

# Summary of the decision of the Competition and Markets Authority in relation to an application by Worldpay UK Limited for a direction pursuant to section 35 of the Competition Act 1998

## Introduction

1. This is a summary of the decision of the Competition and Markets Authority (CMA) in relation to an application by Worldpay UK Limited (Worldpay) for a direction pursuant to section 35 of the Competition Act 1998 (the Act) in relation to the CMA's Visa interchange fees investigation.<sup>1</sup>

## The legal framework

2. The CMA has the power to issue a direction pursuant to section 35 of the Act (an interim measures direction) if:
  - (a) the CMA has begun, but not completed, an investigation under section 25 of the Act; and
  - (b) the CMA considers that it is necessary for it to act (under section 35 of the Act) as a matter of urgency for the purpose of:
    - (i) preventing significant damage to a particular person or category of person; or
    - (ii) protecting the public interest.
3. If the CMA considers that the above conditions are met, it may give such directions as it considers appropriate for the purpose of preventing the significant damage and/or protecting the public interest. In such circumstances, before exercising its discretion to make an interim measures direction, the CMA will have regard to relevant considerations, which may include a) the impact of making such a direction on the potential addressee of such a decision and on other parties, and b) the extent to which the applicant

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<sup>1</sup> Details regarding the CMA's Visa interchange fees investigation can be found on the [case page](#).

has taken reasonable action to seek to avoid or mitigate the significant damage that may arise.

4. The CMA may not issue interim measures if it is investigating an agreement and a person has produced evidence to the CMA in connection with the investigation that satisfies the CMA on the balance of probabilities that the agreement would satisfy the relevant conditions for exemption, as set out in sections 35(8) and 35(9) of the Act.

## **The application for interim measures**

5. Worldpay offers payment services to merchants, including some of the UK's largest retail chains and supermarkets. In this capacity it processes payment card transactions, levying a merchant service charge (MSC) on merchants each time a cardholder uses a payment card to purchase goods or services (in this capacity, Worldpay is referred to as an 'acquirer'). From this MSC, Worldpay must pay fees to both the payment scheme operator (such as Visa or MasterCard) and the bank or other financial institution that issued the payment card to the cardholder (known as the 'issuer' in this process). The latter fee is known as a multilateral interchange fee (MIF).
6. On 22 September 2014, Worldpay submitted an application to the CMA requesting that the CMA exercise its power under section 35 of the Act to issue an interim measures direction to Visa UK Limited (Visa).
7. By its application, Worldpay sought a direction that Visa be required to align the level of the MIFs that apply in the UK for domestic debit and credit card transactions<sup>2</sup> with the MIFs that would apply to cross-border acquired transactions<sup>3</sup> from 1 January 2015 pursuant to commitments accepted by the European Commission from Visa Europe on 26 February 2014 (the Visa Commitments).<sup>4</sup>
8. Worldpay submitted that, without such a direction, it would imminently suffer economic and reputational damage that would jeopardise its financial position. The essence of Worldpay's application in this regard related to the fact that, for payments made using Visa payment cards, from 1 January 2015 the MIFs applicable to cross-border acquired transactions (cross-border acquired MIFs)

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<sup>2</sup> 'Domestic' transactions are those transactions where the issuer of the payment card used and the merchant outlet where the card is used are located in the same state (in this case, the UK).

<sup>3</sup> Under the Visa Commitments (see footnote 4 below), 'cross-border acquired transactions' are those transactions where the merchant outlet and the acquirer are located in different European Economic Area member states (and certain other criteria are met).

<sup>4</sup> See [Case 39398 – Visa MIF, Commission decision of 26 February 2014](#).

would be at levels below the MIFs applicable to equivalent UK domestic transactions (domestic MIFs).

