SEPA Direct Debit (SDD) at the crossroads of competition enforcement and regulation

by Dominique Forest (1)

1. Introduction

The Commission has recently adopted a proposal for a Regulation to promote the transition to SEPA credit transfer and direct debit schemes (2). The proposal includes a provision regarding the use of so-called Multilateral Interchange Fees (MIFs, or collectively agreed inter-bank fees) in direct debit systems. The provision prohibits the use of such MIFs for direct debit transactions on a per transaction basis. For rejected transactions, however, their use is allowed under certain conditions. The proposal marks an important step in the ongoing dialogue between the Commission and the banking industry on the permissibility under EU competition rules of collective financing mechanisms for payment schemes. Once adopted, this element of the Regulation will bring clarity and predictability to joint financing mechanisms for SEPA Direct Debit.

Similar to regulatory approaches (3) in other network industries requiring legal certainty to ensure sufficient adherence to a network, such an ‘ex ante’ regulatory instrument can provide an efficient solution ensuring across-the-board clarity compared to ‘ex post’, case-by-case antitrust enforcement action — which can always be taken if needed (4).

2. SEPA Direct Debit in context

The Single Euro Payments Area (SEPA), a self-regulatory project, aims to create an integrated euro payments area, to ensure that cross-border payments are as easy and efficient as domestic payments. Once implemented, it will cover credit transfers, payment cards and direct debit. The SEPA Direct Debit system is intended to create a pan-European direct debit system enabling cross-border direct debit transactions for the first time. With SEPA Direct Debit (SDD), bank customers will for the first time be able to arrange to pay recurring bills, such as rent, mortgage, energy bills, telephone bills and magazine subscriptions, by direct debit to and from bank accounts in any of the 32 European countries participating in SEPA, instead of just within their own country as at present.

SEPA, while primarily devised by the banking industry itself, is strongly supported by the European Central Bank (ECB) and the Commission. However, SEPA also involves cooperation between — potential — competitors. This is why it has been closely scrutinised under competition rules. One of the competition issues identified by the Commission and the national competition authorities (NCAs) was the collective inter-bank charging mechanism, i.e. the Multilateral Interchange Fee (MIF (5)), envisaged by the banking industry for SDD.

3. The transitional ‘business model’ for SEPA Direct Debit

The Commission raised doubts about the rationale of applying a collectively agreed inter-bank fee (‘Multilateral Interchange Fee’ or MIF) on a per transaction basis for SDD. There was extensive informal dialogue between the Commission and the European Payments Council (EPC), with the ECB as an observer, about the methodology underlying the proposed MIF and its justification. The Commission pointed to likely restrictive effects similar to those of multilateral interchange fees for payment cards as identified in the MasterCard Decision (6). In the course of the dialogue, the EPC did not succeed in convincing the Commission that a per-transaction MIF was justified on the basis of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU).

The lack of certainty about the compatibility of the proposed financing mechanism with the competition

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the author.


(4) Recital 14 of the proposal for a Regulation on SEPA end dates specifies that ‘[…] In any event, rules should be without prejudice to the application of Articles 101 and 102 of the TFEU to multilateral interchange fees for R-transactions.’

(5) An interchange fee is a transaction fee payable between the payment services providers involved in a transaction. A multilateral interchange fee is an interchange fee set by a collective agreement between payment service providers.

rules meant that some banking communities were reluctant to sign up to SDD. To encourage migration to SDD, a transitional regime for national and cross-border MIFs per transaction was therefore introduced for SDD in Regulation 924/2009 on cross-border payments in euros (4). During a transitional period, national MIFs could be maintained at their existing level (without prejudice to national competition authorities taking action on this issue) and a cross-border MIF of 8.8 cents could be applied.

As to the business model to be applied after October 2012, the new Regulation stated that ‘industry can make use of the legal security provided during this transitional period to develop and agree a common, long-term business model for the operation of the SEPA direct debit’.

