

## Commission Working Document on the 'Applicability of Article 81 of the EC Treaty to multilateral interbank-payments in SEPA Direct Debit'

### **Public consultation**

The European Commission invites all interested parties to make comments on this consultation document.

These comments should be sent to DG Competition not later than 14 December 2009. It is standard practice of DG Competition to publish the submissions received in response to a public consultation. However it is possible to request that submissions or parts thereof remain confidential. Should this be the case, please indicate clearly on the front page of the submission that you request it should not be made publicly available. In this case a non-confidential version of the submission should also be forwarded to DG Competition for publication.

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European Commission  
Directorate-General for Competition  
For the attention of the Antitrust Registry  
Ref. HT2282 – SEPA DD  
B - 1049 Brussels

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**WORKING DOCUMENT OF THE COMMISSION**

**Applicability of Article 81 of the EC Treaty  
to multilateral interbank-payments in SEPA Direct Debit  
(Text with EEA relevance)**

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## 1. PURPOSE OF THIS DOCUMENT

1. To be effective, competition needs suppliers who are each subject to the competitive pressure exerted by other suppliers. Agreements between two or more firms which restrict competition are therefore prohibited under Article 81(1) of the EC Treaty.<sup>1</sup> Agreements between rival companies may restrict competition but may also be permissible under Article 81(3) EC if they give rise to efficiencies that benefit consumers and that outweigh the negative effects on competition.
2. In the framework of the creation of the Single Euro Payments Area (SEPA) the question of how to assess collective financing mechanisms for SEPA Direct Debit (SEPA DD) under the European competition rules has arisen. The present document sets out some basic principles to be applied under Article 81 EC when analyzing collective agreements on interchange fees for SEPA Direct Debit. It is intended to provide greater clarity and predictability within the general analytical framework used to determine whether multilateral interchange fees (MIFs) in the context of direct debit markets comply with competition law, in particular as regards Article 81(3) EC.
3. In describing such a framework, this document draws from the current understanding of market conditions in European direct debit markets and from the conditions set out for SEPA DD by the European Payments Council (EPC). The principles outlined are to be applied in light of the circumstances specific to each case. This document is without prejudice to the interpretation of Article 81 EC by the Court of Justice or the Court of First Instance of the European Communities and to the power of national courts and national competition authorities to decide in individual cases. Moreover, it cannot replace a systematic legal and economic assessment within the context of an investigation. It is therefore without prejudice to a future case by case assessment of multilateral arrangements in the context of SEPA DD on the basis of arguments submitted for and against MIFs.
4. This document intends to further develop the guidance already issued in other notices and decisions, notably the Guidelines on the application of Article 81(3) EC, the specific enforcement decisions in the context of multilateral interchange fees for payment cards, the joint press release of the Commission and the European Central Bank (ECB) of 4 September 2008<sup>2</sup>, the new Regulation on cross-border payments in euros replacing Regulation 2560/2001<sup>3</sup> on the equivalence of charges for cross-border and national payments, and the joint statement of the Commission and the ECB of 24 March 2009.<sup>4</sup>

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<sup>1</sup> The term 'agreement' is used for agreements, decisions by associations of undertakings and concerted practices.

<sup>2</sup> See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1290&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>3</sup> OJ L 266 of 9 October 2009.

<sup>4</sup> See [http://ec.europa.eu/competition/sectors/financial\\_services/sepa\\_direct\\_debit.pdf](http://ec.europa.eu/competition/sectors/financial_services/sepa_direct_debit.pdf) and press release <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/468&format=HTML&aged=0&language=EN&guiLanguage=en>

5. In the joint statement of 24 March 2009, the Commission and the ECB had expressed the view that there appears to be no convincing reason for permanent per transaction MIFs under SEPA DD after 31 October 2012. The Commission had also made clear that further guidance on the case by case assessment of specific collective arrangements the industry may have in mind could only be based on substantive input from market actors. The Joint Statement states that 'Provided that the Commission will have received the necessary contributions by relevant market actors, the Commission expects to be in a position to provide further guidance.' This has also been reflected in Recital 11 of the Regulation 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001<sup>5</sup> which states: "[W]ithin the framework of a sustained dialogue with the banking industry and on the basis of contributions made by the relevant market actors, the Commission intends to provide, as a matter of urgency, guidance as to the objective and measurable criteria for the compatibility of such multilateral inter-bank remuneration, which could include multilateral interchange fees, with EC competition law and the Community regulatory framework." As the industry has not submitted facts or projects regarding such collective arrangements, the present working document is by necessity limited in scope to a discussion of some basic competition principles. It has nonetheless been decided to launch a public consultation on the basis of this working document in order to assist the industry and to contribute to a smooth transition towards a SEPA DD scheme that benefits both consumers and companies. After the public consultation, the Commission will decide its next steps and it may, if appropriate, decide to adopt final guidance.