9. According to Worldpay, this difference meant that merchants would have a considerable financial incentive to switch to acquirers that had an appropriately regulated subsidiary based outside of the UK (an offshore subsidiary) as such acquirers would be able, from 1 January 2015, to process UK merchants' Visa transactions as cross-border acquired transactions. Worldpay submitted that the lower MIFs that applied to such transactions would allow such acquirers to charge merchants lower MSCs than Worldpay.
10. Worldpay submitted that, as a result, it would suffer significant damage because its large corporate merchants would switch to acquirers with an offshore subsidiary, resulting in a significant loss of revenue for Worldpay. Further, Worldpay submitted that the loss of those largest customers would bring about a dramatic loss of scale and reputation, triggering a 'domino effect' whereby Worldpay would lose further merchants. Worldpay stated that such losses would prevent it exploiting economies of scale on which its merchant acquiring business relied.
11. In addition, Worldpay submitted that merchants (in particular small and medium-sized merchants) that it said would be unable or unlikely to switch to an acquirer with an offshore subsidiary would suffer significant damage because they would continue to pay the higher domestic MIFs and could be put at a competitive disadvantage compared to rivals which were able to use such an acquirer.
12. Worldpay submitted that the above effects would occur as a result of Visa's domestic MIFs remaining at levels which may constitute an infringement of the Act and Article 101 of the Treaty on the Functioning of the European Union (Article 101 of the TFEU) and specifically the non-alignment of such MIFs with the cross-border acquired MIFs prescribed by the Visa Commitments.

### **The CMA's investigation into Visa's MIF arrangements**

13. In May 2004, the Office of Fair Trading (OFT) opened an investigation under the Act and Article 101 of the TFEU, into the MIF arrangements for UK domestic transactions made using Visa consumer payment cards. In 2009, and again in 2012, the OFT stated that it did not expect to issue a statement of objections in relation to the investigation (if at all) prior to the determination of MasterCard's appeals against the European Commission's 2007 infringement decision against MasterCard's interchange fee arrangements for intra-European cross-border transactions.

14. On 1 April 2014, the CMA took on the OFT's functions and powers under the Act and the OFT's investigation transferred to the CMA. On 4 November 2014, the CMA announced that it had decided not to progress the investigation towards deciding whether or not to issue a statement of objections at that time. The decision was reached in light of the prospective Regulation of the European Parliament and of the Council on Interchange Fees for Card-based Payment Transactions (the interchange fee regulation) which is expected to address the harm which it is suspected may be caused by Visa's UK domestic MIF arrangements. The CMA stated that its investigation remained open and, if it were to consider that the interchange fee regulation would not address the suspected harm as expected, it would look again at continuing proactively with the investigation.

### **The CMA's information gathering further to the application for interim measures**

15. The CMA gathered and assessed detailed evidence from a range of sources to inform its consideration of Worldpay's application for interim measures. The CMA sent formal notices requiring the production of specified documents and/or the provision of specified information under section 26 of the Act to Worldpay, Visa Europe Limited, and third parties including UK-based acquirers and merchants.
16. In addition, the CMA met with, and also received voluntary submissions from, Visa Europe Limited and Worldpay. The CMA also sought and obtained (without using formal evidence gathering powers) information about the card acquiring market and the costs of accepting card payments from the British Retail Consortium, the Federation of Small Businesses and the Association of Convenience Stores.
17. The CMA also discussed Worldpay's application with the Financial Conduct Authority and the Payment Systems Regulator and contacted the De Nederlandsche Bank (the Dutch National Bank, or DNB) regarding the procedure by which companies may apply for regulatory approval in the Netherlands.

### **Summary of the CMA's decision**

18. Having gathered and assessed detailed relevant information, the CMA issued its provisional decision regarding Worldpay's application for interim measures to Worldpay on 5 December 2014. This set out the CMA's provisional conclusions regarding matters relating to Worldpay's application and the

CMA's provisional decision not to impose an interim measures direction on Visa further to Worldpay's application.

19. Worldpay provided representations on the CMA's provisional decision on 15 December 2014. Having carefully considered those representations, the CMA concluded that they did not raise any specific arguments or provide further evidence that changed the CMA's provisional conclusions.
20. On 19 December 2015, the CMA issued its decision not to impose an interim measures direction on Visa further to Worldpay's application. The reasons for the CMA's decision are summarised below.

