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1. SEPA Cards Framework: SEPA-MIF vs. domestic MIF

In December 2009 the EPC published its latest version (2.1) of the SEPA Cards Framework (SCF) with several amendments to the earlier versions. In section 3 "Commitments by card schemes" the principles for interchange fees (3.3) have remained unchanged since the first version 1.0 of 2005 despite the new MIF-methodology and policy of the European regulators. Obviously, the establishment of a domestic MIF (besides a SEPA-wide MIF) within SEPA is still compliant with the SCF - although pricing based on geographical boundaries is a contradiction to the SEPA philosophy of an internal market within a single geographical area. EC Regulation No. 2560/2001 (replaced by the Regulation No. 924/2009) decreed the principle of equality of charges for cross-border payments and corresponding domestic payments in euro. Subject to this regulation are end-user (retailers, consumers etc.) charges of payment service providers but still not the fees agreed between payment service providers like, for instance, interchange fees. In several statements the Eurosystem has stressed the inconsistency of domestic MIFs within SEPA: *"A geographical differentiation of interchange fees (if any) within a given scheme is not compatible with the SEPA concept in the long run"* (2007[1]) or more recently: *A scheme should have a single interchange fee (if any) for the whole euro area within a given brand in the long run"* (2009[2]).

However, in the short run, domestic MIF of credit and debit card schemes will still be the rule rather than the exception. This practise is in line with the SCF. In detail, the requirement of section 3.3 of the SCF says:

"In the case where, and as long as, at local or national level, participating banks of a SEPA scheme establish multilateral interchange rules that differ from that scheme´s SEPA-wide

[1] ECB, Single Euro Payments Area (SEPA) from Concept to Reality, Fifth Progress Report, July 2007, p. 13
[2] ECB Therms of Reference

default multilateral interchange, any SEPA bank operating in that country will be eligible for that local or national multilateral interchange fee."

Based on the European Rules & Regulations of MasterCard and Visa (for all brands), if bilateral Interchange Fee agreements are lacking, there is no choice of the interchange which is applicable for a national transaction (issuer and merchant are operating within the same country):

- If no domestic MIF exists, the European fall-back rate has to be applied.
- If a domestic MIF is agreed by the scheme or by the national banks, this MIF must (!) be applied by every issuer and acquirer (cross-border acquirers included) operating within this country. Therefore merchants were not able to bypass high domestic MIFs through cross-border acquiring contracts

This rule was objected several times by the Eurosystem. It is a coercive rule, which iseems to contradict the wording of the SCF "will be eligible" which expresses a right or an option – not a "must". If you are "eligible" for something, you usually still have the option to waive this right – in our example by not joining an existing multilateral agreement of national banks. In this case – as suggested by the SCF - the default SEPA-MIF should apply (if no bilateral fees are agreed). So the question arises: Are the international card schemes Visa and MasterCard – "self-declared" SCF-complied and SEPA-complied - fulfilling this requirement of the SCF?

Our comment

Although the schemes of general-purpose cards should be SCF-compliant since 1 January 2011, they do not provide a choice of MIF. Therefore, they do not comply with the requirements of the SCF as interpreted above. We see no discussions within EPC and the schemes, no requests by the regulators, no protesting acquirers, who want to enter countries with high domestic MIFs appealing for the lower SEPA-MIF. This section of the SCF may be overlooked by the market players or the first interpretation of a superficial observer could be wrong. So let´s have a closer look at this passage. What are the requirements and assumptions mentioned?

- *The existence of a SEPA-wide default MIF.*
  The schemes Visa and MasterCard still do not explicitly establish a SEPA-MIF, but they do have a European regional MIF covering SEPA. This MIF is not only applying

to cross-border transactions but also to domestic transactions if a domestic MIF is lacking.

- *Banks (scheme members) establish a local or national MIF rule.*
  The domestic MIF should be established by the banks and not by the scheme (in practice, both options are existing). A "local MIF" could also be interpreted as a MIF-agreement between local banks without establishing a domestic MIF. But such local MIFs within a geographical sub-area of a country (e.g. a Bavarian MIF within Germany) are not known in the European market. Anyway, such an agreement could not be a binding scheme rule. So, obviously, existing domestic MIFs based on agreements by the banks are relevant here.
- *The SCF-requirement is relevant for card schemes (section 3 of the SCF).*
  Thus, SCF-compliant card schemes should realise this eligibility for all their member banks and payment institutions (issuers and acquirers) operating as a SEPA institution within a country belonging to SEPA.

