

The Atlantic Divide: Litigation vs. Regulation in Payments

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A mix of market forces, law, regulation, and public and private litigation has determined the price of payments acceptance on both sides of the Atlantic. Their relative importance, however, differs markedly. While private antitrust suits have had a significant impact in the US, in Europe private litigation hasn't directly reduced interchange fees.

In 2003, as part of the settlement of the *Visa Check/MasterMoney* antitrust lawsuit – aka the Walmart case - Mastercard's and Visa's debit interchange fees were reduced by one-third for five months. The latest settlement proposal in the multi-decade antitrust lawsuit against Mastercard and Visa in the US over interchange fees and acceptance rules ("In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation" MDL1720) highlights the difference. It would reduce

credit interchange fees by 10 basis points for five years.

The European Model: Regulation as the Primary Driver

In stark contrast, in Europe, regulatory action and law were the primary forces bringing down interchange fees. In its initial salvo in 2000, the European Commission objected to Visa's interchange fees. Europe's largest retail payment network bent the knee. In 2002, Brussels issued an exemption decision valid for five years under which Visa reduced intra-EU cross-border interchange fees to 70 basis points, agreeing to a public utility model recouping approved costs.

Mastercard fought back, but ultimately lost. Following the EC's 2007 prohibition on its cross-border fees, in 2009 Mastercard agreed to temporarily reduce cross-border credit and debit interchange fees to 30 and 20 basis points, respectively, creating the benchmark that would become law.

In 2009, the EC took another bite at the apple with Visa, charging it with violating EU competition law. Brussels forced Visa to reduce debit and credit

interchange to 20 and 30 basis points in 2010 and 2014, respectively.

In 2013, EU Internal Markets Commissioner Michel Barnier chillingly branded Mastercard's public criticism of interchange price controls as "unacceptable."

EU legislation in 2015 put a permanent ceiling on consumer credit and debit interchange fees of 30 and 20 basis points, respectively. In 2019, the EC jawboned the global card networks to align interchange on in-person payments made with non-EEA cards to the same levels as EEA-issued cards. For e-commerce, it allowed interchange fees of 150 and 115 basis points for credit and debit, respectively.

Beyond the EU, the UK has taken its own regulatory path.

The UK's Payment Systems Regulator (being folded into the Financial Conduct Authority) appears to have the statutory authority to cap interchange fees between the UK and EU by regulatory diktat. It also suggested there's a problem with card scheme acquirer fees, observing that they'd increased over 25% in real terms from 2017 to 2023, and were not directly linked to costs.

Private lawsuits exacted a different toll, principally in the UK. In a pivotal 2020 UK Supreme Court ruling (*Sainsbury's et al. v. Visa & Mastercard*), the court said multilateral interchange fees set by the schemes restricted competition. That opened the floodgates for retailers to sue for damages.

For centuries a fundamental precept of Anglo-American law has been that the burden of proof lies with the accuser. In the realm of payment network competition, however, in 1984 the EC turned that principle on its head. It ruled banks' Eurocheque interchange fees were price fixing, and that any agreement between banks to set a standard fee was automatically illegal unless proven otherwise. To keep them, interbank payment systems' fees must pass an "indispensability" test proving that the system would completely collapse without them.

That created an impossible burden of proof for payment systems relying on asymmetric interchange fees to balance participation on both sides of the network to maximize total value. While it's grossly suboptimal, a payment network can function without interchange fees.

**The U.S. Litigation Path: From Walmart to MDL
1720**

Even in the US where the rules are more favorable for antitrust defendants, the global payment networks have often sought to avoid going to trial.

Nobody is delighted with the proposed settlement of US merchants' longstanding antitrust suit against Mastercard and Visa, except, perhaps, the merchant plaintiffs' attorneys. However, that's the nature of settlements. Nobody gets everything they want.

Merchants detest the two-sided payment networks' asymmetric pricing where merchants pay more to accept, and consumers are paid to make, payments. Consumers, of course, love it.