## **2. DIRECT DEBIT MARKETS AND INTERBANK PAYMENTS**

### **A. Direct debit in the European Union**

6. A direct debit is a payment service for debiting a payer's payment account, where the payment transaction is initiated by the payee on the basis of the payer's prior authorization. Under the rules developed for SEPA DD, the payer signs a mandate authorizing the payee to collect a payment and allowing the payer's bank to debit its account in accordance with direct debit requests issued by that particular payee.<sup>6</sup> Direct debit allows the automatic collection of payments and is typically used for recurring transactions of varying amounts, such as utilities bills. While payees are normally companies, payers are often final consumers. However, companies (in particular, SMEs) also use direct debit to settle their recurring payment obligations.
7. Direct debit is a popular means of payment at national level. In 2008 it accounted for 26% of the number of non-cash transactions in the EU (30.2% in the euro area).<sup>7</sup> However, the existing European direct debit schemes are only national in scope.<sup>8</sup> The Commission has long been supporting the efforts to create a true single market for

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<sup>5</sup> OJ L 266 of 9 October 2009.

<sup>6</sup> A direct debit differs from a credit transfer in the sense that whilst credit transfers are initiated by the payer direct debits are initiated by the payee.

<sup>7</sup> See [http://www.ecb.int/stats/payments/paym/html/payments\\_nea\\_n\\_2008.en.html](http://www.ecb.int/stats/payments/paym/html/payments_nea_n_2008.en.html)

<sup>8</sup> The only exception the Commission is aware of is the possibility of executing cross-border direct debits between Austria and Germany.

payment services. In the framework of the SEPA project, one of the major innovations is the creation of SEPA DD, which will enable cross-border direct debit payments within a pan-European scheme. But since direct debit is one of the most efficient ways of making regular payments, the view of the Commission is that the introduction of SEPA should not lead to more expensive or less effective direct debit instruments. In line with this, the joint statement of the Commission and the ECB of 24 March 2009 made clear that consumers' interests are a paramount consideration in the achievement of SEPA DD.<sup>9</sup>

8. Initially, introducing a collectively agreed interbank fee for SEPA DD had been contemplated by market participants. Such MIFs exist in the legacy schemes of some Member States. Two types of MIF can be observed:
  - Per transaction multilateral interchange fees and
  - Multilateral R-transaction fees
9. A per transaction MIF is a fee agreed collectively by payer banks and payee banks in the framework of a direct debit scheme to be paid to payer banks by payee banks for each direct debit transaction. Such MIFs can either be set by the association responsible for the scheme or agreed collectively by groups of banks participating in the direct debit scheme. An R-transaction MIF is a fee agreed collectively in the framework of a direct debit scheme to be paid between a payee bank and a payer bank in case of a so-called R-transaction. R-transactions are transactions that cannot be properly executed. Depending on the type of transaction, the letter "R" can stand for rejection, refusal, return, or reversal, among others. There is a wide range of reasons why it may not be possible to correctly execute a direct debit transaction, including lack of funds, revocation, wrong amount or date, lack of mandate, and wrong or closed account.
10. The direct debit schemes of 21 out of the 27 EU Member States operate without a per transaction MIF.<sup>10</sup> As a consequence, more than two thirds of all direct debit transactions in the EU are executed without a MIF per transaction.<sup>11</sup> Some of the per transaction MIF arrangements in domestic legacy schemes are under antitrust scrutiny by national competition authorities. Multilateral R-transaction fees exist in five euro countries, two of which are also among the countries in which per transaction MIFs are applied.<sup>12</sup>

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<sup>9</sup> "Currently, direct debit services are perceived by consumers as free-of-charge in many Member States as they are integrated in a package. The Commission will closely monitor the evolution of consumer pricing", joint statement of the Commission and the ECB of 24 March 2009.

<sup>10</sup> Currently, per transaction MIFs exist in Belgium (2 cents per transaction), Spain (less than 3 cents), Sweden (11 cents), France (12 cents), Portugal (23 cents), and Italy (25 cents).

<sup>11</sup> ECB Blue Book 2000-2007. See <http://sdw.ecb.europa.eu/browse.do?node=2746>

<sup>12</sup> R-transaction MIFs of varying sizes exist in Austria, France, Germany, Portugal. In Spain, such R-transaction MIFs only apply to non STP direct debit transactions.

