

Decision on the CMA's review of the Credit Cards (Merchant Acquisition) Order 1990

Contents

	<i>Page</i>
Summary	1
Introduction	2
Background	4
Monitoring activity.....	7
Market developments	7
Stakeholder views	11
Change of circumstances	12
Appropriateness of the 1990 Order	13
Provisional decision and consultation.....	14
Final decision	14

Summary

1. This review has considered the Credit Cards (Merchant Acquisition) Order 1990 (the 1990 Order) and assessed the legislative, regulatory and market changes since the Order came into force.
2. The most significant change was the introduction of the Payment Services Directive and Payment Services Regulations 2009 (PSRs). The PSRs supersede the 1990 Order by limiting restrictive rules in payment systems, with this being enforced, initially by the Office of Fair Trading (OFT), then the Competition and Markets Authority (CMA), and now by the new Payment Systems Regulator. The Payment Services Directive was a maximum harmonisation directive, and consequently, the UK cannot exceed or fall short of its provisions, save where there is an explicit derogation in the Directive.
3. Moreover, the supply of merchant acquisition services has changed significantly since the 1990 Order came into force, with a significant proportion of UK suppliers not also being involved in card issuing activities.
4. Views from stakeholders, including the Payment Systems Regulator were unanimously in favour of revocation of the 1990 Order, due to market,

legislative and regulatory changes since 1990. Responses to the consultation on our provisional decision were also supportive of revoking the 1990 Order.

5. Our conclusion is that there has been a change of circumstances relevant to the 1990 Order, and that due to the nature of these changes – particularly the maximum harmonisation of the Payment Services Directive – the 1990 Order should now be revoked.

Introduction

6. The CMA's annual plan for 2015/2016¹ included the commencement of a systematic review of existing merger, market and monopoly remedies, which may lead to the removal of measures that are no longer necessary and/or may be restricting or distorting competition.
7. On 14 July, the CMA commenced two reviews of market remedies. These are the 1990 Order and the undertakings given by Metal Box plc in 1972. In addition, the CMA is seeking views on whether to carry out reviews of 13 sets of market remedies that had been put in place by the CMA's predecessors prior to 2005, and which have not been reviewed recently.

Reasoning for the Order

8. The Monopolies and Mergers Commission's (MMC) 1989 report 'Credit Card Services – A report on the supply of credit card services in the United Kingdom'² examined a range of issues across credit card services markets. In relation to merchant acquisition, it found that there was a 'lack of competition in merchant acquisition and that obstacles to further competition should be removed'.³ These obstacles were in the form of restrictive rules which prevented or delayed prospective companies from becoming merchant acquirers. The MMC considered these rules to be restrictive as companies had first to be accepted as card issuers, and only enter into merchant acquisition once they had made progress in meeting card-issuing targets.⁴

¹ See [CMA annual plan 2015/16](#), paragraphs 4.12 and 4.17.

² MMC (August 1989), [Credit Card Services – A report on the supply of credit card services in the United Kingdom](#).

³ MMC (August 1989), [Credit Card Services – A report on the supply of credit card services in the United Kingdom](#), paragraph 7.104.

⁴ MMC (August 1989), [Credit Card Services – A report on the supply of credit card services in the United Kingdom](#), paragraph 7.105.

9. The 1990 Order sought to address these problems. It prevents payment card organisations from:
 - (a) making any agreement that prevents card issuers from acting as merchant acquirers;
 - (b) requiring payment card issuers to issue a certain number of payment cards before they can become a merchant acquirer; and
 - (c) withholding any service from a payment card issuer that would normally be needed for the company to act as a merchant acquirer.
10. The intention was to increase competition in the merchant acquisition market.
11. The remedies set out by the MMC were specific to the Visa and Access (Mastercard/Eurocard) schemes, and were not designed to cover other schemes, given the findings of the MMC's report.⁵

Jurisdiction

12. The 1990 Order was made under the monopoly provisions of the Fair Trading Act 1973.
13. The CMA has a statutory duty under sections 88(4) and 88(5) of the Fair Trading Act 1973, as preserved in Schedule 24 to the Enterprise Act 2002, to keep under review undertakings and Orders. From time to time, the CMA must consider whether, by reason of any change of circumstances:
 - (a) undertakings are no longer appropriate and need to be varied, superseded or released; or
 - (b) an Order is no longer appropriate and needs to be varied or revoked.
14. Responsibility for deciding on variation or termination of Orders lies with the CMA pursuant to Schedule 2 to the Enterprise Act 2002 (Enforcement Undertakings and Orders) Order 2004 (SI 2004/2181) and the transition provisions under the Enterprise and Regulatory Reform Act 2013.