If the landmark settlement is greenlighted, it will give US merchants modest economic relief and additional tools to pressure the credit card networks and issuers on fees, while the leading open-loop payment card networks would eliminate a massive legal risk.

To stand up in court, antitrust violations require abuse of market power harming consumers. Mastercard and Visa have a righteous defense against the antitrust charges levied against them. Nonetheless, storied trial attorney Lloyd Constantine's framework for thinking about Mastercard's and Visa's risk obtains.

In 2004, at a UBS conference in New York City, Constantine likened Mastercard and Visa at trial to defend themselves against an antitrust lawsuit to playing Russian roulette. Reasonable people could disagree on how many chambers the revolver had. Mastercard and Visa, however, know there would be a catastrophic outcome in at least one chamber.

In June 2024, Judge Margo Brodie rejected the last proposed settlement because it didn't address the honor-all-cards doctrine. She also deemed the agreement's interchange-fee reductions and surcharging liberalization insufficient. To satisfy her objections, the leading open payment networks sweetened their offers, weakening the honor-all-cards doctrine, increasing the credit interchange reduction a tad, and loosening surcharging restrictions.

The reigning general-purpose credit and debit card systems provide guaranteed payments for the majority of merchants' sales while generating incremental sales. Sellers take for granted that, every year, interoperating and competing payment networks, processors, issuers, and fintechs will deliver improved services.

However, in the merchants' dream world, card acceptance would be free, or, better yet, generate

fees. They can't get free acceptance in the market, in settlement of their class-action antitrust lawsuit, or thus far on Capitol Hill and in state capitals.

Elsewhere, when retailers have had the power, they've forced banks to pay them to accept payment cards. Indeed, for several decades, Australia's national EFTPOS debit network had negative interchange fees.

Enormous Value

Imagine a counterfactual in which American and European cardholders were indifferent between half a dozen payment cards in their leather and digital wallets, a world where merchants wouldn't lose sales by aggressively preferencing a particular payment product. Interchange fees would plummet, and likely go negative. But consumers in the Old and New Worlds have payment preferences.

Mastercard and Visa deliver enormous value to consumers and merchants, value that's taken for granted. Their concessions to US merchants will destroy value.

The settlement proposes the networks' credit interchange fees on a weighted basis systemwide be reduced by 10 basis points for five years. On

standard cards, the reduction would be considerably more, to 125 basis points for an eight-year period. Retailer Goliaths enjoying custom interchange rates would receive proportionate reductions for the lesser of five years or the term of their deal. Joseph Stiglitz and Keith Leffler, the plaintiffs' economists, estimated these interchange cuts would save merchants \$38 billion in fees by 2031.

The Economics of Two-Sided Platforms

Two-sided open payment networks like Mastercard and Visa use interchange pricing to optimize participation on both sides of the platform to maximize total value. Interchange fees fund rewards, grace periods, fee-free accounts, robust consumer protections, and a host of neobank and fintech innovations.

Moreover, two-sided, semi-open payment systems like American Express also price asymmetrically. The epic Supreme Court's 5-4 "Ohio et al v. American Express" decision in 2018, penned by Justice Clarence Thomas, held AmEx's antisteering provisions didn't violate federal antitrust law, and recognized that general-purpose payment card networks are two-sided platforms and that competition and value must be viewed holistically.

It held that the plaintiffs' focus on one side of the market - on merchants' transaction costs - was flawed. It noted Amex used higher merchant fees to fund "a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes it valuable to merchants."

Large retailers' profitable two-party and cobranded credit card programs similarly incentivize use by offering cardholders hefty benefits.

Many two-sided-platform businesses employ asymmetric pricing. Job boards charge employers, not jobseekers who have more elastic demand. Internet search is free for consumers, as advertisers pay for it. Bars sometimes offer women free drinks. If Google charged for search and paid advertisers, it would lose share to Bing and Yahoo. A bar that gave men but not women free drinks wouldn't last long.