## B. Application of competition law to multilateral interchange fees in direct debit

11. Multilateral interchange fees have been assessed under Article 81 EC in the context of recent investigations into payment card markets.<sup>13</sup> As concerns antitrust enforcement, MIFs in direct debit markets in many respects resemble MIFs in payment card markets. The two products, although not identical, share a number of similar characteristics. As in the case of payment card networks, direct debit schemes operate in so-called two-sided markets. On one side of the industry, payer banks compete for final consumers (usually with a package of services connected to a payment account). This is the equivalent of issuing banks competing for cardholders in the context of payment cards. On the other side of the industry, payee banks compete for companies. This is the equivalent of acquiring banks competing for merchants in the context of payment cards.<sup>14</sup> As in card payment markets, direct debit MIFs determine a collectively set cost floor which is bound to increase fees on one side of the industry (here: the payee side).
12. As MIFs typically fix a floor under the prices banks charge to companies, they constitute a restriction of competition by object as by their very nature they are likely to restrict competition. They can also constitute a restriction by effect. In *MasterCard* it was established that MasterCard's MIFs had a restrictive effect on competition between acquiring banks.<sup>15</sup> The Decision concluded that MasterCard's cross-border MIF infringed Article 81(1) EC by inflating the cost of card acceptance for merchants as the MIF has the effect of appreciably restricting and distorting competition in the acquiring markets by creating an important cost element common to acquirers.<sup>16</sup> The MIF was also not found indispensable to the functioning of a payment card system.<sup>17</sup>
13. For the purpose of the present document, the foregoing assessment under Article 81(1) EC of the existence of a restriction of competition, in particular by object, is taken to apply by analogy to direct debit. This assumption is made solely for the purpose of this document and is without prejudice to a future case by case assessment on the basis of arguments relating to MIF arrangements in the context of SEPA DD. It also cannot replace a systematic legal and economic assessment within the context of an investigation.
14. The relevant question concerning the competition law assessment is then whether or not a particular multilateral interchange fee qualifies for an exemption according to Article 81(3) EC. In determining whether a particular MIF is compliant with Article 81(3) EC, the interested parties should demonstrate that all of its four conditions are met. It must:

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<sup>13</sup> See in particular cases COMP/34.579 *MasterCard*, COMP/36.518 *EuroCommerce*, and COMP/38.580 *Commercial Cards*.

<sup>14</sup> Two-sided markets are networks that enable the interaction between two or more distinct customer groups. Users affect each other through their participation and usage of the network. For instance, in both card and direct debit networks, the decision of a payer to use a particular means of payment generates costs and benefits for the payee.

<sup>15</sup> See *MasterCard* Decision, Section 7.2.

<sup>16</sup> *MasterCard* Decision, Section 7.2.

<sup>17</sup> *MasterCard* Decision, Section 7.3.

- contribute to improving the production or distribution of goods or to promoting technical or economic progress,
  - while allowing consumers a fair share of the resulting benefit,
  - and not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives
  - or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
15. Within the context of the first condition, it should be demonstrated how a particular form of multilateral interchange fee can improve the direct debit system. For instance, such a demonstration could relate to a reallocation of costs between participants such that consumers to a greater extent face the actual costs and benefits that their usage decisions create for the system and accordingly make more efficient use of the network.
  16. Within the context of the second condition, it should be demonstrated how this greater efficiency of the system benefits consumers themselves. In certain cases, this demonstration may be facilitated if the multilateral interchange fee is coupled with a rule on the basis of which consumers are not additionally charged for cost elements already covered by a MIF.
  17. Within the context of the third condition, particular attention should be devoted to the fact that a reallocation of costs and benefits may not only be achieved through a MIF, but can often be settled by payer and payee directly, within the commercial relationship that underlies the direct debit mandate. For instance, the cost of an error transaction may be allocated to the responsible party either inside the banking system (through a reject fee on the bank whose client has caused the rejection); or such a reimbursement may be executed outside the banking system (e.g., through a late payment fee between payer and payee). It is therefore important to outline why the benefits that would be generated through a multilateral interbank fee could not be achieved in an as efficient way through direct interaction between payers and payees.
  18. In direct debit markets where payments are typically recurring, many companies<sup>18</sup> offer differentiated prices according to the payment instrument used. This implies that if companies find direct debit payments more beneficial than other means of payment (e.g. credit transfers), then they can directly transmit this price signal to payers, for instance through a rebate for direct debit transactions.<sup>19</sup> This is usually different in payment card markets.<sup>20</sup>

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<sup>18</sup> Such behaviour is common practice for instance amongst a number of utilities and telecommunication companies.