So, even after a closer look we still have to conclude that in case of a domestic MIF agreed by national banks within a SEPA card scheme, any other bank (issuer or acquirer), which is already operating or intends to enter this country, should have the possibility- but not the obligation - to opt for the SEPA MIF or for the domestic MIF. However, an implementation of this requirement would result in an arbitrage between diverging SEPA-MIFs and domestic MIFs. Any acquirer would opt for the lower one of the two rates.
We decided to ask the relevant players in SEPA (regulators, card schemes, issuers and acquirers) for their opinion and interpretation of this SCF-requirement during the last months. Interchange is still a hot regulatory and legal issue, so it is quite understandable that none of the interviewed players were able or willing to give an official statement which can be cited here. Most of the interviewed people have serious problems to understand this SCF requirement. Even legal departments are confused. Most of the card experts confirm our opinion. A few answers and interpretations of stake holders:

- *"A SEPA-wide default MIF is not established until now, so the section is not relevant yet."*
- *"Scheme-members within a country do have at a certain time a choice; they can opt for a SEPA-MIF or for a domestic MIF. After this decision the respective MIF is binding for the national community until they make a new decision." (Comment: "any SEPA bank" is interpreted here as national banking community.)*

- *"Not all the schemes meet all SCF-requirements. There is no real legal enforcement power to realise SCF-compliance of card schemes."*
- *"SCF-compliance is certainly not the biggest issue for the international card schemes yet."*
- *"This paragraph was intended to give the choice to the banks, not to the schemes."*

Based on this experience we strongly suggest the cards working group of the EPC that is already working on a new version to revise this section in the next version of the SCF by clarifying used terminology and the meaning of this requirement. The Working Group could also consider the case of MIF-agreements, which are not national (or local) but international, restricted to a geographical restricted area within SEPA covering two or more countries.

2. EPC critique of proposed end-date regulation

In February 2011, the EPC has issued an official appraisal of the proposed end-date regulation.[3] The EPC endorses the approach to regulate end-dates for non-SEPA compliant schemes. However, it criticises many elements of the proposal and suggests major revisions. The EPC opposes the provisions of article 5 (4) and 12 – 15 that provide the Commission with the right to amend the technical Annex. Such a right would transform the Commission into a "de facto scheme manager and standard setter". This rule should be better left to industry and its standardisation bodies. Therefore, the EPC proposes to delete articles 5(4) and 12 – 15 of the Commission proposal.

To substantiate its point, the EPC questions the applicability of Article 290 of the Treaty on the functioning of the European Union. Article 290 forms the legal basis for empowering the Commission to adopt "delegated acts". According to Article 290 such delegated acts may be carried out with respect to "non-essential elements" of a legislative act. The EU Commission would like to have the right to change the "technical requirements" in the annex of the proposed regulation. As the EPC points, not so long ago, the EU Commission referred to these requirements as "essential requirements". Thus, the new wording ("technical requirements") seems to have been adopted with the purpose of "suggesting compliance" with Article 290. Thus, the EPC argues, the proposed Articles of the end-date regulation dealing with delegated acts do not comply with Article 290.

[3] EPC: Regulation establishing technical requirements for credit transfers and direct debits in euros. Executive Summary - EPC Comments, Doc. EPC468-10, Version 1.0, 18 February 2011. See also Gerard Hartsink: The Breakthrough for SEPA? EPC Newsletter, Issue 9, January 2011.

The EPC opposes article 4(2) mandating interoperability because it argues that interoperability of payment schemes is not feasible and may threaten full reachability. The point is further elaborated in a separate document.[4]

The EPC is not happy with all of the technical requirements set out in the technical annex of the Commission proposal. In particular, it criticises some of the requirements defined for direct debits (payer rights and creditor bank obligations in sections 3 (c), (d) and (e)). According to the EPC, the Commission disregards the preference of the large majority of direct debit users for a creditor driven model – as defined in the SDD Rule Book.

Finally, the EPC proposes that it should be made clear that large value payments are out of scope.

Our Comment

When it comes to SEPA the term "self regulation" is often used. This is somewhat mis-leading. SEPA has always been primarily a political project. So far, however, it was common understanding that the design of SEPA schemes and products would be left to the market. However, both the EPC and the EU Commission were not convinced that the market would embrace all of the new SEPA products. Thus, the call for regulation. What the EPC now experiences is that calling in the regulators may have unintended consequences. The EU Commission does not intend to simply mandate the use of EPC products – it also starts defining features of these products. Supposedly, this is not what the EPC expected. In politics, maybe more so than in other areas, it is true what the Rolling Stones told us, long ago: "You can't always get what you want."