4. From guidance on SEPA Direct Debit MIFs ...

With legal certainty for the interim period in sight, the long-term ‘business model’ appeared to be the key element determining the EPC’s decision to launch the system. To provide guidance in this respect, the Commission and the ECB issued a joint statement on 24 March 2009, in which they expressed the preliminary view that ‘there appears to be no clear and convincing reason for per transaction MIFs to exist after 31.10.2012’, the deadline set by Regulation 924/2009. (5) A MIF for transactions that cannot be properly executed or have been reclaimed by a payment service provider (R-transactions) could nevertheless be envisaged, provided it is economically justified, enhances efficiency and benefits users. Following this statement, the EPC plenary decided to launch the SEPA Direct Debit system on 1 November 2009.

Under the Commission and ECB’s joint statement, further guidance was scheduled for November 2009, ‘provided that the Commission will have received the necessary contributions by relevant market actors’. In addition, recital 11 of Regulation 924/2009 referred to ‘a sustained dialogue with the banking industry and on the basis of contributions made by the relevant market actors’. However, the industry was unable to agree on the mandate and composition of an EPC working group for this purpose at the EPC Plenary of 24 June 2009. Although, in the SEPA Roadmap, (6) the industry was again encouraged to undertake ‘the design and implementation of long-term business models for SDD in line with competition rules’, this did not lead to the desired result.

Nevertheless, in order to provide clarification to facilitate adherence to the SDD, the Commission published a working document (7) on 3 November 2009 aiming to provide further guidance. It built upon and complemented the guidance already issued in the joint statement. A public consultation was launched subsequently.

The working document focuses on general principles governing MIF arrangements — applying on a per transaction basis and concerning R-transactions — and alternative payment arrangements (e.g. bilateral). It outlines the principles applied in analysing such systems in the context of direct debit markets to determine whether they comply with competition law, and in particular with Article 101(3) TFEU.

The working document took the view that collectively agreed inter-bank fees applied per transaction restrict competition between payees’ banks by setting a floor under the fees they charge to their corporate customers. Companies will pass on these inflated fees to their customers in their own bills. Since the consumers’ own banks — the payer banks — receive MIF revenues from the payee banks, they might not charge the consumers, who think they receive the service for free. This is however not true as the costs are passed on by the billing company to their customers, the final consumers. Consumers have no way of knowing that they are paying indirectly via the company receiving the direct debit or how much they are paying.

Even if consumers knew that their bank is charging for the transaction and the level of the fee, the collective character of the fees prevents them from looking around and switching to a bank that will charge less for retail banking operations. Since the fee is agreed collectively by payers’ banks and payees’ banks, companies whose bank is being charged this ‘minimum floor’ are also prevented from looking for other banks to negotiate lower fees.

Business models using MIFs for R-transactions as a financing mechanism for the whole scheme tend to have equivalent effects to per-transaction business models, as MIFs are then set at a (high) level such that payer banks can recover all or a large part of their direct debit costs. Payer banks will then pass on these costs to the payee (with a mark-up), who might request reimbursement (with an additional mark-up) from the payer if the latter is deemed responsible for the R-transaction. Such MIFs are likely to restrict competition between payee banks, resulting in inflated costs to the whole system. They may introduce additional inefficiencies, as overcharging for the occurrence of errors may create excessive disincentives to avoid them in the system.

Furthermore, although in ‘two-sided markets’ a MIF might be considered necessary under Article 101(3) TFEU to create an incentive for the use of efficient means of payment, direct debit payments are typically made on a regular basis as part of long-term agreements. Companies have a clear interest and effective means to directly encourage consumers to use direct debit, in particular by granting rebates, which decrease the price for the final consumer in a transparent way. It is therefore neither necessary nor efficient for banks to apply a collective, indirect mechanism to encourage the use of direct debit.

However, the Commission working document acknowledged that under certain conditions, collectively agreed fees for R-transactions may benefit a scheme and its users, for instance if they lead to a more efficient allocation of responsibilities for R-transactions within the system.

5. ... to the SEPA End Dates Regulation

Although the deadline for achieving a fully fledged SEPA was initially 2010, the use of SEPA standards for credit transfers and direct debits has remained low and mostly limited to cross-border payments. Faced with this, the Commission adopted a proposal for a Regulation to promote the transition to SEPA credit transfer and direct debit schemes (the End Dates Regulation (13)) on 16 December 2010. The proposal also provides greater clarity and predictability regarding collective agreements on financing mechanisms for SEPA Direct Debit (Article 6) (12).