<sup>19</sup> The information about this rebate provided to the consumer by the company would therefore have to be transparent for the consumer to take it into account when choosing a payment method. The rebate proposed by the company would also have to be sufficiently high to induce the consumer to install a direct debit instruction instead of using an alternative payment method. This is obviously part of the company's economic decision on its business model.

<sup>20</sup> In payment card transactions, which are typically one-off, the majority of merchants do currently not differentiate retail prices according to the payment instrument used even when they are free to do so. This implies that final consumers do not face systematic price signals as concerns the true costs of different payment instruments on the merchant side. In the absence of such signals, the underlying commercial

19. Finally, as regards the fourth condition, previous Commission decisions on multilateral interchange fees in payment card markets have not found that the respective MIFs eliminate competition completely.<sup>21</sup>

### **3. PER TRANSACTION MULTILATERAL INTERCHANGE FEES**

20. Two main arguments have been raised in favour of MIFs per transaction for direct debit. First, it has been argued that a permanent per transaction MIF for direct debit allows balancing the costs and benefits of direct debit between payers and payees in such a way as to ensure the efficiency of a direct debit scheme. Second, it has been argued that a (temporary) per transaction MIF for direct debit is necessary to incentivize the migration of individual banks from domestic legacy systems to the new SEPA DD scheme.

#### **A. Permanent per transaction MIFs as multilateral balancing payments**

21. The efficiency defence usually advanced in favour of MIFs is that they allow reallocating costs and benefits of a scheme between the two sides of the industry in such a way as to balance the demand on the two sides in the most efficient way. This argument is based on the existence of network externalities between payers and payees. It is argued that payees benefit over-proportionally from direct debit payments, as they control the initiation of the payment (which results in certainty as regards the execution and as regards the date of the payment). Thereby they save on costs of non-payment, foregone interest and administrative expenses. But as payers decide which payment instrument they will use based on their own preferences, they are likely to ignore the large payee benefits from direct debit. In principle, this may lead to an underuse of the scheme. A per transaction MIF is said to redress this by shifting costs of direct debit from the payer side to the payee side. To the extent that incoming MIF revenues are passed on by payer banks to their customers (e.g., in the form of lower direct debit fees), a MIF may counter the possible underuse of direct debit to achieve the right balance between the two sides.
22. Although in theory it is possible that a MIF per transaction may help inducing a more efficient use of a two-sided payment network, it is unlikely that this would be the case for a direct debit scheme under current market conditions. As explained in Section 2.B., direct debit markets are different from payment card markets in that payees are typically well-placed to offer direct rebates to payers for the use of payment instruments they consider more efficient. To the extent that payees indeed prefer direct debit to other means of payment they can (and often do) directly induce customers to use it.
23. While a MIF per transaction could in principle trigger similar effects by giving payer banks an incentive to promote direct debit, this channel is likely to be less efficient. In particular, incentivization through a payee is immediate and direct, while a MIF per

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relationship cannot be expected to lead to efficiency-enhancing reallocations of costs and benefits between the different sides of the payment cards industry.

<sup>21</sup> In the Visa II Decision (24 July 2002, OJ L 318/17, 2002) the Commission held that the MIF did not eliminate competition between issuers, which remain free to set their respective client fees. It did not eliminate competition between acquiring banks, either, since acquiring banks remain free to set the merchant fees and can still compete on the other components of the merchant fee apart from the MIF (cf. par. 106).

transaction has to pass through the banking system until the impulse can reach the payer. Given that retail banking fees for direct debit and other account services are characterized by a lack of transparency and a strong degree of cross-subsidization and bundling the incentive effect of a direct debit MIF per transaction is likely to be diluted or distorted to some extent.<sup>22</sup> The current market information therefore does not suggest that a per-transaction MIF would be necessary or indispensable for the efficient use of direct debit schemes.

## **B. Transitional per transaction MIFs to provide incentives to migrate to SEPA DD**

24. It has been argued that a per transaction MIF for direct debit not only allows addressing an imbalance between payer and payee sides, but also provides individual banks with the necessary incentive to migrate from national legacy systems to a unified pan-European SEPA DD scheme.

