card are sufficient to offset the cost, there is every reason to believe they will choose to do so.[58] Consequently, the logical result of allowing surcharging, as noted by the Tribunal in *Visa Canada Corporation*, is that "either surcharging or the threat of it would steer or threaten to steer credit card network transaction volume to other means of payment and this would either constrain increases or bring about reductions in the interchange fees and thus to the [a]cquirer [f]ees."[59] The hoped-for result of permitting surcharges, therefore, would be a more efficient market in which inter-

change fees were set by truly competitive forces. Merchants' overriding objective in pursuing complaints against networks is not to lower fees per se, but to ensure that those fees are set by competitive negotiations—an objective that generally aligns with competition policy.[60]

There is agreement among all parties that there are costs to operating credit card schemes and those costs will need to be borne by some party, or parties, in some form. Given this starting point, networks commonly make the argument that, if the costs are not going to be carried by the merchants, they will inevitably be passed on directly to cardholders in the form of surcharges. While merchants do not deny this possibility, their argument, as reflected in *In re Payment Card*, is that "the goal [of surcharging] is to incentivize the networks to compete for the merchants' credit card volume through lower fees of all kinds, including interchange fees, and to allow merchants to recoup their costs when their efforts to steer customers to lower-cost means of payment do not succeed."[61]

In countries where surcharging is now permitted and common practice, the key development was not that the costs of running the system dropped, but that those costs became transparent all the way down the chain to the cardholder level. The importance of transparency is demonstrated by the court in *In re Payment Card*:

> Specifically, although the settlement either obtains or locks in place an array of rules changes, at its heart is an important step forward: a rule change that will permit merchants to surcharge credit cards at both the brand level (i.e., Visa or MasterCard) and at the product level (i.e., different kinds of cards, such as consumer cards, commercial cards, premium cards etc.) subject to acceptance cost and limits imposed by other networks' cards. *For the first time, merchants will be empowered to expose hidden bank fees to their customers, educate them about those fees, and use that information to influence their customers' choices of payment methods.* In short, the settlement gives merchants an opportunity at the point of sale to stimulate the sort of network price competition that can exert downward pressure on interchange fees they seek.[62]

It is worth noting however that introducing surcharging into the Australian market has not been without issue and is a perfect example of the slippery slope encountered when trying to regulate complex pricing relationships. Courts have found that merchants are in many cases surcharging at rates grossly exceeding their actual cost of card acceptance. For example, the General Court of the Seventh Chamber in *MasterCard v. European Commission* noted that:

> [W]ith regard to the claim that the situation of cardholders in Australia worsened after the regulation of interchange fees, it is certainly true that the evidence produced by the applicants shows that the reduction in interchange fees led to an increase in the costs charged to cardholders or to the reduction of certain benefits.[63]

Eventually, as noted by the court in *Watson*, the RBA decided to impose a middle-ground solution, permitting Visa and MasterCard to limit the surcharging allowed by merchants to a level reasonably related to the cost of acceptance.[64]

Australia's experience is a cautionary tale for those following the implications of the *Amex* decision, where the court noted that it "expects that merchants will pass along some amount of the savings associated with declining swipe fees to their customers in the form of lower retail prices."[65] This is especially true given that the court acknowledged that price competition and other desired procompetitive effects had not manifested in the four years since Visa and MasterCard agreed to abandon their no-discrimination rules.[66] It would seem that there continues to be no guarantee that the removal of the no-discrimination rule will result in any real benefit being passed through to cardholders.

An Alternative Solution. One unavoidable reality about the current state of the credit card system is that, until now, no alternative has been proposed that would see interchange fees eliminated. This reality forms a significant part of any analysis of fees in the credit card industry. When considering the Visa MIF, the Commission in *Commission Decision of 24 July 2002* stated: "[N]o alternative, less restrictive than the revised Visa MIF, exists at present, which would achieve the advantages and benefits to consumers . . . while being practically feasible in the context of the Visa international four-party card payment scheme."[67]

Arguably the most effective response to date has been allowing interchange fees to remain, but regulating their level, which is always fraught with its own challenges and market-distorting risks.

Judicial and Legislative Intervention

Judicial Intervention. In some cases, courts themselves have expressed doubt about their ability to offer a viable solution, even as courts continue to be used as an avenue to address complaints. A recent example includes the *Amex* decision, where it was stated:

> The court recognizes that it does not possess the experience or expertise necessary to advise, much less dictate to, the firms in this industry how they must conduct their affairs as going concerns. For that reason, the court has repeatedly urged the parties in this case to negotiate a mutually agreeable settlement that appropriately balances American Express's legitimate business interests with the public's interest in robust interbrand competition. However, the parties having failed to do so, the court is left with no alternative but to discharge its duty by deciding the question before it.[68]

Further, in *Visa Canada Corporation*, the Tribunal concluded that even if the antitrust offense alleged had been established (which it was not), it would have exercised its discretion not to issue the order sought because it believed that the proper solution to the applicant's legitimate concerns was regulatory.[69] Relying on evidence from other jurisdictions, the Tribunal found that issuing an order would risk "replacing one set of distorted incentives by another."[70] In reaching this conclusion, the Tribunal emphasized the pitfalls of the "blunt instrument" of competition law as a means of

achieving balance in the credit card industry, commenting that tribunals are not institutionally equipped to provide remedies for "technical hitches, unforeseen consequences, [and the] need for ongoing adjustment and stakeholder consultation" which would likely be required in any enforcement measure in such a complex and interconnected industry.[71]

Despite the Tribunal's sentiments, the British Columbia Supreme Court in *Watson* recently certified a class action where the plaintiffs pleaded that Canada's major banks and credit card networks, through interchange fees and merchant rules, engaged in civil conspiracies and unlawfully interfered with the economic interests of the proposed class members.[72]