Shackling interchange prices by lawsuit, law, or regulatory fiat reduces payment-platform value.

Forced interchange cuts harm cardholders.

Across the pond, the EU's draconian 30-basis-point credit interchange price cap means European credit card reward programs are sclerotic by U.S.

standards. Consequently, Europeans have less incentive to use credit cards. While credit cards accounted for a paltry 8.8% of EU card payment volume in the first half of 2025, they represent a majority of US card payment volume.

Under the settlement, credit card rewards that U.S. Mastercard and Visa issuers offer would be trimmed, but would still be robust compared with Europe. To offset reduced interchange fuel for the system, Mastercard and Visa could hike network acquirer fees and slash issuer fees, and even make them negative. After the EU's interchange price caps took effect in 2015, card networks increased acquirer network fees.

Greenlighting Surcharging

Merchant lobbyists in the US have long demanded the right to surcharge. Permitting it is part of the price of ending vendors' decades-long antitrust lawsuit. The agreement would permit surcharging up to the lesser of 3% or sellers' acceptance costs, defined as interchange and network fees. For purposes of the settlement, acquirers' (net) fees are excluded from acceptance costs.

Sellers could surcharge Mastercard and Visa credit cards without surcharging American Express and

Discover. AmEx bans surcharging unless all competitor cards – including debit – are surcharged. Since Mastercard and Visa prohibit surcharging on debit, merchants can't meet AmEx's requirement. Thus, the settlement offers a significant concession: surcharging credit without triggering AmEx's parity rules.

Surcharging hurts cardholders. That's why, historically, the global card networks banned the practice. That's why 10 states, including New York, California, Texas, and Florida, once prohibited it. Connecticut, Massachusetts, and Puerto Rico still ban it. And laws in California, New York, and Maine render surcharging nearly impossible for merchants.

Ironically, while the EU's PSD2 largely banned surcharging on consumer cards to protect the user experience, this U.S. settlement would encourage more surcharging. Like a handful of U.S. states, EU regulators, for all their faults, recognized that surcharging is anti-consumer.

Many national and state regulators and lawmakers understand surcharges are anti-consumer and often abused. They're increasingly viewing them through the lens of unfair and deceptive practices. Even where surcharging is permitted by payment-network rules and state law, unfair or deceptive acts or

practices laws still require they be disclosed clearly, prominently, and early enough in the purchase flow that consumers can reasonably anticipate them.

Regulators have repeatedly framed hidden or late-breaking fees as “junk fees” or “drip pricing,” emphasizing the problem is not just the fee, but consumers being misled about the ultimate price.

Surcharging is already widespread and widely abused. Because the settlement would make it easier, more merchants will surcharge. That will alienate consumers and shift spend to debit, cash, Zelle, ACH, private-label cards, American Express, and perhaps Discover.

‘A Poisoned Chalice’

Ominously, the agreement would weaken the honor-all-cards rule. US merchants could accept, or not, each of four categories of Mastercard and Visa payment cards: commercial, premium, and standard credit, and debit cards.

The leading credit networks, however, likely wager this concession has no teeth. The honor-all-cards doctrine is fundamental to their value proposition. For consumers, Mastercard’s and Visa’s brands convey the promise of universal acceptance.

Eviscerating that promise would destroy value for everybody.

While EU regulation permits merchants to accept consumer cards while declining commercial ones, this right is rarely exercised in practice

Strictly speaking, Mastercard's and Visa's U.S. honor-all-cards rules – or more accurately, honor-all-products rules – ended in 2003 as part of the Walmart settlement when debit and credit acceptance were unbundled. However, only a tiny percentage of merchants accepts Mastercard and Visa debit but not credit cards.

The right to decline more expensive premium credit cards would be a poisoned chalice for retailers. It would be operationally challenging, and, critically, would provoke the ire of their best customers—a penny-wise, pound-foolish strategy if ever there was one.