### *a) Transitional domestic MIFs*

25. The Commission considers SEPA DD to be an important stepping-stone in the further development of an integrated European payments market as part of the European financial system. SEPA DD will for the first time allow millions of final consumers to execute cross-border transfers via direct debit, which will reduce transaction costs for many EU citizens, companies and authorities. SEPA DD will also allow a larger degree of competition for direct debit services as payees, in particular, will be able to choose banks from other Member States as their service providers. Assuming a large part of the costs of a direct debit system is fixed, co-ordination on an integrated European scheme may moreover allow a reduction of costs through the exploitation of economies of scale. Finally, a new pan-European direct debit system may allow the introduction of efficient functionalities in Member States where direct debit has been less developed than elsewhere.
26. However, banks from Member States that still apply per transaction MIFs in their legacy systems may have significantly lower incentives to abandon these systems in exchange for a pan-European scheme, if such a transition would imply giving up the revenue streams generated by domestic MIFs—even though those legacy MIFs are the subject of antitrust procedures by a number of national competition authorities.
27. Thus, some payer banks are likely to have an incentive to inefficiently delay migration if SEPA DD offers lower revenue streams. Given the concrete danger that the market actors would have opted against a timely launch of SEPA DD, it was likely that temporarily maintaining the same MIF level for domestic SEPA DD transactions as

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<sup>22</sup> See the Commission staff working document on the follow up in retail financial services to the consumer services scoreboard published by DG SANCO on 22 September 2009, [http://ec.europa.eu/consumers/rights/docs/swd\\_retail\\_fin\\_services\\_en.pdf](http://ec.europa.eu/consumers/rights/docs/swd_retail_fin_services_en.pdf). In this report, it was underlined in particular that "fee structures of current accounts are often so opaque that it is difficult for consumers to know how much they are paying and to compare different offers". The practice of product tying was also analysed in depth in the report on the retail banking sector inquiry (See the Commission Staff Working Document SEC(2007) 106 of 31 January 2007 [http://ec.europa.eu/competition/sectors/financial\\_services/inquiries/sec\\_2007\\_106.pdf](http://ec.europa.eu/competition/sectors/financial_services/inquiries/sec_2007_106.pdf) part A5 p.59). Free banking (eg. free current account, free payment cards) was for instance mentioned as a pricing strategy to attract new clients.

currently still apply for domestic legacy transactions would facilitate the transition to the SEPA DD regime, with its potential advantages.<sup>23</sup>

28. Consistent with this reasoning, the Council and the European Parliament adopted Regulation 924/2009.<sup>24</sup> Under this initiative, existing domestic legacy MIF can be maintained at their current levels until 31 October 2012. These strictly temporary per transaction MIFs allow a smoother transition for Member States where legacy per transaction MIFs still apply and will benefit consumers by enabling an integrated direct debit market without increasing fees. This is without prejudice to ongoing or future proceedings under competition rules by National Competition Authorities regarding these national MIFs, which could then lead to a reduction of the transitional MIFs accordingly<sup>25</sup>.

*b) Transitional cross-border per transaction MIF*

29. As cross-border direct debit payments are currently not possible in the EU, the absence of a cross-border per transaction MIF under SEPA DD does not impose opportunity costs of migration on payer banks.<sup>26</sup> The justification for temporary domestic per transaction MIFs described in the previous subsection therefore does not apply to cross-border transactions.
30. However, the operation of a cross-border MIF-free SEPA DD is likely to lead to cross-border competition on the level of local interbank charges. As the SEPA DD scheme obliges each member bank to process payment requests by each other member bank, payees could make use of an absence of cross-border MIFs by collecting direct debit payments through banks established in other Member States. This implies that during the transitional period, banks in Member States with transitional per transaction MIFs might lose large payees to banks operating in other Member States if domestic per transaction MIFs are not reduced. The transitional maintenance of domestic legacy per transaction MIFs, which was intended to provide incentives not to delay transition, might therefore have been undermined without a similar temporary provision for cross-border payments.
31. In view of this economic consideration, and taking into account that the number of genuine cross-border direct debits is likely to be small at the beginning of the SEPA DD project, a transitional default MIF per transaction for cross-border SEPA DD transactions was agreed upon under the Regulation on cross-border payments in euros,

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<sup>23</sup> See joint press release by the Commission and the ECB of 4 September 2008, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1290&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>24</sup> The proposal for amendment was tabled in the framework of the review of Regulation 2560/2001 on the equivalence of charges for national and cross-border euro payments. Regulation 2560/2001, replaced by Regulation 924/2009 applies to credit transfers, cash withdrawals at cash dispensers and payments by means of debit card and credit card. The review aimed at including direct debit payments in the scope of the regulation.

<sup>25</sup> Article 7 of Regulation 924/2009, 'Where such a multilateral interchange fee or other agreed remuneration is reduced or abolished before 1 November 2012, such reduction or abolition shall apply to any national direct debit transactions executed before that date'.