Sentiments like those of the Tribunal were expressed in another seminal U.S. decision, *In re Payment Card*, where relief was sought in the form of interchange fee regulation, among other proposals. The U.S. district court felt that the plaintiffs' complaints were beyond its reach to resolve and stated:

> [S]ome of those issues stem from the fact that a lawsuit is an imperfect vehicle for addressing the wrongs the plaintiffs allege in their complaint. For example, there are forms of relief many objectors seek, such as the regulation of interchange fees, that this Court could not order even if the plaintiffs obtained a complete victory on the merits. In addition, there are features of the industry landscape, such as other credit card issuers with whom the defendants compete, and laws in some states prohibit merchants from surcharging the use of credit cards, that are beyond reach of this case but will undermine (at least in the near term) the efficacy of the agreed-upon-relief.[73]

In re Payment Card eventually resulted in a settlement, the terms of which included a multi-billion dollar monetary payment and permission for merchants to surcharge transactions in order to recover their fees.[74] However, some merchants, including Target, Walmart, and Home Depot, objected to the terms of the settlement on the basis that it: (1) left open the possibility that credit card networks could raise fees in the future; (2) granted a sweeping release to the named credit card networks that would shield them from all future merchant claims, including antitrust claims; and (3) did not have the practical effect desired for the surcharge rules.[75] In fact, approximately 8,000 of the 12 million eligible merchants[76] were so displeased with the settlement that they opted out.

In academic literature from the United States, Fumiko Hayashi and Jesse Maniff discuss the limits of the court system to effectively impose a solution to the challenges miring the credit card industry, commenting that court decisions or settlement agreements only result in a limited set of conditions for the specific parties involved without setting a standard for the future and serve to fragment the market due to jurisdictional reach in an environment where parties are calling for a more level playing field.[77]

Nonetheless, the courts continue to be used as an avenue in the United States for disgruntled merchants in the credit card industry. For example, Walmart has filed a suit in the Arkansas federal court against Visa U.S.A. alleging that the latter conspired with banks to fix the interchange fees merchants pay for Visa transactions and requesting more than $5 billion in damages.[78] Google also filed a lawsuit with similar allegations in December 2014 in a Texas federal court.[79]

In addition to doubts about whether courts are even the right forum to "fix" the credit card industry, categorizing the behavior at issue under the existing antitrust laws has been difficult. In Canada, for example, a lack of statutory authority was fatal to the Commissioner's case in *Visa Corporation Canada*. The Commissioner challenged the merchant rules on a theory of resale price maintenance that their effect was to influence upward or to discourage the reduction of merchant fees contrary to the *Competition Act*.[80] However, the Tribunal found that the statutory price maintenance requirement that a product actually comes for resale to a customer had not been established because credit card network services provided by Visa and MasterCard were not subsequently "resold" by acquirers to merchants.[81] The same problem arose in the United States in *Kendall v. Visa U.S.A. Inc.*, with the U.S. Court of Appeals for the Ninth Circuit noting 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."[82]

Due to the reliance on, and growing disappointment with, the judicial route as a solution to the challenges in the credit card industry, numerous countries are shifting towards more regulatory, policy-driven reform.[83] As of 2014, the Federal Reserve Bank of Kansas estimated there were 38 countries where public authorities had intervened or investigated interchange or merchant service fees and approximately 36 which intervened or investigated no-surcharge or no-discrimination rules since 1990.[84] In addition to the countries discussed in this article, which include countries in the European Union, these countries are Argentina, Brazil, Chile, China, Colombia, Israel, Mexico, Norway, Panama, Switzerland, Turkey, and Venezuela.[85]

Legislative Intervention. While seemingly a popular solution, legislation has not been able to completely remedy the complex challenges plaguing the credit card industry. Australia, the United Kingdom, and the United States offer examples of the challenges associated with legislative intervention. As mentioned above, in 2003, the RBA imposed a standard requiring the repeal of the Visa and MasterCard no-surcharge rules in order to improve efficiency and competition in the payment system.[86] After discovering that Australian merchants were surcharging "well in excess" of their cost of accepting credit cards, the Payments System Board changed the surcharging standards to require card schemes to limit surcharges to "the reasonable cost of acceptance."[87]

Although the rate of excessive surcharging has declined since then, things are still far from perfect. In March 2014, MasterCard released a study that found Australian cardholders had paid $800 million in additional credit card sur-

charges over the previous year.[88] The Australian Government urged consumer agencies to actively monitor credit card provider practices for hidden fees and charges and develop protocols to address cardholder concerns over surcharges.[89] Similarly, in the United Kingdom, the government legislated to allow surcharging but had to subsequently propose legislation to prohibit surcharging beyond the reasonable cost of credit card acceptance.[90]

The United States faced similar challenges when imposing caps on debit card interchange fees through the Durbin Amendment to the Dodd-Frank Act.[91] Merchants, including Walmart and 7-Eleven, challenged the Federal Reserve Board's (FRB) interpretation of the Durbin Amendment, claiming that FRB's interpretation resulted in higher than intended fee caps.[92] This challenge, which initially was affirmed at the district court level, was ultimately denied on appeal, where the interpretation was upheld, and again at the level of the U.S. Supreme Court, which declined to hear the challenge on January 20, 2015.[93] Commentary on the Supreme Court's refusal to hear the challenge points out that "work on swipe fees is not done."[94]

Notwithstanding these difficulties, legislative intervention continues. For example, in South Korea, new rules were introduced in 2012 to limit the fees paid by small and midsized merchants.[95] Similarly, in 2012, India introduced regulation through the Reserve Bank of India, which similarly capped debit card transaction fees to merchants.[96] More recently, in Europe, the European Parliament voted in favor of proposals to impose caps on interchange fees and have reached an agreement on the details of the regulation, capping credit card transaction fees at 0.3 percent and debit card transaction fees at 0.2 percent.[97]