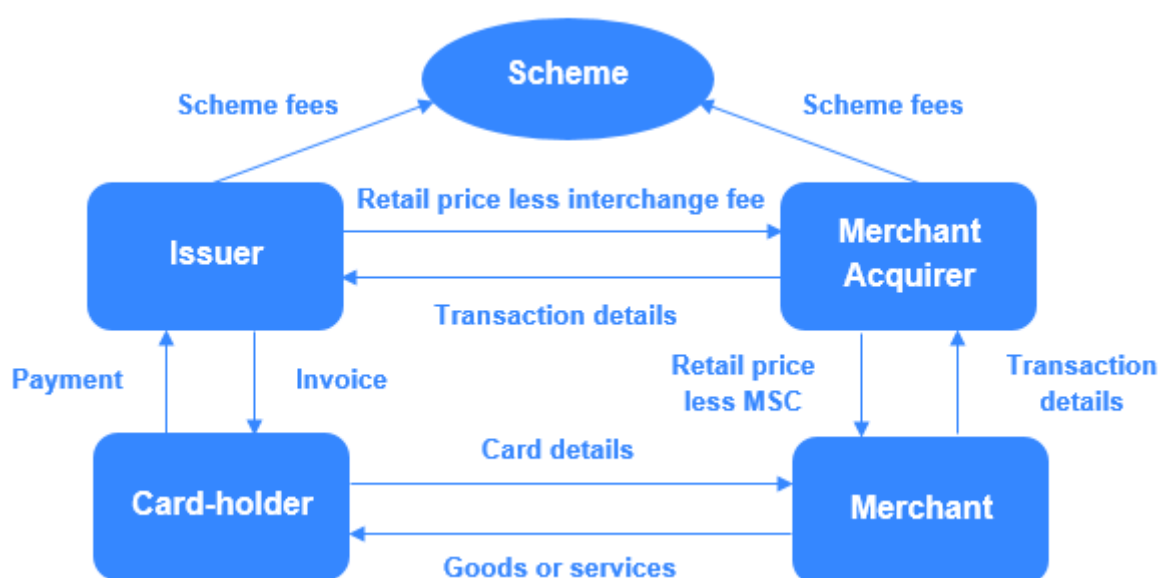
⁵ See paragraph 7.113 for details of the MMC's conclusions on remedies.

Background

Payment card schemes in the UK

15. There are a number of different payment card schemes in the UK, including debit cards, credit cards, charge cards, and store cards. Credit card holders can use their card to buy goods and services and withdraw cash up to a pre-determined limit. They receive a statement (typically monthly) and can pay part or all of the balance on a monthly basis, with interest charged on sums that are not repaid within the interest-free period.⁶
16. There are two main types of payment card schemes in the UK, three and four party schemes. Visa and Mastercard are examples of four-party schemes which are described below.

Figure 1: Four-party payment card scheme



Source: CMA.

17. As the diagram above shows, the four main parties are:
 - (a) the consumer (**card-holder**);
 - (b) the business from which the card-holder makes a purchase (**merchant**);
 - (c) the bank that issued the card to the card-holder (**issuer**); and

⁶ Store cards are similar to credit cards in operation but are able to be used only in specific retailers. Charge cards are similar to credit cards except that the full balance needs to be repaid each month. Debit cards are linked directly to an existing bank account and goods and services are paid for through an immediate debit of the linked account.