***The CMA's assessment of whether it had received evidence to satisfy it that on the balance of probabilities the agreement would satisfy the relevant conditions for exemption***

21. The CMA considered for the purposes of jurisdiction under sections 35(8) and 35(9) of the Act whether it had sufficient evidence to be satisfied that Visa's UK domestic MIF arrangements would satisfy the relevant conditions for exemption under Article 101(3) of the TFEU and section 9 of the Act. It was not possible in the timescale of an interim measures assessment in this case for the CMA to undertake a detailed assessment of the evidence submitted by Visa on this matter, in particular the underlying data used to generate it, and given the CMA's conclusion regarding significant damage (see paragraph 32 below) it was not necessary for the CMA to conclude on this matter. However, on the basis of its preliminary assessment of the evidence submitted by Visa, and having taken into account the approach taken by the European Commission in its commitments decisions,<sup>5</sup> the CMA considered it unlikely that a more detailed consideration of such evidence would on its own have led the CMA to conclude that Visa's domestic MIF levels met the relevant conditions for exemption.<sup>6</sup>

***The CMA's assessment of whether it was necessary to act to prevent significant damage to Worldpay***

22. Having fully considered the evidence it had gathered, the CMA concluded that it was more likely than not that Worldpay would be able to process cross-border acquired transactions for UK merchants in early January 2015, if not sooner, and that Worldpay would therefore suffer little or no damage from the

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<sup>5</sup> See the European Commission's commitments decisions referenced at footnotes 4 and 8.

<sup>6</sup> As set out at paragraph 34 below, the CMA noted that from 1 March 2015 Visa's UK domestic MIFs for debit card transactions would change and that, had the CMA concluded that Worldpay was likely to suffer significant damage, it would have considered whether it was appropriate for interim measures to apply to debit card transactions beyond that date.

non-alignment of MIFs for domestic and cross-border acquired Visa transactions. As such, the CMA did not consider that it was necessary for it to act as a matter of urgency to prevent significant damage to Worldpay.

23. In this regard, the CMA noted that Worldpay had set up an offshore subsidiary, Worldpay BV, in the Netherlands with the intention that the subsidiary would be able to process UK merchants' transactions as cross-border acquired transactions. However, Worldpay submitted to the CMA that the requisite regulatory approval for Worldpay BV to engage in acquiring activities had not yet been granted by the DNB and that such approval might either not be granted, or might not be granted in time to avoid Worldpay's large corporate merchants switching to other acquirers that already had an offshore subsidiary.
24. In addition, Worldpay submitted that even if regulatory approval for Worldpay BV was granted, it faced technical challenges to ensure that its systems would be ready to provide cross-border acquiring by 1 January 2015.
25. At the time of the CMA's consideration of Worldpay's application, it was not possible to state with certainty whether, and if so when, the DNB would grant regulatory approval to Worldpay BV. Nevertheless, having considered a range of relevant evidence in the round, the CMA concluded that it was more likely than not that such regulatory approval would be granted in early January 2015 if not earlier. The evidence on which the CMA based this conclusion included:
  - the date at which Worldpay's application for regulatory approval was deemed to be complete by the DNB and the timeframe by which the DNB was considered to typically reach decisions regarding such applications;
  - Worldpay's professional advisers' assessment regarding the likelihood of the application being successful and the likely timing by which approval would be granted; and
  - the DNB's indication, given to Worldpay during the course of the CMA's consideration of the interim measures application, regarding the likely timing of its decision.
26. With regard to Worldpay's ability to ensure that its systems would be ready to provide cross-border acquiring, based on detailed information obtained from Worldpay the CMA concluded that it was more likely than not that Worldpay would be able to make the changes that were required to be able to provide cross-border acquiring to its largest corporate merchants (those merchants which Worldpay deemed to be at greatest risk of switching to another acquirer) for their January 2015 invoices.