Also, in Canada, in September 2014, the Canadian government commented that they would work with stakeholders to promote "fair and transparent practices" in the credit card industry, which will help lower card acceptance fees for merchants and also encourage merchants to reduce prices for cardholders. The government wanted networks and issuers to curb fees by about 10 percent and to implement this change, and any other necessary changes, within "months, not years."[98] Subsequently, in November 2014, it was announced that Visa and MasterCard voluntarily committed to lowering their credit card transaction fees by 10 percent over a period of five years beginning in April 2015.[99] Merchants expressed doubt about the tangible benefits of this voluntary arrangement, but the Canadian government appears committed to ensuring the promised benefits accrue.[100] A similar compromise with respect to network rules was entered into by Visa and MasterCard in connection with the *Amex* suit. Both networks agreed to enter into consent decrees with the government to remove or change many of their challenged credit card rules.[101]

Other examples include: (i) the Netherlands where MasterCard promised the Netherlands Authority for Consumers and Markets to reduce its interchange fee beginning in 2014 and gradually lowering it into 2016;[102] (ii) Poland which capped their payment card interchange fees in 2014 to a maximum of 0.5 percent;[103] and (iii) South Africa which implemented interchange fee regulations through the South African Reserve Bank that came into effect on January 1, 2015.[104]

Intervention through legislation appears to be viewed as a viable solution—or at least an important element of a complete solution. However, as discussed above, judicial or legislative intervention has not effectively resolved the issues raised by players and many remain deeply dissatisfied.

In Search of a Happy Medium. In all of the above scenarios one common theme emerges: for judicial or regulatory intervention to impose a solution, it is not enough to remove rules or impose regulations in the abstract. While imposing a standard has proven capable of creating harmony in some arenas,[105] any government considering regulating in this area would be well served to bear in mind the caution provided by the Tribunal in *Visa Canada Corporation*: "[I]t is uncertain that the supposed 'cure' will not be worse than the 'disease'."[106]

Market Innovation. As is evident across the world, decision makers are trying to find remedies for the antitrust concerns around interchange fees and merchant rules with the common goal of balancing the interests of the various players. We have also seen that the approaches used so far have their limits. Even in jurisdictions where interventions have been imposed through courts or legislation, new difficulties, such as excessive surcharging, are coming to light. Although these attempts to engineer a solution are well-intended, we see that market innovation occurring in the electronic payment industry is an equally, if not more, promising source of competitive discipline, as it is organically disrupting and reshaping the existing payment infrastructure. Indeed, even courts have noted that "there is evidence of the accelerated pace of competition from new technologies, mainly mobile phone payments" and that the entry of these services into the market "is further evidence of the market's dynamic."[107] While there is still a role for traditional credit card systems to play, the emergence of new technology provides reason for optimism about a path forward for the issues currently facing the industry.

While there is still a role for traditional credit card systems to play, the emergence of new technology provides reason for optimism about a path forward for the issues currently facing the industry.

The companies discussed below were chosen because they are emerging as disruptive viable alternatives to traditional payment systems and demonstrate the scope of innovation in this arena.[108] While each approaches the market from a dif-

ferent technological angle, each promotes transparency via simple fee structures and the potential to move markets to a different payment platform. By changing expectations about the public nature of information in the payment processing industry, these new market participants will force credit card companies to establish similar policies in order to remain competitive.

One of these new innovations is electronic payment systems. Cardholders are no longer limited to cash, debit, and credit cards. There is an argument that these new payment industry entrants are naturally creating the type of competition that regulation could only hope to encourage.[109] For example, Square Inc., a merchant services aggregator and mobile payments company launched in 2010 provides businesses with a free application that turns an iPad or iPad mini into a point-of-sale device, thereby competing with the service offered by credit card acquirers. Merchants pay a fee of 2.75 percent per swipe for all major credit cards (i.e., Visa, MasterCard, American Express, and Discover) and the funds from the transaction are deposited into their bank accounts in one to two business days.[110] This service provides a direct replacement option for merchants to traditional credit card acquirers.

New players are also emerging in unexpected areas. M-PESA, a Kenya-based mobile-money service, now sees more than a quarter of Kenya's gross national product flow through its networks[111] and more than 70 percent of the nation's adult population is signed up.[112] M-PESA was launched by Vodaphone associate Safaricom in Kenya in 2007 and now operates in over 20 countries worldwide, including Australia, New Zealand, the United Kingdom, and was recently launched in India.[113] M-PESA's success is a result of its simplicity. Without the need of a bank account, people can register an account at any M-PESA agent. Once registered, they can deposit cash in exchange for "electronic money" that can be sent to any registered person or business merely by sending a text message. The recipient can then go to any agent or select ATMs and convert the electronic money to cash.[114] This process completely disintermediates credit card companies, wire-transfer companies, and bank payment systems.

