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## **1. Payment visions of the Dutch competition authority NMa**

The Dutch competition authority NMa published recently (December 2010) a document<sup>1</sup> with its views and comments on current developments within SEPA and the expected effects for the Dutch market. The main focus is on the migration of the legacy direct debit and debit card scheme to SEPA schemes. It supports the time limit of domestic and XB-MIF within SDD (until November 2012) set by the European Commission. At the time being, the relatively high MIF (0.088 €) for cross-border SDD is a barrier for foreign banks to offer competitive SDD-products to Dutch companies compared to direct debit products of local banks, who have to deal with local bilateral interchange fees of 2 – 3 eurocent.

The NMa is still worried about the XB-MIFs of Maestro (average of 0.2%), which could become a new benchmark for the interchange level of domestic transactions after migration from the terminated domestic debit card scheme (“PIN”) to Maestro. In 2009, the Dutch interchange level for domestic transactions – based on bilateral agreements – was equal to 1 to 2 eurocents (average merchant fee 4 cents). Banks will have the choice between the low bilateral interchange and the more attractive default Maestro MIF. NMA fears: *“The higher the MIF is, in theory, the greater the risk that bilateral negotiations will break down.”*

Most of the Dutch banks will issue Maestro-only debit cards (or are already doing so). The result will be dominating position of Maestro and a lack of scheme competition. To stimulate competition, NMa is making an interesting suggestion: A debit card with competing payment applications (e.g. Maestro and V PAY), which is technically feasible with an EMV chip card. Card schemes should therefore amend their rules by allowing competing brands on the same card.

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<sup>1</sup> Visiedocument Betalingsverkeer 2010; download:  
[http://www.nmanet.nl/nederlands/home/Actueel/Publicaties/Visiedocumenten/Visiedocument\\_Betaling\\_sverkeer\\_2010.asp](http://www.nmanet.nl/nederlands/home/Actueel/Publicaties/Visiedocumenten/Visiedocument_Betaling_sverkeer_2010.asp)

NMa is also supporting more scheme competition in the internet payments market, where the scheme iDeal (a joint initiative of the Dutch banks) has a strong position.

In 2009 NMa started the monitoring of prices in the payment market as an on-going process.

Some of the results are published in this report, for instance:

- the average price of a creditor bank for generating a direct debit transaction (5.1 eurocents) or
- the merchant service charge for accepting iDeal-transactions (0.39 €).

### **Our Comment**

*The SEPA-induced shift to a “two-level-competition” requirement in the debit card market (competition between payment service providers as members of the same scheme and scheme competition as well) has now been adopted by the NMa. This has taken place without any justification or discussion. It is interesting to see that the NMa is supporting the idea of scheme competition also for the e-payment market. Unfortunately, the report is not discussing the competitive issues of the coming monopolistic scheme structure of SEPA direct debits and credit transfers. For that reason, we asked the NMa for its position with respect to scheme competition in the field of direct debits or credit transfers. The NMa replied that a single scheme would ensure enough competition – pointing to the existing domestic schemes in individual countries. Obviously, NMa is not convinced that this “one-level-competition” approach would be sufficient in the debit card and e-payments market. Even at the level of competition authorities we still see no basic discussion regarding the applicability of the two approaches in the payment (network) industry.*

*Regarding the issue of the required single SEPA-MIF for card transactions (see also topic 1 of the newsletter of February 2011) NMa is expecting in the medium-term the continuing existence of diverging domestic MIFs within SEPA. If the national competition authorities will follow the new interchange methodology of the European Commission (called “merchant indifference test” or “tourist test”) the outcome would be a different rate per country, assuming that the merchant costs for cash handling will not have the same level in each country. NMa refers to a conclusion of the Commission related to the MasterCard decision of 2009<sup>2</sup>, stating that the market conditions of the national card payment markets are still inhomogeneous within Europe. So, the outcome – based on the new methodology – will be*

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<sup>2</sup> By the way, we do not found this conclusion of the Commission in the published documents relating to the MasterCard-case 2009.