Article 6 is in line with the earlier guidance under competition rules, as it clarifies that, after the transitional period, per-transaction MIFs will not be allowed for national and cross-border direct debits. The impact assessment (14) accompanying the proposal confirmed the above analysis of per-transaction MIFs as it found that, on the basis of the public data available, there does not appear to be any correlation between the existence of (high) MIFs and (low) consumer fees for using direct debit. There does not appear to be a link either between the existence (and level) of a per-transaction MIF and bank account fees for consumers. In addition, only six Member States have a per-transaction MIF, with a clear trend towards a decreasing or zero MIF (15).

Article 6 also defines the general conditions for interchange fees for R-transactions, in line with the working document. To preserve a level playing field between payment providers and to avoid circumvention of the ban on per-transaction MIFs,

(12) Article 6 ‘Interchange fees for direct debit transactions’:
\[ 1. \text{Without prejudice to paragraph 2, no multilateral interchange fee per direct debit transaction or other agreed remuneration with an equivalent object or effect shall apply to direct debit transactions.} \]
\[ 2. \text{For direct debit transactions which cannot be properly executed by a payment service provider because the payment order is rejected, refused, returned or reversed (R-transactions) carried out by payment service providers, a multilateral interchange fee may be applied provided that the following conditions are complied with:} \]
\[ (a) \text{the arrangement shall be aimed at efficiently allocating costs to the party that has caused the R-transaction, while taking into account the existence of transaction costs and the aim of consumer protection} \]
\[ (b) \text{the fees shall be strictly cost based} \]
\[ (c) \text{the level of the fees shall not exceed the actual costs of handling an R-transaction by the most cost-efficient comparable payment service provider that is a representative party to the multilateral arrangement in terms of volume of transactions and quality of service} \]
\[ (d) \text{the application of the fees in accordance with points (a), (b) and (c) shall prevent the payment service providers to charge additional fees related to the costs covered by these interchange fees to their respective payment service users} \]
\[ (e) \text{there must be no practical and economically viable alternative to the collective agreement which would lead to an equally or more efficient handling of R-transactions at equal or lower cost to consumers.} \]

For the purposes of the first subparagraph, only cost categories directly and unequivocally relevant to the handling of the R-transaction shall be considered in the calculation of the R-transaction fees. These costs shall be precisely determined. The breakdown of the amount of the costs, including separate identification of each of its components, shall be part of the collective agreement to allow for easy verification and monitoring.

3. Paragraph 1 and the conditions set out in points (a), (b) and (d) of paragraph 2 shall apply also to bilateral and unilateral arrangements that have an equivalent object or effect.’


(15) The only countries where per-transaction MIFs apply are Portugal, Italy, France, Sweden, Belgium and Spain with very low MIFs of 2 and 3 cents respectively for the last two.
all forms of interchange fees for R-transactions (multilateral, bilateral and unilateral) are covered. They are allowed if indispensable for the efficient handling of R-transactions and if appropriately designed. They should be strictly cost-based to incentivise efficient use of the scheme and not to finance its whole operation, thus preventing scheme participants from being overcharged relative to the actual costs they incur by causing an R-transaction. Also, such fees should efficiently allocate costs to the entity responsible while not causing users to be charged additionally for the costs already covered by the fees. Finally, they should not exceed the costs of the most efficient comparable — and representative — operator. Failing this, incentives for providers to improve the efficiency of their operations would be limited, as they could align in part or in full with the costs of less efficient providers.

The implementation of these objective criteria would be subject to monitoring and sanctions by the authorities in charge of monitoring the implementation of this provision at national and European level and by the relevant courts and judicial bodies.

6. Conclusions and way forward

The creation of a level playing field through a regulation setting clear rules for financing models for SDD compatible with competition rules responds to calls from parts of the industry for greater ‘clarity’ and predictability, against the background of the threat of competition law enforcement. In addition, one single, harmonised Regulation is likely to avoid the need for competition enforcement proceedings and court procedures at national and/or European level to assess MIFs for SDD in the light of the guidance provided. While ‘ex ante’ regulatory tools have already been used by the Commission in other network industries, this is a new step in tackling the competition concerns raised by collectively agreed inter-bank fees. More than ever, regulation, self-regulation and competition law enforcement have complementary roles to play.