- (d) the payment service provider or bank that processes the transaction for the merchant (**merchant acquirer**).
18. Despite being referred to as a four-party scheme, there is a fifth party – the card scheme itself, for example, Mastercard or Visa, which are member associations comprising those businesses that are involved in the issuing or acquiring of Mastercard and/or Visa payment cards. The scheme provides the payment system network over which the payment details and transactions are carried.
19. Three-party schemes are to some extent similar, with the main parties being the scheme itself, card-holders and merchants. In a three-party scheme, the scheme itself provides the network for transactions, as well as recruiting both card-holders and merchants directly. We are aware that more recently some licensee issuers and merchant acquirers have been appointed in some three-party schemes.
20. The fees for using payment cards in a four-party scheme include the following:
- (a) **Interchange fees**, which are paid by merchant acquirers to issuers.
 - (b) **Merchant Service Charges (MSC)**, which are paid by merchants to merchant acquirers. Merchant Acquirers pass on the cost of the interchange fees to Merchants and include the cost of providing Merchants with a card processing service.

Market definition

21. The OFT considered the supply of credit services including issuing and merchant acquisition as part of its (now closed) investigation into multilateral interchange fees. In its Competition Act decision on this matter, published on 6 September 2005,⁷ the OFT, in its consideration of four-party payment card schemes, found three separate relevant economic markets:
- (a) 'The (**wholesale**) market for the provision of card transaction services between issuers and acquirers for purchases made by way of [Mastercard branded] consumer credit and charge cards in the UK.

⁷ See OFT (2005), [MasterCard UK Members Forum Limited](#); and the CMA's [Interchange fees - MasterCard and Visa](#) case page. This decision was appealed to the Competition Appeal Tribunal on 2 November 2005. On 19 June 2006, the Competition Appeal Tribunal set aside the OFT's decision.

- (b) The (**acquiring**) market for the provision of merchant acquiring services by acquirers to merchants for purchases made by way of [Mastercard branded] consumer credit and charge cards in the UK.
- (c) The (**issuing**) market for the provision of branded consumer credit and charge card issuing services by issuers to card-holders in the UK'.⁸

Issuing and merchant acquisition

22. When the MMC reported in May 1989, the two main credit card schemes were Visa and Access (Mastercard/Eurocard).
23. At that time, Visa was listed in the UK as an overseas company run by its members. In order to become a merchant acquirer in the Visa card scheme, members needed to be listed as principal members and to have issued a specific number of Visa cards (although not necessarily credit cards). At the time of the MMC's report, Barclays, TSB,⁹ and Lloyds were the acquirers in the Visa scheme.
24. The Access card scheme used the Mastercard/Eurocard trademarks and represented the only significant alternative to Visa at the time of the MMC's report. During 1989, the Access card scheme opened up its merchant acquiring from being provided by the Joint Credit Card Company (JCCC) Ltd (owned by member companies) to also being provided by JCCC Ltd and the members, including Lloyds, Midland Bank, National Westminster Bank, and the Royal Bank of Scotland Group.
25. Access (Mastercard/Eurocard) rules noted that a financial institution that participated in any card activities that use either Eurocard or Mastercard branding, must become a member. These rules also required that within one year of becoming a member and at all times thereafter, each member must have both issued and maintained a reasonable number of Mastercard/Eurocard branded cards. Consequently, any member wishing to undertake merchant acquisition activities would have needed to join the card scheme and have issued cards in order to be able to act as a merchant acquirer.

⁸ OFT Competition Act Decision of 6 September 2005, CA98/05/05, paragraph 149.

⁹ TSB Trustcard was based in Northern Ireland. TSB also provided merchant acquiring services for two TSB companies that accept Visa Cards: Swan International Ltd and TSB Trust Company Ltd.

Monitoring activity

26. There have been no formal reviews of the Order since it came into force.

Market developments

27. Since 1990, there have been a number of developments that are relevant to these markets. This section focuses on the most recent developments which are examined in the following three categories:

- (a) Legal developments relevant to payment card schemes.
- (b) Competition and regulatory developments relevant to payment card schemes.
- (c) Developments in the market relevant to issuing and acquiring.