*different for each country. Thus, the new interchange methodology is likely to delay the vision of a single SEPA-MIF (if any)?*

*The European Commission announced at the end of 2008 the preparation of an EU-wide analysis of the costs and benefits to merchants accepting different payment methods as basis for the new interchange methodology. The study has not been started yet. The outcome could be different national costs for cash, justifying the maintenance of domestic MIFs. But then it will be difficult to defend the single uniform SEPA-wide cross-border MIFs as practised by MasterCard and Visa, which are based on studies published by the central banks of the Netherlands, Belgium and Sweden comparing the costs of cards and cash.*

## **2. Direct charging of cardholders for cross-border ATM withdrawals**

The European Commission DG Internal Markets and Services published a "Note on Application of Regulation (EC) No 924/2009 - Direct Charging of Cardholders for cross-border ATM withdrawals"<sup>3</sup>. In this note, the commission gives its (unbinding) opinion on the question, whether direct charging of ATM operators for cross border ATM withdrawals is in line with the regulation of "equal charge". The Commission states that "*charges [...] are usually settled indirectly between the bank of the cardholder and the bank which owns the ATM*" in contrast to some Member states where banks decided to implement the model of "direct charging" where the ATM operator charges a fee directly from the cardholder. In Germany, the Netherlands and the United Kingdom, for instance, the direct charging-model has been implemented, however with some differences. The Commission continues stating that "*the direct charging phenomenon is limited to national transactions in some Member States, attempts have been made to apply it also to the cross-border ATM withdrawals in EURO*" and raises the question of "*compatibility of direct charging of cardholders with the Regulation EC No 924/2009*"

The Commission argues that "*there is no indication of a 'direct' and independent contractual relationship between the ATM owner and the cardholder*", so that "*the cardholder conducts the payment transaction exclusively under his/her framework contract with the card issuer*". Finally, the Commission concludes that "*as additional direct charges related to the cross-border use of an ATM are requested from the cardholder independently of the charges requested by the issuing bank to cover the cost of ATM withdrawals, the cardholder pays in*

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<sup>3</sup> [http://ec.europa.eu/internal\\_market/payments/docs/reg-924\\_2009/application\\_direct\\_charging\\_en.pdf](http://ec.europa.eu/internal_market/payments/docs/reg-924_2009/application_direct_charging_en.pdf)

most circumstances a higher fee for the cross-border ATM withdrawal than for a corresponding national withdrawal. This is not in line with Article 3(1) of the Regulation" and qualifies this as a breach of Article 3(1) on side of the payment service provider of the cardholder.

### **Our Comment<sup>4</sup>**

*The issue in question needs to be analysed thoroughly: Usually, it is subject to schemes rules, which fee model applies to ATM withdrawals. According to the rules of a scheme, an ATM operator is allowed / not allowed to charge a direct fee or an interchange fee. Some schemes grant the right to choose which fee model is applied (excluding double charging). There are also cases in which a scheme employs the direct charging model for domestic transactions, whereas all cross-border-transaction are processed under an interchange model.*

*The concern of the Commission is based on the constellation where a cardholder who pays a disloyalty fee for domestic transactions gets directly charged by an ATM operator for a cross border transaction. This can occur when*

- 1. either both, national and cross-border transactions are processed within the same scheme and this scheme allows direct charging only for cross border transactions,*
- 2. or national transactions and cross border transactions are processed in different schemes with a co-badged card.*

*For the 1<sup>st</sup> case above we are not aware of a scheme which actually implemented the interchange model for domestic transactions and the direct charging model for cross-border transactions. Furthermore, it would be hardly surprising if issuing banks implemented a*

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<sup>4</sup> To avoid confusion let us first introduce some terms in the context of ATM withdrawals:

- By an "**interchange fee**" we mean a charge which is paid from the issuing bank to the ATM operator. Clearing and Settlement procedures for interchange fees are subject of the respective payment scheme rules.
- By a "**direct charge**" we mean a charge which is paid by the cardholder 'directly' to the ATM operator. Clearing and Settlement procedures for interchange fees are subject to the respective scheme rules. Normally the fee is separately reported in the clearing record and settled in one amount together with the withdrawal from the issuing bank. Usually card schemes allow operators to charge either an interchange fee or a direct charge but not both.
- By a "**disloyalty fee**" we mean a charge which is paid by the cardholder to the issuer for withdrawing cash from ATMs which are not operated by the issuing banks. According to 924/2009, a disloyalty fee must be the same for national transactions and cross border transactions.
- Issuing banks usually charge a disloyalty fee only when the cardholder is not charged a direct charge. Even if there is no prohibition of such "**double charging**" we actually do not observe it in the market.