Another technology gaining recognition is the digital wallet. According to Forrester Research, the market for digital wallets could reach $90 billion by 2017, up from $12.8 billion in 2012.[115] PayPal was the best known example of a digital wallet used with a computer, but today, mobile phones can literally be wallets. A digital wallet uses near-field communications technology much like a radio to enable a "contactless" payment in-store. Cardholders can simply tap their phones at the cash register and the payment is automatically withdrawn from their account. One example is Google Wallet, which lets cardholders virtually store their credit and debit account information in one place.[116]

These emerging services are not without cost to merchants, and, in some cases, there has been difficulty in achieving the critical mass (i.e., network effects) needed to make them viable alternatives to credit cards. In recognition of this problem, Weve was launched in 2014 as a joint venture between the United Kingdom's three largest mobile network operators: EE, O2, and Vodafone UK, which together represent 80 percent of the mobile network market.[117] This venture was formed with the explicit goal to "create and accelerate the development of mobile marketing and [digital] wallet services in the UK."[118] Another example with the potential to revamp the industry is the reported plan by Apple Inc. to turn the next version of its iPhone into a mobile wallet, "Apple Pay," through a partnership with major payment networks, banks, and merchants.[119] If they are able to reach the necessary level of market penetration, digital wallet providers may have some significant advantages over conventional merchant acquirers. In addition to their flexibility and portability, it is suggested that wallet schemes can apply low interchange fees to help keep merchant fees down, creating an advantage over traditional card acquirers.[120]

Lastly, some United States merchants have opted for "self-help" innovation to respond to the alleged anticompetitive structure of the payment systems market.[121] In August 2012, a consortium of United States merchants started a joint venture to create a mobile wallet, "CurrentC," which will be launched in 2015.[122]

Overall, these examples serve as a testament to the primary role that modern technology and market innovation will imminently play to disrupt and ensure the credit card and payments industry remains competitive in the modern world.

Conclusion

Increasingly, competition authorities are recognizing the global magnitude of the challenges and conflicts in the credit card industry, turning to international examples to inform their approaches and decisions. Polarizing regulatory solutions—those that pit merchants against networks—have led to mixed outcomes, at best, with increased litigation and ineffective regulation. While there are important questions that need to continue to be explored, effective solutions are challenging to craft. This is due in part to the complex layers of issues and interests within the credit card industry and to market outcomes and feedback effects that are difficult to predict and control.

These complex market dynamics within high-tech sectors do not often best lend themselves to court-mandated solutions. In the United States, the ongoing cases and the unraveling of court-imposed truces demonstrate the inherent limits of antitrust law and the court process in engineering a coherent solution to the issues at stake. Legislation that is well-considered and responsive to previously ineffective solutions may be part of an effective solution; but, even legislators have to be careful about treating merchant credit card fees as fundamentally different from other business costs. The purpose of antitrust law is not to undermine and punish successful market actors because of their efficiencies or

their size, since doing so would only punish success, penalize innovation, and distort market incentives.

Taking into account all of the relevant implications of court- or legislative-imposed solutions, perhaps the primary forerunner for a credible solution is market innovation or, at the very least, market innovation in tandem with the most appropriate level of regulation necessary to result in an efficient and competitive market. It is possible—and probably likely—that transformational technological and innovative change will provide the most powerful enforcement tool and that, consequently, courts and regulators need to show enforcement forbearance, even though, in the moment, there are intense pressures for them to act. This sentiment was reflected in *Amex*:

> The court nonetheless shares American Express's concerns about disrupting the competitive landscape in such a concentrated, complex market. . . . [I]t would have *strongly preferred* the parties to have resolved this dispute among themselves. *Absent such an agreement*, the court is *compelled* to enforce Section 1 [of the Sherman Act] . . . .[123]

Sometimes, the most difficult enforcement decision is the decision not to act, or to act with extreme caution and allow the market to rectify itself within technology driven sectors in the midst of an innovation revolution. In this case, perhaps enforcers should take comfort that they do not need to fight every war because the market may soon impose its own peace. ■

[1] United States v. Am. Express Co., 2015 WL 728563, at 6 (E.D.N.Y. Feb. 19, 2015).

[2] *Id.*; Complaint, Wal-Mart Stores Inc. v. Visa U.S.A. Inc., No. 14-5101 (W.D. Ark. Mar. 25, 2014); Watson v. Bank of Am. Corp., 2014 B.C.S.C. 532 (Can.).

[3] *In re* Payment Card Interchange Fee and Merch. Discount Antitrust Litig., 986 F. Supp. 2d 207, 218 (E.D.N.Y. 2013).

[4] Visa and MasterCard operate what is referred to as a "four party" or "open loop" payment card system. In this system, the parties are: issuers, acquirers, merchants, and cardholders. American Express and Discover operate a three party system, in which they act as both the issuer and acquirer, removing the need to pay an interchange fee but taking on additional risks such as directly extending credit to cardholders. John Bulmer, *Payment Systems: The Credit Card Market in Canada*, Library of Parliament 1–5 (Sept. 24, 2009), http://www.parl.gc.ca/content/lop/researchpublications/prb0910-e.pdf. *See American Express*, 2015 WL 728563, at 9–10.

[5] *Understanding the Credit Card Transaction Process*, CANADIAN BANKERS ASS'N, http://www.cba.ca/contents/files/misc/msc_cctransactions_en.pdf [hereinafter Canadian Bankers Ass'n].

[6] *Id.*

[7] *Id.*; Comm'r of Competition v. Visa Canada Corp., 2013 Comp. Trib. 10, paras. 9–22 (Can.).

[8] Canadian Bankers Ass'n, *supra* note 5; *Visa Canada Corp.*, 2013 Comp. Trib. 10, para. 23.

[9] Canadian Bankers Ass'n, *supra* note 5.

[10] *Id.* It is important to note the difference in services provided by networks and acquirers. While networks supply authorization, clearance, and settlement of transaction services to acquirers over their respective networks, acquirers provide merchants with the services that allow them to accept credit cards. The Tribunal in *Visa Canada Corp.* found that the best way to distinguish between these two services is to refer to those provided by the networks as "Credit Card Network Services" and those sold by acquirers to merchants as "Credit Card Acceptance Services." *Visa Canada Corp.*, 2013 Comp. Trib. 10, para. 147.

[11] Visa Int'l Serv. Ass'n v. Reserve Bank of Austl., [2003] F.C.A. 977, para. 82 (Austl.).