<sup>26</sup> Cross-border direct debit transactions are possible between Austria and Germany. However, no MIF is applied to those transactions.

also limited to 31 October 2012. The maximum for this transitional cross-border MIF has been set at 8.8 cents in the new Regulation.

32. As a result of this process, it was possible to formalize the mandatory and timely take-up of SEPA DD within the Regulation on cross-border payments in euros. The regulation contains a "reachability" clause, under which from 1<sup>st</sup> November 2010 banks from the Eurozone that accept national direct debit payments in euros must also accept SEPA DD cross-border payments in euros.<sup>27</sup>

#### **4. MULTILATERAL R-TRANSACTION FEES**

33. Under certain conditions, multilateral R-transaction fees set at scheme level may contribute to an efficient organization of a direct debit scheme. However, R-transaction MIFs can be set with different objectives in mind, some of which may be compliant with competition law while others may not. This section addresses the two most prominent objectives, R-transaction MIFs as a financing mechanism and R-transaction MIFs to incentivize an efficient use of the scheme.

##### **A. Multilateral R-transaction fees as a financing mechanism**

34. Sometimes, R-transaction MIFs have been set up as a financing mechanism for payer banks. In such schemes, multilateral R-transaction fees typically flow from payee banks to payer banks. Their level exceeds the actual payer bank costs of a reject transaction so that payer banks can cover all (or at least large parts) of their direct debit costs from the received reject fees alone. As a consequence, multilateral R-transaction fees are relatively large in such systems. Payee banks pass these charges on to their corporate customers, who in turn are likely to request reimbursement from payers (if the latter were responsible for the rejection).
35. Similarly to per transaction MIFs, multilateral R-transaction MIFs applied as financing mechanism for the whole scheme are by their very nature likely to restrict competition between payee banks. They typically fix a common cost floor under the price payee banks charge to companies and would therefore constitute a restriction of competition under Article 81(1) EC. Moreover, it is unlikely that a multilateral R-transaction fee applied with the primary intention of financing the scheme will fall under the exception of Article 81(3) EC as helping to induce a more efficient use of direct debit schemes. Its incentive effect on payers as a whole is likely to be diluted through the lack of transparency and the bundling and cross subsidization of retail banking fees. Also, like for a per transaction MIF direct incentivisation of payers by payees through rebates

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<sup>27</sup> Article 8 ("Reachability for direct debit transactions") of the Regulation specifies:

1. A payment service provider of a payer reachable for a national direct debit transaction denominated in euro on the payment account of that payer shall be reachable, in accordance with the direct debit scheme, for direct debit transactions denominated in euro initiated by a payee through a payment service provider located in any Member State.
2. Paragraph 1 shall apply only to direct debit transactions which are available to consumers under the direct debit scheme.
3. Payment service providers shall comply with the requirements of paragraphs 1 and 2 by 1 November 2010.
4. Notwithstanding paragraph 3, payment service providers located in a Member State which does not have the euro as its national currency shall comply with the requirements of paragraphs 1 and 2 for direct debit transactions denominated in euro by 1 November 2014. If, however, the euro is introduced as the national currency of any such Member State before 1 November 2013, the payment service provider located in that Member State shall comply with the requirements of paragraphs 1 and 2 within one year of the date on which the Member State concerned joined the euro area.

would be more efficient. Moreover, such multilateral R-transaction fees possibly introduce an additional inefficiency. By overcharging the occurrence of error transactions, multilateral R-transactions fees that exceed the actual costs of a multilateral R-transaction are likely to create excessive disincentives to avoid errors in the system.

36. Excessive multilateral R-transaction fees imply that direct debit users who create erroneous transactions not only have to pay for the costs they have generated, but may also have to cover the costs incurred by other users. This may lead to distorted error avoidance. For instance, payer banks may have a reduced incentive to encourage prudent account management by their customers because rejects generate larger revenues than costs. Moreover, payees may be inclined to undertake inefficient expenses to avoid errors at all cost.<sup>28</sup>