*disloyalty fee in this case so that there would be double charging. Thus, we conclude that the Commission has the second case in mind. Let us analyse this case below.*

*Suppose that the cardholder has a co-badged card with two schemes of which one employs the direct charging model and the other the interchange model. According to the basic SEPA principles, scheme rules may not regulate that all national transactions are processed through one scheme and all cross-border transactions through the other scheme (the pre-SEPA case in many countries).<sup>5</sup> Accordingly, under SEPA rules the case that the cardholder is faced with direct charge **only for cross-border transactions** can only occur as a consequence of actual market coverage of the two brands on the card but not due to contractual terms.*

*If an issuer would charge a disloyalty fee also in cases where the cardholder paid a direct charge (which we never observe, in practise) this double charging would also apply for national transactions within the respective scheme. Accordingly, we would deny an infringement of Regulation (EC) No 924/2009. The case the Commission has identified is simply due to the limited coverage of some of the European card schemes. Cartes Bancaires, girocard and others all have declared themselves to be SCF compliant SEPA card schemes. However, as long as they are merely used within national borders, the problem identified will persist. Once card schemes reach a true SEPA coverage the problem is going to vanish from a practical perspective. However, the legal assessment of fee models for ATM withdrawals depends not on the practical experience but on the titles of the PSD and of Regulation (EC) No 924/2009. With regard to the legal assessment of interbank fees and customer fees for ATM withdrawals, the reasoning of the commission has interesting consequences. We will continue the discussion in the next issue.*

### **3. The number of Payment Institutions expands**

Recently published figures of the European Commission show that the number of authorised Payments Institutions (PIs) is strongly rising. While a year ago there 72 authorised PIs, this year there are 131 authorised PIs and 59 applications are currently processed. Moreover, there are 705 waived entities (incl. applications for a

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<sup>5</sup> For instance, a German card, co-badged ec cash and Maestro, could only be used for ec cash transactions in Germany and Maestro transactions abroad.

waiver). By far the largest numbers of PIs are registered in the UK (79). Germany is a distant second (16 PIs) followed by Ireland (10) and Bulgaria (9).

**Our Comment**

*When the EU Commission published its evaluation report<sup>6</sup> of the first E-Money Directive (2000/46/EC) the result was sobering. More than 5 years after the passing of the Directive, there were only 9 ELMIs in the EU – and of these 9 only 6 were active. Given the time and energy that had been devoted to this Directive, this result was utterly disappointing. The E-Money Institute as defined in the Directive simply was not going to fly.*

**Payment Institutions in the EU (March 2011)**

	Number of authorised PIs	Number of applications being processed
Belgium	1	19
Bulgaria	9	
Cyprus	2	
Czech Republic		8
Denmark	1	
Finland	2	
France	2	5
Germany	16	
Greece		10
Hungary	2	
Ireland	10	
Italy	1	
Lithuania		5
Luxembourg	1	
Malta	1	
Netherlands	1	
Portugal	0	
Romania	1	
Slovakia	1	
Slovenia		5
Spain	1	4
Sweden		3
UK	79	
Total EU	131	59

Source: European Commission

<sup>6</sup> EVALUATION OF THE E-MONEY DIRECTIVE (2000/46/EC). Final Report for DG Internal Market, European Commission. Submitted by Evaluation Partnership Limited, 17 February 2006.

*When looking at recent figures on the numbers of Payment Institutions (PIs), a different picture emerges. Less than 4 years after the passing of the PSD there are already 131 authorised PIs. Thus, at least from a quantitative point of view, the PI is definitely a success story. While the E-Money Directive targeted a market for a new product that did not fulfil expectations, the PSD applies to established services. With the implementation of the second E-Money Directive (2009/110/EC), the ELMI, as well, may become a more interesting model than in the past for many market players.*

*It is noteworthy, that by far the largest number of PIs is registered in the UK. This may be due to factors such as high demand for foreign currency exchange services and remittance services in the UK. But it may also reflect simpler authorisation procedures in the UK. Such simplicity may be due to low standards or it may be due to efficient processes. We cannot decide which explanation is true. But comments of market participants clearly indicate that outside the UK supervisory institutions may not always be very efficient in processing applications.*

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