Legal developments relevant to payment card schemes

28. Following the MMC's 1989 report, two orders were put in place to address the concerns raised. The Credit Cards (Merchant Acquisition) Order 1990 came into force in February 1991, while the Credit Cards (Price Discrimination) Order 1990 came into force in March 1991. In January 2012, the Competition Commission (CC) decided to revoke the Price Discrimination Order. This was due to it being superseded by the Payment Services Regulations 2009 and the Payment Services Directive being maximum harmonisation – thus preventing Member States from maintaining or introducing provisions other than those laid down in that Directive.
29. The Payment Services Directive, published in late 2007 was transposed into UK law by the Payment Services Regulations 2009 (PSRs). The PSRs came into force on 1 November 2009 and were enforced and monitored primarily by the Financial Services Authority, which became the Financial Conduct Authority on 1 April 2013. The OFT, and subsequently the CMA, had responsibility for the supervision of the regulations relating to access to payment systems. From 1 April 2015, following an amendment to the PSRs, this function transferred to the new Payment Systems Regulator.
30. The aims of the PSRs were to increase efficiency, competition and innovation in EU payments, and lead to greater integration of national payments towards the creation of a single market for payments. The Directive itself had three main elements:
- (a) A prudential authorisation regime for payment service providers that are not already authorised.

(b) Harmonised business conduct rules to apply to all payment service providers.

(c) Provisions to open up access to payment systems throughout the EU.

31. The most relevant aspect of the Directive and the PSRs to the 1990 Order are the provisions that prohibit restrictive rules or conditions governing access to or participation in payment systems by payment service providers under Part 8 of the PSRs. Specifically, Regulation 97 of the PSRs states the following:

1. Rules or conditions governing access to, or participation in, a payment system by authorised or registered payment service providers must:

(a) be objective, proportionate and non-discriminatory; and

(b) not prevent, restrict or inhibit access or participation more than is necessary to:

(i) safeguard against specific risks such as settlement risk, operational risk or business risk; or

(ii) protect the financial and operational stability of the payment system.

2. Paragraph 1 applies only to such payment service providers as are legal persons.

3. Rules or conditions governing access to, or participation in, a payment system which, in respect of payment service providers, payment service users or other payment systems:

(a) restrict effective participation in other payment systems;

(b) discriminate (whether directly or indirectly) between:

(i) different authorised payment institutions; or

(ii) different small payment institutions

in relation to the rights, obligations or entitlements of participants in the payment system; or

(c) impose any restrictions on the basis of institutional status

are prohibited.¹⁰

32. Following the introduction of the PSRs, card scheme rules needed, at least in theory, to be compliant with the 1990 Order as well as the PSRs. The CMA considers that there is an overlap in the aims and provisions of the 1990 Order and the PSRs. While the 1990 Order was specific to issuing and merchant acquisition activities, the PSRs provide for broader regulation of access and objectivity of rules in payment systems, including card schemes. The CMA considers that this broader regulation encompasses the aims of the 1990 Order. While the 1990 Order characterised certain actions as unlawful, the PSRs takes a broader approach to ensure rules are objective and do not restrict access and participation more than is necessary, without absolute prohibitions. Therefore, while the details and approach of the two are not identical, it can be seen that the PSRs are intended to achieve outcomes that encompass those of the 1990 Order and has, in effect, superseded the 1990 Order. The CMA notes that maintaining both the 1990 Order and the PSRs could create at least some degree of confusion among payment service providers and other stakeholders.
33. The Payment Services Directive is a maximum harmonisation directive. This means that national law cannot exceed or fall short of its provisions, save where there is an explicit derogation in the Directive. This refers to both the law transposing the Directive itself and any other national law, even if that national law pre-dates the Directive. If any national law contains provisions that are inconsistent with the provisions of a maximum harmonisation directive, it is considered unenforceable if it cannot properly be interpreted in conformity with the Directive. However, if there is a transposing measure for a Directive, any other domestic measure in the field is unlawful in accordance with the EU law general principle of legal certainty. Even if a law is entirely consistent with the Directive – except where relied upon as giving effect to the Directive – it ceases to have effect when the Directive enters force, as the Directive supersedes national legislation where the European legislation, ‘occupies the field’.
34. The 1990 Order is pre-existing legislation which was not relied upon to transpose the Directive, and which has been superseded by Part 8 of the PSRs.