[12] The party that sets the interchange fee is country-specific. Networks typically set the interchange fee, and it can be procompetitive for networks to set the fee because networks have incentives to keep fees low and/or uniform to maximize use of the network. The same is not true for issuers, who have hold-up incentives. Issuers are in a position of power regarding their negotiations with acquirers because acquirers cannot remit payment to merchants without the issuers' participation in the process. If issuers were allowed to set the interchange fee without any checks on their power, the resulting fee has the potential to be skewed in the issuer's favor.

[13] *Visa International Service Ass'n*, [2003] F.C.A. 977, para. 87.

[14] *Visa Canada Corp.*, 2013 Comp. Trib 10, paras. 35–46.

[15] Commerce Comm'n v. Cards NZ Ltd., (unreported) High Court, Auckland, [2007] NZHC 281 (Apr. 5, 2007) (Asher, J. and Dr. Ralph Lattimore (Lay Member), at para. 5 (N.Z.).

[16] *See In re Payment Card*, 986 F. Supp. 2d at 214–15; Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1046 (9th Cir. 2008); *Watson*, 2014 B.C.S.C. 532.

[17] *See Visa Canada Corp.*, 2013 Comp. Trib. 10, paras. 35–46; *American Express*, 2015 WL 728563, at 4 (the no-discrimination rule create[s] an environment in which there is nothing to offset credit card networks' incentives . . . to charge merchants inflated prices for their services. This, in turn, results in higher costs to all consumers who purchase goods and services from these merchants.").

[18] Comm'n Decision, No. COMP/29.373—Visa Intern'l, 2002 O.J. (L 318) 17, para. 76 (EU). Practically speaking, this argument is as follows: if the interchange fees were too high, merchants would no longer be willing to accept credit card payments, while if they were too low, consumers would be forced to bear a disproportionate part of the cost of the network through higher annual fees and other costs and would stop using credit cards altogether, reverting to debit, cash, or checks. *See also American Express*, 2015 WL 728563, at 9 ("Therefore, in order to compete effectively, networks must account for the interdependence between the demands of each side of the platform and strike a profit-maximizing balance between the two. As a result . . . where the court's analysis focuses on one side of the relevant platform (merchants), due consideration must be given to the competitive dynamics of the other side (cardholders).)."

[19] *Commission Decision Visa International*, 2002 O.J. (L 318) 17, para. 75.

[20] *Visa Canada Corp.*, 2013 Comp. Trib. 10, para. 177. *See also American Express*, 2015 WL 728563, at 8–9.

[21] Andrei Hagiu & Julian Wright, *Multi-Sided Platforms* 2 (Harvard Bus. Sch. Working Paper No. 12-024, 2011). *See also American Express*, 2015 WL 728563, at 8.

[22] Hagiu & Wright, *supra* note 21, at 2.

[23] Stephen Gale & Ben Gerritsen, Competition Policy and Credit Card Interchange Fees in New Zealand, N.Z. Ass'n Econ. Annual Conf. 3 (July 1, 2010), http://nzae.org.nz/wp-content/uploads/2011/08/Gale_and_Gerritsen__Competition_Policy_and_Credit_Card_ Interchange.pdf. *See also American Express*, 2015 WL 728563, at 9, 25.

[24] *Watson*, 2014 B.C.S.C. 532, para. 238.

[25] *Visa Canada Corp.*, 2013 Comp. Trib. 10.

[26] *Visa International Service Ass'n*, [2003] F.C.A. 977, para. 740; *see also American Express*, 2015 WL 728563, at 24.

[27] *See Visa International Service Ass'n*, [2003] F.C.A. 977, para. 742 ("With respect to the need for a definition of a market for payment services, in particular, I am not persuaded that this is necessary to enable the RBA to properly consider 'competition'. . . . The fact that highly qualified and experienced experts reach such a view indicates that the question is far from settled. I accept that a body of economic experts do not find market definition necessary for an appropriate economic analysis of competition. I

agree with . . . Professor Farrell that 'In view of the pitfalls and presumptions in the market definition approach, it is incorrect to say that the RBA omitted an "essential" step by addressing questions of competition without the formal use of this approach.").

[28] *See, e.g.*, the discussion in *Australian Retailers Association v. Reserve Bank of Australia*, [2005] F.C.A. 1707, para. 501 (Austl.). *See also Commission Decision Visa International*, 2002 O.J. (L 318) 17, para. 52 ("For the purposes of the present decision, it is not necessary to make any distinction between types of payment card in order to define the relevant product market in the present case, and therefore the relevant inter-system market is to be considered as comprising all types of payment card. This does not rule out that a distinction between consumer and commercial cards, between national and international cards, or between debit, charge and credit cards may be sufficiently important to consumers that those types of card constitute distinct product markets.").

[29] *See, e.g.*, *Visa Canada Corp.*, 2013 Comp. Trib. 10, para. 177 (Although the respondents submitted that the relevant product market was the supply of payment services (including cash, debit and other entrants, such as PayPal), the Tribunal found that the relevant product market was limited to the supply of credit card network services to acquirers); *see also* Case T-111/08, MasterCard v. European Comm'n, 2012 O.J. (C 319) 4, paras. 21–23, 172, 174 (May 24, 2012), *aff'd*, Case C-382/12—MasterCard v. Comm'n (Eur. Ct. J. Sept. 11, 2014), [hereinafter *MasterCard v. Commission*]. The European Court of Justice similarly rejected the argument that the product market included competing payment card systems and all other forms of payment (e.g., cash and checks), finding instead that "four-party bank card systems operated in three separate markets: an inter-systems market, an issuing market and an acquiring market, and [the respondent] relied on the restrictive effects of the MIF on the acquiring market."; Nat'l Bancard Corp. v. Visa U.S.A., Inc., 596 F. Supp. 1231 (S.D. Fla. 1984).