Some 55.5% of U.S. general-purpose card spend is on credit cards. A majority of that comes on premium cards. Issuers would migrate more cardholders and payment volume from standard to premium credit cards, making it even more difficult for merchants to decline or surcharge premium cards.

American Express—whose cards are priced like the leading open payment networks' premium credit cards - isn't part of this settlement. Declining or surcharging Mastercard and Visa premium credit cards would push profitable payment volume to AmEx. It also might create an opening for the distant number-four credit network, Discover (now part of Capital One), to up its game and start to take share.

If merchants refuse to accept Mastercard and Visa premium credit cards, that would harm cardholders. Cardholders haven't had a seat at the table. They want richer, not diminished, rewards. They don't want to be surcharged or declined at the point of sale because their card has generous rewards.

Paid to Pay

The dynamic U.S. payments system isn't broken. It's fiercely competitive and innovative at every stage in the value chain. The nature and intensity of that competition and innovation continue to evolve.

The more competitive the system, the more – to a point – consumers are paid to pay.

The U.S. has four general-purpose credit networks, a dozen general-purpose debit networks, a range of two-party retail credit and debit card networks,

digital-wallet-anchored payment networks like PayPal, a raft of burgeoning BNPL systems, open-banking-initiated payments, P2P payment systems spilling into retail like Cash App, Venmo, and Zelle, and emerging dollar stablecoins and deposit tokens.

How the market works and is defined matters in antitrust.

Judge Barbara Jones said in her epic 2001 ruling that Mastercard and Visa banning member banks from participating in Amex and Discover was illegal “[b]ecause Visa and Mastercard have large shares in a highly concentrated market with significant barriers to entry, both defendants have market power in the general-purpose card network services market, whether measured jointly or separately.”

But the competitive field in payments is expanding. The broader market definition used by Judge William Hoeveller in deciding the first US antitrust suit against Visa’s asymmetric interchange pricing is relevant.

In 1979, Nabanco contended Visa’s interchange fees involved price fixing and were anticompetitive. Hoeveller held that the relevant market was “the nationwide market for payment systems,” in which Visa didn’t have market power. He concluded that

interchange fees were pro-competitive and promoted “efficiency and competition,” and that prohibiting them would “undermine interbrand competition.”

Not a Done Deal

The current case stems from more than 50 antitrust lawsuits consolidated into MDL 1720. A \$7.25-billion proposed settlement was overturned in 2016 because merchants seeking damages and those seeking changes to the system’s rules didn’t have the same interests and therefore weren’t adequately represented by the same counsel.

MDL 1720 was split into damages and injunctive-relief cases. The damages case settled for \$5.5 billion in 2018 and was upheld on the final appeal in 2023.

The proposed settlement of the injunctive-relief suit isn’t a done deal. It’s subject to a preliminary hearing this year and a fairness hearing, presumably, late this year or early in 2027. The National Retail Federation, the National Association of Convenience Stores, Walmart, Circle K Stores and 7-Eleven, have sent Judge Brian Cogan, who replaced Brodie, a barrage of objections.

An imperfect negotiated settlement between private parties is better than a solution imposed by politicians or regulatory fiat, albeit not as good as outcomes determined in a competitive free market. It would preserve, albeit with constraints, the leading credit networks' ability to use interchange to balance participation across the ecosystem. Moreover, it would complicate the passage of the Credit Card Competition Act, notwithstanding President Trump's endorsement, and make it more difficult to advance legislation regulating interchange fees at the state level.

If Cogan approves the settlement, Mastercard and Visa would get an armistice with merchants on one front in the forever war over acceptance fees. They won't, however, be singing kumbaya. The forever war over payment-acceptance fees will continue at the point of sale, on Capitol Hill, in state capitals, and with regulators.

The settlement would nudge the U.S. closer to the European regulatory model – lower interchange, lower rewards and reduced cardholder value, and a less dynamic payments system.

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