¹⁰ The Payment Systems Regulator confirmed in its response to the CMA's Invitation to Comment that the proposed EU Directive which will revise the Payment Services Directive maintains the relevant provisions on access and participation in payment systems.

Competition and regulatory developments relevant to payment card schemes

35. Since the 1990 Order came into force, there have been a number of developments concerning competition and regulatory bodies for financial services and payment systems.
36. The Competition Act 1998 introduced two prohibitions designed to limit anti-competitive activity of firms. First, agreements between undertakings that have as their object or effect, the prevention, restriction or distortion of competition are prohibited unless they are exempt. Second, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited. The Enterprise Act 2002 made a number of changes to competition law as well as introducing the possibility for the OFT and other bodies to make market investigation references to the CC. Moreover, from 2004, following modernisation of EU competition law in 2004, national competition agencies, including the OFT, became competent to apply Articles 81 and 82 of the Treaty of Rome.¹¹
37. The new Payment Systems Regulator in the UK assumed its powers from 1 April 2015. It has a range of regulatory powers over payment systems designated by HM Treasury which, at present, include: Bacs; C&C; Chaps; Faster Payments Scheme; LINK; Northern Ireland Cheque Clearing; MasterCard; and Visa Europe.
38. The main legislation that applies to the Payment Systems Regulator is the Financial Services (Banking Reform) Act 2013, which created the Regulator and sets out its objectives and duties. The Payment Systems Regulator also has concurrent powers under the Competition Act 1998 and Enterprise Act 2002, and has assumed responsibility for the access requirements of the PSRs from the CMA. It also expects to be the competent UK authority for certain EU legislation, including the recent Interchange Fee Regulation.
39. In its response to the CMA's Invitation to Comment, the Payment Systems Regulator noted that, in the event of the re-emergence of concerns highlighted in the MMC's report of 1989, the Regulator considers that it has a number of options, including enforcement of Regulation 97 of the PSRs, as well as powers under the Competition Act 1998, Enterprise Act 2002 and specifically, under the Financial Services (Banking Reform) Act 2013 to:
 - (a) give directions to participants in regulated payment systems;

¹¹ Equivalent to Articles 101 and 102 of the Treaty Forming the European Union.

- (b) impose requirements on participants in regulated payment systems;
- (c) on application, require the granting of access to a regulated payment system; or
- (d) on application, vary the terms and conditions of agreements relating to regulated payment systems.

Developments in the market relevant to issuing and acquiring

- 40. There have been significant changes in the businesses supplying merchant acquisition services in the UK. However, in exploring these changes, the CMA has not considered the extent to which the 1990 Order or other causes were contributory factors in these changes.
- 41. While some banks in the UK still offer merchant acquiring services and also issue payment cards to customers, they do not represent the whole of the merchant acquisition market. Indeed, the largest provider of merchant acquisition services in the UK, Worldpay, does not issue payment cards and is not at present owned by a bank. Worldpay was previously owned by RBS, but was sold to Bain Capital and Advent International in late 2010, and represents around 44% of merchant acquisition services in the UK.¹² In addition to Worldpay, other providers of merchant acquisition services in the UK that are not issuers of payment cards include Elavon, First Data, and Global Payments. There are now only two large banks that offer merchant acquisition as well as issuing payment cards, including Barclays and Lloyds Banking Group (Cardnet – a joint venture between Lloyds and First Data International).
- 42. One further development relevant to merchant acquiring is that merchant acquirers based outside the UK are now able to compete more effectively with providers located in the UK, thus increasing the choice of acquirer for merchants in the UK.

Stakeholder views

- 43. At the time of publishing its decision to launch this review, the CMA wrote to relevant stakeholders including card schemes, merchant acquirers, representatives of UK retailers, and the Payment Systems Regulator. The CMA received comments from three market participants, all of which were in

¹² Worldpay (2014), [Annual Report and Accounts 2014](#), p1.

favour of revocation of the 1990 Order due to market, legislative and regulatory changes since 1990.