[30] *American Express*, 2015 WL 728563, at 22.

[31] 344 F. 3d 229 (2d Cir. 2003).

[32] *American Express*, 2015 WL 728563, at 25–26.

[33] *Id.*

[34] *Id.* at 22.

[35] *See Commission Decision Visa International*, 2002 O.J. (L 318) 17, para. 69; *MasterCard v. Commission*, *supra* note 29, at 2012 O.J. (C 319) 4, para. 223; *Visa International Service Ass'n*, [2003] F.C.A. 977, para. 599.

[36] *See American Express*, 2015 WL 728563, at 8–9. ("A key feature of the payment network services industry, like all two-sided platforms, is that it is subject to indirect or cross-platform network effects . . . . In this case, for example, having a credit or charge card on a particular network . . . is more valuable to the cardholder when there are more merchants willing to accept that card and, conversely, the value to merchants of accepting . . . cards increase with the number of cards on that network in circulation.").

[37] *Visa Canada Corp.*, 2013 Comp. Trib. 10, para. 363.

[38] *Id.* para. 189.

[39] *Id.* para. 366.

[40] *Watson*, 2014 B.C.S.C. 352, para. 244.

[41] *Id.*

[42] *Commission Decision Visa International*, 2002 O.J. (L 318) 17, paras. 103, 106.

[43] *MasterCard v. Commission*, *supra* note 29, 2012 O.J. (L 318) 17, paras. 95–96, *aff'd*, Case C-382/12, paras. 172–174.

[44] *National Bancard*, 596 F. Supp. 1231 (S.D. Fla. 1984).

[45] *Id.*

[46] *In re Payment Card*, 986 F. Supp. 2d 207.

[47] *Id.* at 217–20.

[48] Gale & Gerritsen, *supra* note 23, at 2–3.

[49] *American Express*, 2015 WL 728563, at 19.

[50] *Id.* at 4, 76.

[51] *Id.* at 19.

[52] *Id.* at 20 ("In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.").

[53] *Id.* at 68.

[54] *Id.* at 54, 77, 80.

[55] Broadcast Music, Inc. v. CBS, 441 U.S. 1, 20 (1979).

[56] *Visa International Service Ass'n*, [2003] F.C.A. 977, paras. 599, 741.

[57] *Id.* para. 740.

[58] *In re Payment Card*, 986 F. Supp. 2d 207, 231 (E.D.N.Y. 2013).

[59] *Visa Canada Corp.*, 2013 Comp. Trib. 10, para. 318.

[60] *See American Express*, 2015 WL 728563, at 14–16. (Here the court discusses the difficulty for merchants to negotiate merchant rules with networks, noting that even larger merchants are not able to fully negotiate out of merchant rules in network standard form contracts).

[61] *In re Payment Card*, 986 F. Supp. 2d at 219.

[62] *Id.* (emphasis added). It was also recognized recently in *Amex*, where the court commented that the no-discrimination rule was anticompetitive in part because it prevented cardholders from internalizing the full impact of their payment choices and that "[a]llowing merchants to actively participate in their customers' point-of-sale decisions would remove the artificial barrier that now segregates merchant demand from the price of network services, and allow merchants and cardholders alike to jointly determine how the prices charged on each side of the GPCC platform weigh against one another." *American Express*, 2015 WL 728563, at 64.

[63] *MasterCard v. Commission*, *supra* note 29, 2012 O.J. (C 319) 4, para. 118.

[64] *Watson*, 2014 B.C.S.C. 532, para. 41. A similar situation occurred in New Zealand. In 2009, Visa and MasterCard agreed not to (1) enforce any rules that prevent surcharging by merchants or (2) require or encourage acquirers to include any provision to that effect in any merchant agreement or take steps to enforce any such provision in an existing merchant agreement. That did not, however, settle the matter. The Commerce Commission, New Zealand's competition enforcement and regulatory agency, has since been monitoring changes in the market and has expressed concerns over credit card surcharges at a level that does not bear a reasonable relationship to the merchant's cost of accepting credit cards. The Commission confirmed that they will investigate surcharging practices to ensure that key competition objectives are realized, such as raising public awareness regarding credit card fees and incentivizing credit card insurers to reduce their transaction fees. Commerce Comm'n N.Z., Commission Closes Air New Zealand Credit Card Surcharge Investigation (Dec. 19, 2013), http://www.comcom.govt.nz/the-commission/media-centre/media-releases/detail/2013/commission-closes-air-new-zealand-credit-card-surcharge-investigation/.

[65] *American Express*, 2015 WL 728563, at 64.

[66] *Id.*

[67] *Commission Decision Visa International*, 2002 O.J. (L 318) 17, para. 103.

[68] *American Express*, 2015 WL 728563, at 4. In addition to its hesitancy to make a ruling, the court did not provide a remedy, deferring until it could determine the "appropriate remedy." *Id.* at 81. American Express plans to appeal the decision. Robin Sidel, *American Express Loses Antitrust Lawsuit on Merchant Rules*, WALL ST. J., Feb. 19, 2015, http://www.wsj.com/articles/american-express-loses-antitrust-lawsuit-on-merchant-rules-1424360909.

[69] *Visa Canada Corp.*, 2013 Comp. Trib. 10, paras. 394–395.

[70] *Id.* para. 396.

[71] *Id.* para. 395.

[72] *Watson*, 2014 B.C.S.C. 532, paras. 4, 51.

[73] *In re Payment Card*, 986 F. Supp. 2d at 218.

[74] *Id.* (settlement).