27. Further, the CMA considered that in the event that Worldpay was not able to provide cross-border acquiring by 1 January 2015, it would, as a rational business, agree to compensate those merchants that were at greatest risk of switching away from it in the short-term. By agreeing to provide compensation equal to the savings that such merchants would have been able to achieve by switching to another acquirer, the CMA considered that Worldpay would have been able to mitigate the risk of such switching occurring. In doing so, Worldpay would have avoided any long-term damage that may have been caused by the loss of such merchants including the 'domino effect' described by Worldpay in its submissions to the CMA.
28. The CMA considered that, to the extent that Worldpay would need to compensate certain merchants to prevent them from switching to other acquirers, the overall scale of such compensation was likely to be limited. The CMA concluded that, even in the unlikely scenario of Worldpay not being able to provide cross-border acquiring until the beginning of March 2015 (for instance due to a delay in obtaining DNB approval for Worldpay BV), such compensation payments would not constitute significant damage for a company of Worldpay's size and financial resources.<sup>7</sup>

***The CMA's assessment of whether it was necessary to act to prevent significant damage to merchants***

29. Having gathered and considered evidence from a range of sources, the CMA concluded that it was not necessary for it to act as a matter of urgency to prevent significant damage to merchants, or to a category of merchants (such as small and medium-sized merchants) for the following reasons.
30. First, merchants that did not switch to a cross-border acquirer would continue to incur the same levels of domestic MIFs as had been the case for a considerable period of time. As such, the CMA did not consider that it was necessary for it to act as a matter of urgency to prevent significant damage. Second, the CMA did not find any evidence that other acquirers which intended to offer cross-border acquiring (through an offshore subsidiary) would be subject to any capacity constraints that would prevent merchants that wished to do so from switching to them to benefit from cross-border acquired MIFs. Finally, the CMA considered that the differential between cross-border acquired MIFs and domestic MIFs was, relative to merchants' other costs, unlikely to be sufficient to mean that merchants that did not switch

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<sup>7</sup> In considering Worldpay's financial resources the CMA took account of Worldpay's revenues, EBITDA, capital expenditure, and profits before and after tax over the last three financial years and its cash reserves in the last financial year.

would suffer significant damage due to any competitive disadvantage compared to merchants that did switch.

***The CMA's assessment of whether it was necessary for it to act as a matter of urgency for the purpose of protecting the public interest***

31. While not obliged to do so, the CMA also considered whether the evidence available to it indicated that there were significant broader public interest issues. The CMA considered that no such issues arose and that it was therefore unnecessary for the CMA to act as a matter of urgency in order to protect the public interest.

***The CMA's conclusion regarding whether it had the power to impose an interim measures direction in this case***

32. In light of the above conclusions that it was not necessary as a matter of urgency for the CMA to act to prevent significant damage to either Worldpay or merchants (or a category of merchants) or to protect the public interest, the CMA concluded that it did not have the power to impose an interim measures direction in this case.

***The CMA's consideration of whether it would have been appropriate to impose an interim measures direction***

33. For completeness, the CMA also considered whether it would have been appropriate to impose an interim measures direction if it had concluded that Worldpay was likely to suffer significant damage. In this regard, the CMA considered that imposing the requested interim measures would have been more likely than not to have adverse effects on other parties, in particular on other acquirers that had put themselves in a position to provide cross-border acquiring from January 2015. The CMA was also not satisfied that Worldpay had taken sufficiently timely and appropriate steps to mitigate the risk of it suffering the damage in relation to which it sought an interim measures direction.
34. Further, the CMA noted that from 1 March 2015 UK domestic MIFs for Visa debit card transactions would change to rates which Visa submitted would result in a lower weighted average than the 0.2% weighted average rate laid down in the commitments offered by Visa Europe and accepted by the European Commission on 8 December 2010.<sup>8</sup> In light of this, the CMA noted that, if it had concluded that Worldpay was likely to suffer significant damage,

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<sup>8</sup> Case COMP/39.398 - Visa MIF, Commission decision of 8 December 2010.

it would have considered whether it was appropriate for any interim measures to apply to debit card transactions after 1 March 2015.