### **B. Multilateral R-transaction fees to incentivize an efficient use of the scheme**

37. Contrary to the use of Multilateral R-transaction fees as a pure revenue stream for payer banks, R-transaction MIFs to incentivize an efficient use of the scheme may under certain circumstances be efficient and compatible with competition law. As underlined above, their level should not exceed the actual costs of an R transaction – to avoid that scheme participants are overcharged relative to the actual cost they have imposed on the system by causing an R-transaction. Multilateral R-transactions due to inefficient scheme control mechanisms should however not be encouraged. Appropriate measures to avoid R-transactions should therefore be implemented, e.g. cover control before settlement and pre-check of mandates, to avoid in particular R-transactions due to lack of sufficient funds on the account and absence of mandates. Measures such as cover control before settlement and pre-check of mandates may reduce the need for using R-transactions fees to encourage efficient use of the system.
38. In principle, there may be different efficiency objectives for a multilateral R-transaction fee. The application of competition rules will not impose on the market actors how to optimize their system. Therefore, this section does not prescribe any particular type of set-up. Rather, it broadly describes certain objectives that efficient R transaction systems may follow, and how they relate to competition law assessment. In order to assess the specificities of a particular system, it would then be necessary to weigh each cost category that is supposed to be covered by a multilateral reject fee separately according to the principles discussed below.

#### *a) Allocation of costs to the responsible party*

39. R-transaction charges may be aimed at allocating costs to users of the scheme that have caused an R-transaction. If scheme participants face the financial consequences of their

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<sup>28</sup> Within this context the Commission points out that the reduction of errors alone does not guarantee the existence of benefits of which consumers would receive a fair share within the meaning of Article 81(3) EC (first and second condition of Article 81 (3) EC). A hypothetical system that were to impose prohibitively large reject fees on its users would certainly reduce errors, as no consumer would want to bear the financial consequences of an actual rejection. But at the same time, this minimization of errors is far from efficient as reject charges would vastly exceed the external effect that potential consumer negligence could impose on the system. Consumers are likely to find such a system less rather than more valuable. Fees to achieve efficient error avoidance should therefore not exceed the actual cost that erroneous transactions impose on the scheme and its participants.

own actions, they are exposed to appropriate incentives to engage in error avoidance, and financial contributions are allocated fairly among users. In principle, a multilateral R-transaction fee can contribute to such an allocation.

40. An R-transaction system which seeks to optimize the allocation of R transactions costs among the scheme's users by a collective fee may in principle constitute an improvement over the private allocation of costs among payer and payee that would also take place absent such a fee. As explained in Section 2.B., payer and payee will generally arrange a reimbursement of R transaction costs within the scope of their commercial contract. A multilateral R-transaction fee would meet the indispensability criterion under Article 81(3) EC if it can be demonstrated that this fee generates benefits which outweigh the costs of private settlement.
41. Banks may often not be in a position to determine whether the origin of an R-transaction was a fault of the payer or the payee. For instance, a wrong account number may be due to the payer (transmission of a wrong number to the payee) or the payee (transmission of a wrong number to the payer bank through the dematerialisation process of the mandate). Nonetheless, the indispensability criterion under Article 81 (3) EC may be met for several categories of costs. For illustrative purposes, the following examples may be considered:
  - The costs of erroneous transactions that are due to a mistake by one of the banks (rather than payer or payee) can only be settled through interbank charges, but not through the interaction of payer and payee.
  - Whenever certain costs are due to either payer or payee in the majority of cases, an automated settlement procedure via a multilateral R-transaction fee may save transaction costs over commercial negotiations.
  - A comprehensive list of cost categories would of course require a concrete assessment within the scope of an investigation in order to decide whether it meets the indispensability criterion.

*b) Multilateral R-transaction fees to protect the more vulnerable party*

42. With respect to the commercial transaction underlying a direct debit payment, it has been argued that payers are likely to be in a more difficult position to seek redress from companies in case the payer's account has wrongly been debited, than is the case the other way around.<sup>29</sup> This has been recognized in the set-up of the SEPA DD scheme, which grants extensive reimbursement rights to payers (such as refund rights). In particular, payers have an unconditional right to revoke payments within eight weeks from the date on which the direct debit amount was debited. This measure of consumer protection enhances the trust of payers in the system and may thereby increase the willingness of payers to use SEPA DD, which could also benefit payees.
43. It might be argued that payers should obtain a comparable form of consumer protection concerning R-transactions. Indeed, payees are likely to be in a better position than banks to determine whose error led to an R-transaction. It is also correct

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<sup>29</sup> In case of a dispute, payees can react to perceived contract non-performance by cutting off services, which in the case of the services typically paid for by direct debit (electricity, telephone, insurance) may put significant pressure on payers. Moreover, payers are likely to face larger transaction costs of solving disputes through private litigation.

that many payees (usually undertakings) are in a more comfortable position to seek redress from payers than is the case the other way around.