[75] *Id*; Daniel Fisher, *Wal-Mart Balks at $7 Billion Visa/MasterCard Settlement*, FORBES (July 24, 2012, 11:33 AM), http://www.forbes.com/sites/danielfisher/2012/07/24/wal-mart-balks-at-7-billion-visamastercard-settlement/; David McLaughlin, *Wal-Mart Among Retailers Quitting Visa, MasterCard Deal*, BLOOMBERG PERSONAL FINANCE (May 21, 2013, 4:58 PM), http://www.bloomberg.com/news/2013-05-21/wal-mart-among-retailers-opting-out-

of-visa-mastercard-deal.html. According to the objectors of the settlement, the elimination of the no-surcharge rule is rendered useless by the credit card networks' "level-playing-field" provisions, which condition the merchants' ability to surcharge on a requirement they also surcharge other payment products of equal or greater cost of acceptance. Since many merchants also accept American Express cards, which prohibit surcharging but carry higher fees, the argument is that most merchants will likely not surcharge Visa and MasterCard products. In addition, some merchants felt that the settlement was a hollow victory for those in the ten states where surcharging is prohibited by law. It is worth noting, however, that these bans are currently being challenged in some states with merchants arguing that surcharging has the same effect as offering a discount for cash which is expressly permitted under the Durbin Amendment. (The Durbin Amendment, among other things, amended the Dodd-Frank Act to include new fee caps on debit card interchange fees.)

[76] John Stewart, *Google Becomes Latest Major Player to Sue Card Networks After Settlement Opt-Out*, Digital Transactions (Dec. 29, 2014), http://digitaltransactions.net/news/story/Google-Becomes-Latest-Major-Player-to-Sue-Card-Networks-After-Settlement-Opt-Out.

[77] Fumiko Hayashi & Jesse Leigh Maniff, *Interchange Fees and Network Rules: A Shift from Antitrust Litigation to Regulatory Measures in Various Countries*, Fed. Reserve Bank of Kansas City (Oct. 2014), *available at* http://www.kc.frb.org/publicat/psr/briefings/psr-briefingoct2014.pdf.

[78] Wal-Mart Stores Inc. v. Visa U.S.A. Inc., No. 14-5101 (W.D. Ark. Mar. 25, 2014); *see also* Andrew M. Harris & Christie Smythe, *Wal-Mart Sues Visa Claiming Card Transaction Fee Fixing*, Bloomberg Personal Finance (Mar. 28, 2014, 12:01 AM), http://www.bloomberg.com/news/2014-03-27/wal-mart-sues-visa-claiming-card-transaction-fee-fixing.html.

[79] Google Inc. v. Visa Inc., No. 5:14-cv-162 (E.D. Tex. Dec. 23, 2014); *see also* Victoria Conroy, *Google Sues Visa and MasterCard over Interchange*, Payments Cards & Mobile (Jan. 6, 2015), http://www.paymentscardsandmobile.com/google-sues-visa-mastercard-interchange/. Further supporting the point about the limits of the court system, the merchants that opted out are at risk because they will no longer be eligible for the settlement and may not succeed on the merits of their cases.

[80] R.S.C. 1985, c. C-34 (Can.).

[81] *Visa Canada Corp.*, 2013 Comp. Trib. 10, para. 395.

[82] 518 F.3d 1042, 1048 (9th Cir. 2008).

[83] Fumiko Hayashi, *Public Authority Involvement in Payment Card Markets: Various Countries August 2014 Update*, Fed. Reserve Bank of Kansas City (Aug. 2014), http://www.kc.frb.org/publicat/psr/dataset/pub-auth_payments_var_countries_August2014.pdf.

[84] *Id.*

[85] *Id.*

[86] *Reforms to Payment Card Surcharging*, Reserve Bank of Austl. (Mar. 2013), http://www.rba.gov.au/payments-system/surcharging/index.html.

[87] Reserve Bank of Austl., 2013 Payments System Board Annual Report 33–34 (2013), *available at* http://www.rba.gov.au/publications/annual-reports/psb/2013/pdf/2013-psb-ann-report.pdf.

[88] Amy Bainbridge, *Australians Hit with $800m in Credit Card Surcharges, Data Shows, as Choice Says Reforms Not Working*, ABC News (Mar. 18, 2014), http://www.abc.net.au/news/2014-03-18/credit-card-surcharges-top-800-million/5327092.

[89] *Id.*

[90] *Europe's Plan to Cut Card Fees Will Hurt Banks But May Not Help Consumers*, The Economist, July 27, 2013, *available at* http://www.economist.com/node/21582306/print [hereinafter *Plan to Cut Card Fees*].

[91] Hayashi & Maniff, *supra* note 66.

[92] NACS v. Fed. Reserve Board Sys., 746 F.3d 474 (D.C. Cir. 2014).

[93] Lawrence Hurley & Emily Stephenson, *Supreme Court Rejects Challenge to Debit Card "Swipe Fees" Rule*, Reuters (Jan. 20, 2015 5:38 PM), http://www.reuters.com/article/2015/01/20/us-usa-court-debitcards-idUSKBN0KT1LA20150120.

[94] *Id.*

[95] Fumiko Hayashi, *Public Authority Involvement in Payment Card Markets: Various Countries August* 6–7, Payments System Research Dept., Fed. Reserve Bank of Kansas City (2013), http://www.kansascityfed.org/publicat/psr/dataset/pub-auth_payments_var_countries_August2013.pdf.

[96] Hayashi, *supra* note 83.

[97] *European Parliament Votes in Favor of Caps on Credit and Debit Card Interchange Fees*, Out-Law (Apr. 4, 2014), http://www.out-law.com/en/articles/2014/april/european-parliament-votes-in-favour-of-caps-on-credit-and-debit-card-interchange-fees/.