44. The Payment Systems Regulator responded, noting that ‘our understanding is that there has been a significant change in the UK acquiring market since the making of the Order. This change has been characterised by the emergence and subsequent growth of “monoline” card acquirers that carry on no issuing activity.’ It also notes that ‘the Order has been in effect superseded by the PSD [Payment Services Directive].’ Further, it noted the possibility for removing the 1990 Order to reduce unnecessary confusion: ‘the maintenance of two similar (or even directly equivalent provisions) might cause unnecessary confusion on the part of participants and service users.’

Change of circumstances

45. The changes outlined above appear to be significant and to have important implications for the 1990 Order, specifically in relation to the following:
- (a) Legal developments including the Payment Services Directive and the PSRs in the UK have gone further than the 1990 Order in establishing a prudential regulatory regime for payment service providers, providing for reasonable access to relevant card schemes for such businesses. This means that previous restrictions and a need to issue payment cards before offering acquiring services are no longer relevant, and furthermore, complaints about reasonable access to such schemes can be considered and addressed under the PSRs. The CMA considers that the overall effect of the PSRs has been to supersede the 1990 Order.
 - (b) Furthermore, the Payment Services Directive was a maximum harmonisation directive, and this required member states not to create or maintain separate legislation to that in the Directive. Consequently, it may be considered inappropriate for the 1990 Order to remain in force.
 - (c) The regulatory developments are relevant to the 1990 Order, in that, following the establishment of the Payment Systems Regulator, with a full suite of regulatory powers, as well as concurrent competition powers under the Competition Act and Enterprise Act, its role is promoting competition and innovation in payment markets, such as merchant acquiring services. Therefore, enforcing access provisions for payment systems, as well as considering new competition investigations in this area are for the Regulator to consider, rather than necessarily being matters for the CMA, at least in the first instance.

- (d) Changes to the market for merchant acquiring services show that a significant proportion of the UK market is served by providers that are not issuers of payment cards in the UK. In addition, there is now scope for competitive cross-border acquiring from providers located in other EU Member States. This means that there are likely to be greater competitive constraints on suppliers of merchant acquiring services for UK merchants, and scope for greater competition than was the case at the time of the MMC's investigation, with barriers to effective competition having been removed.
46. When considered collectively, the CMA finds that the changes set out above represent relevant changes of circumstances for the purposes of Section 162 of the Enterprise Act 2002.

Appropriateness of the 1990 Order

47. Given the finding of changes in circumstances relevant to the 1990 Order, it is necessary for the CMA to determine whether the Order should remain in place in its current form, or whether it should be revised, or revoked.
48. The 1990 Order was designed to increase the level of competition in the merchant acquisition market in the UK by allowing providers of merchant acquiring services to enter the market without having to issue credit cards to consumers.
49. The presence of the PSRs superseding the 1990 Order and the maximum harmonisation of the Payment Services Directive imply that the 1990 Order should be revoked. Article 86(1) of the Directive provides that, 'insofar as this Directive contains harmonised provisions, Member States shall not maintain or introduce provisions other than those laid down in this Directive'.
50. The regulatory changes that have taken place, particularly the creation of the new Payment Systems Regulator, show that issues around payment systems, including access, could now be addressed through regulatory powers, or at least by the regulator rather than the CMA, at least in the first instance. Such developments would be consistent with revoking the 1990 Order, as if any such issues arose again, they could be considered by the new Regulator with a strong set of regulatory and competition powers.
51. At present in the market, there are a number of providers that are non-bank payment service providers that do not issue payment cards, while there are still some banks that offer both merchant acquiring and issuing of payment cards. The choice of merchant acquirer is further increased by the ability to have transactions acquired cross border by an acquirer in another EU

Member State. This suggests that previous barriers to competition have been removed and the 1990 Order is no longer necessary and should be revoked.

Provisional decision and consultation

52. The CMA published its provisional decision to revoke the 1990 Order on 23 September 2015 and undertook a short consultation. The CMA received two brief responses; the first from Visa Europe, and the second from the Payments Systems Regulator. Both were supportive of the CMA's provisional decision.

Final decision

53. The CMA's decision in relation to the 1990 Order is that, given the developments in the years since the Order came into force, there have been changes of circumstances that are relevant to the 1990 Order. Consequently, the CMA's conclusion is that the 1990 Order should be revoked.