44. A collectively agreed R-transaction fee relating to refusals initiated by the payer could be a logical complement to the consumer protection embedded in SEPA DD. Collective reject fees that reallocate other R-transaction costs for reasons of protecting the more vulnerable party to a transaction could also be discussed. However, in order to be in a position to evaluate a specific system based on the objective of consumer protection, a description of that system would be required and more detailed information on how it could improve the efficiency of a direct debit system.
45. For instance, the majority of reject transactions is apparently due to payers who fail to provide sufficient funds on their account, which would seem to point in the opposite direction. At the same time, insufficient funds may arise solely due to the fact that the requested payment included excessive charges, was requested in advance of the normal payment date or was requested more than once by mistake. Moreover, payees may sometimes initiate payments even if they are aware that there are no funds on the account – for instance through repeating a direct debit transaction which has already been rejected due to lack of funds on the account.
46. In this context it is also relevant to investigate whether a multilateral arrangement would still be deemed necessary for direct debit R transactions if a system imposing a prior check of the mandate before the first DD operation and a prior check of the availability of the funds on the payer account would be put into place.

*c) Other Multilateral R-transaction fees to improve the efficiency of the system*

47. As explained above, a number of objectives are conceivable to motivate a multilateral R-transaction fee that improves the efficiency of a direct debit scheme. In that regard, the simplicity of a direct debit scheme may in itself constitute a benefit that reduces costs for consumers. It is therefore clear that any efficient R-transaction system faces a trade-off between simplicity and accuracy concerning the wider objective it pursues.

## **5. ALTERNATIVE PAYMENT ARRANGEMENTS**

48. Besides MIFs and multilateral R-transaction fees, there are several other mechanisms that market actors have used or may decide to use to organize direct debit schemes. This section discusses the two alternatives raised by market actors, which are also the most common alternatives observed in practice.

### **A. 'SHARE' option**

49. The market actors in many Member States have not engaged in a collective agreement on interbank fees.<sup>30</sup> In the context of SEPA DD, the absence of multilateral interbank payments has been termed the SHARE option: an arrangement according to which each side bears its own costs (unless otherwise bilaterally agreed).
50. Under the SHARE system, payer banks recover costs from payers, and payee banks recover costs from payees. In the possible case of an imbalance between the two sides

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<sup>30</sup> Such an option would also apply under the e-invoicing system – considered as a more 'advanced direct debit solution' in Finland.

in the sense that payees would like payers to make greater use of SEPA DD, payees are in a reasonable position to incentivize the use of direct debit via direct incentives, via rebates for instance. The SHARE option could be coupled with an appropriately reasoned multilateral interbank payment for R-transactions.

## **B. Bilateral interchange fees**

51. A "pure" bilateral interchange fee (BIF) is an independent agreement between one payer bank and one payee bank on an interchange fee. However, an interchange fee does not fall outside the scope of Article 81(1) EC solely because it is not agreed at scheme level. In particular, interchange fees that are jointly agreed among subgroups of banks (e.g., within a Member State) are no different in nature than a MIF determined at scheme level as far as the applicability of antitrust law is concerned. Moreover, the form in which an interchange fee is determined is not the decisive criterion regarding the existence of an agreement within the sense of Article 81 EC.
52. If there is a common understanding among several banks to implement a particular level of interchange fee, then this fee is likely to fall within the scope of Article 81(1) EC even if it is formally adopted via a series of seemingly independent bilateral contracts. Such collective agreements between subgroups of banks will have to be scrutinized under Article 81, and this would be even more so if they have as their object or effect the discrimination of competitors, e.g., new entrants into a given market.<sup>31</sup>
53. The same principles should apply to so-called additional optional services (AOS) offered by groups of payment services providers under the SEPA DD scheme and value added services (e.g. dematerialization of paper mandate offered by payer banks to payees, storage of the dematerialized mandate data by the payer bank, checking of incoming collections against the payer bank's mandate portfolio).<sup>32</sup> If there is a common understanding among several banks to implement a particular level of interchange fee, then this fee needs to be examined under Article 81 EC even if it is formally adopted via a series of seemingly independent bilateral contracts.

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<sup>31</sup> See case COMP/38.606 Groupement des Cartes Bancaires.

<sup>32</sup> According to the rules developed by the European Payment Council that also concern the SEPA DD scheme, AOS may be offered by an individual participant to its own customers as part of its products and services offering but these AOS must not compromise the Schemes and the roles, responsibilities and liabilities of other participants. Furthermore, they should not impact the interoperability of the participant in the Scheme – full interoperability must be provided to all participants in the scheme including the ones not participating in the AOS. The operation of the scheme for participants not taking part in the AOS must not be disturbed or compromised in any way by a community AOS.