3. Italian anti-trust watchdog fines MasterCard and eight Italian banks

In November 2010, the Autorità Garante della Concorrenza e del Mercato (AGCM) found MasterCard and eight Italian banks (Banca Monte dei Paschi di Siena, Banca Nazionale del Lavoro, Banca Sella Holding, Barclays Bank, Deutsche Bank, Intesa

[4] EPC: Interoperability Of Payment Schemes Is Not Feasible. Comment on article 4 (2) of the proposal for a regulation establishing technical requirements for credit transfers and direct debits in euros, 18 February 2011.

Sanpaolo, ICBPI and Unicredit) guilty of anti-competitive behavior.[5] The ruling refers to the setting of a multilateral interchange fee and the practise of banks to charge non-differentiated merchant fees that do not take different levels of scheme fees into account. The ACGM fined MasterCard and the eight banks a combined EUR6 million (MasterCard: EUR 2.7 million and the banks between EUR 50.000 and EUR 900.000).

Our Comment

The pressure on interchange fee remains high. Once more, the Italian anti-trust authorities have ruled against the banks. It is noteworthy that the ruling seems to be strongly influenced by the interchange decisions of the European Commission. Thus, the AGCM explicitly asks why rates for an Italian transaction have to be much higher than for an intra-European x-border transaction. This is a question other anti-trust authorities are likely to ask, as well, some time in the future.

4. Belgian debit card scheme will become SEPA-compliant

On 11 February 2011 the association of the Belgian banks Febelfin announced that the Belgian banks will continue the bank-owned debit card scheme Bancontact/Mister Cash (BC/MC)[6] - contrary to the expectations in the market. The scheme will be upgraded to a SEPA (SCF)-compliant scheme with access of issuers and acquirers outside of Belgium. The joint "Brand & Licence Company", who manages the brand and the licences, will amend the rules and regulations of the scheme in the next months. The continuance of the debit card scheme is a result of long negotiations between the banks and retailer organisations. Both parties will set a common round-table platform to jointly promote cashless POS-payments. The banks

[5] Autorità Garante della Concorrenza e del Mercato: Press release: Payment cards: Antitrust authority fines MasterCard and eight banks for agreements restricting competition. Over six million Euros in fines, Rome, 4th November 2010. http://www.agcm.it/stampa/comunicati/5050-i720-carte-di-pagamento-antitrust-sanziona-mastercard-e-otto-banche-per-intese-restrittive-della-concorrenza-multe-per-oltre-sei-milioni-di-euro.html

[6] Shareholders are the following banks: Fortis Bank, Dexia Bank Belgium, KBC Bank, ING Belgique and AXA Bank Belgium.

are also starting an initiative to promote m-payments for the low-value segment together with three leading mobile operators[7].

Retailer organisations welcome the continuance and migration of the scheme, although they are not willing to make any financial contribution to the investments which are necessary to rebuild the scheme. It is generally expected that this decision of the Belgian banks will foster scheme competition.

Our Comment

In 2006 the Belgian banks decided to terminate their own debit card scheme and to migrate to Maestro. This premature SEPA-induced decision was heavenly criticised by SEPA-regulators and Belgian retailers. The banks withdrew the decision and since that time it has been an open question how the banks would realise SCF-compliance in the Belgian debit card market. Finally, pressure was mounting given the end-date for the SEPA-compliance cards (1 January 2011). Until recently it was expected that BC/MC would follow the Dutch way to terminate the domestic scheme and to shift to Maestro. The BC/MC-shareholder KBC already made a decision last year in favour of Maestro. V PAY is not in the market yet, but announced in January 2011 an issuer contract with a "big Belgian bank". Also PayFair was ready for take-off to fill in the gap after the expected retreat of BC/MC. Now the cards will be shuffled again. In any case, a winner will be ATOS Worldline as acquirer and processor of BC/MC-transactions.

The round-table approach as a permanent facility between banks and retailers was a success factor in the Dutch market to become one of the European countries with the highest penetration rate of debit card transactions per inhabitant. Belgium will take over this model, while in other countries retailers often are seen as opponents.

At the beginning of the era of SEPA for Cards (starting January 2011), almost all the old legacy domestic card schemes have become SCF-compliant. Probably the Dutch scheme owner will regret now its early decision to be out of the game. In theory, all of these schemes should expand geographically within the whole SEPA-area together with MasterCard and VISA, competing with each other in the new common payment market. In the whole European history of card payments we never had so much competition! From this point of view the requirement of the Eurosystem for a third European card scheme is more than fulfilled.

[7] Mobistar, BASE (KPN Group Belgium) and Belgacom

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