[98] Leah Schnurr, *Finance Minister Presses for Lower Credit-Card Fees for Retailers*, Globe And Mail Report on Business (Sept. 4, 2014, 1:56 PM), http://www.globeinvestor.com/servlet/WireFeedRedirect?cf=GlobeInvestor/config&vg=BigAdVariableGenerator&date=20141104&archive=rtgam&slug=escenic_21437001.

[99] Steve Dickson et al., *Visa and MasterCard Cut Canada Fees Amid State Pressure*, Bloomberg (Nov. 4, 2014, 7:13 AM), http://www.bloomberg.com/news/2014-11-04/visa-to-cut-canada-consumer-card-interchange-fees-to-1-5-.html.

[100] Jacqueline Nelson, *Deal to Reduce Credit Card Fees Falls Flat with Merchants*, Globe and Mail (Nov. 4, 2014, 7:26 AM), http://www.globeinvestor.com/servlet/WireFeedRedirect?cf=GlobeInvestor/config&vg=BigAdVariableGenerator&date=20141104&archive=rtgam&slug=escenic_21437001.

[101] *American Express*, 2015 WL 728563, at 3.

[102] Hayashi, *supra* note 83.

[103] *Id.* at 7.

[104] *Id.* at 8.

[105] *See Visa International Service Ass'n*, [2003] F.C.A. 977, para. 393.

[106] *Visa Canada Corp.*, 2013 Comp. Trib. 10, para. 398.

[107] *Id.* para. 250.

[108] Another major player is Bitcoin, a digital currency whose key differentiating factor is that it facilitates direct transactions without the need for a third party (issuers, acquirers, or networks) to become involved, thus eliminating the fees normally charged by these entities. Jerry Brito & Andrea Castillo, *Bitcoin: A Primer for Policymakers* 11 (Geo. Mason Univ. Dec. 11, 2013), *available at* http://mercatus.org/sites/ default/files/Brito_BitcoinPrimer_v1.3.pdf. Bitcoin also offers security advantages over credit card processing because it is a non-reversible payment system, which eliminates charge-backs. When paying with a credit card customers can fraudulently "charge-back" the merchant—falsely claiming a product was not delivered and reversing the payment.

[109] *Europe's Plan to Cut Card Fees*, *supra* note 90.

[110] Square, https://squareup.com/ca (last visited Aug. 12, 2014). LevelUp Inc. is also quickly gaining popularity. This company's mobile app displays a debit or credit card code that scans as payment for over 1.5 million subscribers at over 14,000 businesses worldwide. The company charges merchants a flat fee of 1.95 percent, eliminating the need to distinguish between higher-cost and lower-cost credit cards. Levelup, https://www.thelevelup.com/ (last visited Aug. 12, 2014). iZettle is a similar concept that started in Sweden and has now expanded into nine countries around the world. *About iZettle*, Zettle, https://www.izettle.com/about.

[111] *Cash Be Cowed*, The Economist, Sept. 14, 2013, *available at* http://www.economist.com/news/finance-and-economics/21586309-paul-edwards-took-pay-tv-and-mobile-phones-africa-now-its-e-payments-cash-be.

[112] Duncan McLeod, *Vodacom Banks on M-Pesa Relaunch*, TechCentral (Aug. 10, 2014), http://www.techcentral.co.za/vodacom-banks-on-m-pesa-relaunch/50253/.

[113] *Where We Are*, Vodafone, http://www.vodafone.com/content/index/about/about-us/where.html; Vodaphone India, https://www.mpesa.in/portal/support/about_us.jsp.

[114] *M-Pesa*, Vodafone, http://www.vodafone.com/content/index/about/about-us/money_transfer.html. Businesses that permit bills to be paid via M-PESA will generally not need to go through this step. *Id.*

[115] Kelly Liyakasa, *Adoption Problems Plague Digital Wallets*, CMR Mag. (Apr. 2013), http://www.destinationcrm.com/Articles/Columns-Departments/

Insight/Adoption-Problems-Plague-Digital-Wallets-88274.aspx.

[116] *Id.*

[117] Jessica Davies, *EE, O2 and Vodafone's UK Mobile JV Weve Racks Up £13m in Revenue in First Year and Unveils 2014 Roadmap*, The Drum (May 12, 2014, 6:00 AM), http://www.thedrum.com/news/2014/05/12/ee-o2-and-vodafones-uk-mobile-jv-weve-racks-13m-revenue-first-year-and-unveils-2014.

[118] *Who Are Weve?*, Weve, http://www.weve.com/partners.

[119] Matt Townsend, *Apple Said to Team with Visa, MasterCard on IPhone Wallet*, Bloomberg (Sept. 1, 2014, 1:10 PM), http://www.bloomberg.com/news/2014-08-31/apple-said-to-team-with-visa-mastercard-on-iphone-wallet.html.

[120] *MasterCard's Wallet Fee: A Tool of Oppression, or One to Level the Acquiring Playing Field?*, Digital Transactions (Mar. 22, 2013), http://digitaltransactions.net/news/story/3928.

[121] Merchant Customer Exchange LLC, http://www.mcx.com/.

[122] Phil Goldstein, *MCX to Launch Currentc Mobile Wallet in 2015 at Major Retailers*, Fierce Wireless (Sept. 5, 2014), http://www.fiercewireless.com/story/mcx-launch-currentc-mobile-wallet-2015-major-retailers/2014-09-05. *See US: Schubert Explores Apple Pay Spat*, Competition Policy Int'l (Nov. 5, 2014). It appears this market may be so viable that there has been a recent investigation into the merchants, including CVS and Rite Aid, for possible anticompetitive plans not to accept Apple Pay and Google Wallet.

[123] *American Express*, 2015 WL 728563, at 76 (emphasis added).