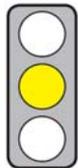


## MAIN ISSUES

**Objective of the Green Paper:** The objective is a fully integrated payment market in the EU.

**Parties affected:** Payment service providers, companies, merchants, consumers.



**Pros:** (1) Cross-border acquiring can boost competition for merchant fees.

(2) The access of alternative payment service providers to account information – including the account balances – of bank customers, given their consent, strengthens competition.

**Cons:** Market regulation with regard to multilateral inter-bank fees (MIF), “No Discrimination Rules”, “Honour All Cards Rules” and the separation of payment schemes and processing entities is justifiable only if a “non-contestable market power” exists. However, the Commission must first prove its existence.

## CONTENT

### Title

**Green Paper COM(2011) 941** of 11 January 2012: An integrated European Market for **card, internet and mobile payments**

### Brief Summary

#### ► Background and targets

- The Green Paper contains a description of the current situation in the EU payment market and action proposals for market integration in five areas. The focus is on card payments.
- Card payment transactions are carried out by banks which are members of certain “card schemes” – e.g. VISA, MasterCard or Maestro – which define the framework conditions.
- If a cardholder uses a card to pay a merchant, the merchant’s bank (“acquirer”) draws the amount from the bank of the cardholder (“issuer”), which then charges the account of the cardholder. The acquirer may draw the payment directly or through a “payment processor”.
- Costs: fees and payments
  - The merchant pays its acquirer a merchant fee.
  - The acquirer pays the issuer – i.e. the bank of the cardholder – an inter-bank fee.
  - The inter-bank fee is normally not agreed upon bilaterally between banks but is fixed by the card scheme in the form of the “multilateral interchange fee” (MIF).
  - The inter-bank fee has a major impact on the merchant’s fee.
  - The acquirer and the issuer pay fees to the card scheme; the amount of fees is set individually by the card schemes.
- The Commission’s aim is to eliminate differences between national and cross-border payments (p. 2).
- Full market integration could lead to “direct and indirect benefits” of more than 300 billion Euros over a six-year period for consumers, companies, merchants and payment service providers (pp. 3 and 6).

#### ► Current payment landscape

According to the Commission, the degree of integration is still very different in the European payment market. It depends on the payment instrument: transfer, debiting, card payments and on the channel: payments through the internet (e-payments) and mobile payments (m-payments) (pp. 3-6):

- For credit transfers and direct debits, specific “pan-European payment schemes” exist.
- With regard to card payments, the European market is “far from complete”.
- With regard to e-payments, “a coherent and comprehensive (self-) regulatory framework” is missing. With regard to m-payments, there is a lack of compatibility between the payment systems of various providers (“interoperability”). Therefore, the markets are very fragmented.

#### ► Topic 1: Competition

##### Inter-bank fees

- The Commission asks whether (p. 8)
  - the fact that MIF differ from one Member State to another and for cross-border payments can be justified by differences in the card markets,
  - different MIF create problems in an integrated market,
  - MIF are too high.

### **Cross-border acquiring**

- Merchants can use the credit transfer services of an acquirer established in another country (cross-border acquiring, p. 8).
- According to the Commission, this practice leads to more competition in merchant fees and enables merchants operating at international level to cooperate with one bank only (p. 9).
- The Commission asks whether obstacles to cross-border acquiring exist, which benefits are related to their removal and if a cross-border MIF should be applicable to cross-border acquiring. (p. 9)

### **Co-Badging**

- With co-badging, a customer can carry out payments through different card schemes on the same card (p. 9).
- According to the Commission, it is still unclear whether the rules set by the card schemes actually allow co-badging if the card schemes involved are competitors in the national market (p. 10).
- The Commission wishes to know,
  - which advantages and disadvantages co-badging creates,
  - whether and how the restrictions of co-badging should be removed through card schemes or banks and
  - who is to decide which card scheme is used for a payment transaction (p. 10).

### **Separating card schemes and card payment processing**

- Several card schemes impose on acquirers and issuers the use of payment processing through their subsidiaries.
- Separation – be it operational or in terms of ownership – enables banks to charge only one enterprise with the processing of payments.
- The Commission asks whether and how such a separation should be carried out. (p. 10)

### **Information on the financial situation of customers**

- Often a payment is not carried out until information on the availability of funds on the customers' bank account has been provided.
- Therefore, the Commission is considering obliging banks to provide other payment schemes (e.g. PayPal) with such information, given the customers' agreement (p. 11 et sqq.).

### **Dependence on payment card transactions**

- According to the Commission, due to the growing importance of e-commerce, the survival of more and more companies is becoming increasingly dependent on their customers having the option to use card payment (p. 12).
- Therefore, the Commission asks whether conditions are to be stipulated which enable card schemes to deny the provision of services to companies (p. 12).

#### ► **Topic 2: Transparent and cost-efficient prices**

- The Commission criticises that the “real cost of these payment services is often opaque” both to customers and merchants. This leads to high prices for payment transactions. (p. 12)
- The Commission asks whether consumers should be informed as to the fees merchants pay for different methods of payment (e.g. different card brands, cash, cheques) (p. 13).
- The Commission asks whether merchants (pp. 13 and 14)
  - should be allowed to add the payment method fee to the sale price,
  - must accept a “widely used, cost-effective electronic payment instrument without surcharge”,
  - may apply rebates and surcharges to a greater degree than currently practised in several Member States.
- The Commission is concerned by the following rules applied to card schemes (p. 14):
  - the “No Discrimination Rule” (NDR) under which merchants are prohibited from directing their customers towards the use of the payment instrument they prefer (e.g. through rebates or surcharges);
  - the “Honour All Cards Rule” (HAC) under which merchants are obliged to accept all cards within the same brand, even if the fees related to them are not the same (e.g. private card or business card).
- The Commission is further concerned about the blending practices applied by acquirers, whereby merchants are charged with an average fee for card payments without their actually knowing which fee is charged for which card (p. 14).

#### ► **Topic 3 and 4: Standardisation and interoperability between service providers**

- The Commission criticises the lack of common standards across borders for the data exchange between merchants and acquirers. Therefore, many merchants can only use the services of domestic acquirers. (p. 15)
- M-payments should be standardised in such a way that they allow for the interoperability of the payment schemes by different providers. The Commission sees “a serious risk of fragmentation through proprietary solutions” and therefore prefers open standards, i.e. standards that are easily accessed by all. (pp. 16 and 17)
- With regard to e-payments, it is rather the “lack of inter-operability between actors in the payment process chain” than the lack of standards that causes problems, e.g. because the internet uses precisely defined communication protocols. (p. 16)

### ► Topic 5: Payment security

- The lack of payment security is one of the key hurdles “preventing the widespread adoption of electronic commerce” (p. 18). This finding was the result of a public consultation on the future of e-commerce in the internal market ([Summary by the Commission](#)).
- Especially important for payment security is the prevention of fraud, particularly in remote card transactions, and data protection; sensitive customer data should only be processed and stored within a “secure payment infrastructure” and access to authentication data should be restricted to the payment transaction parties (p. 19).

### Statement on Subsidiarity by the Commission

The Commission does not address the issue of subsidiarity.

### Policy Context

The European Payments Council (EPC) established by European banks and banking associations developed the transfer and direct debit procedures for the Single Euro Payments Area (SEPA) (s. [CEP Policy Brief](#)). As of 1 February 2014, only SEPA debits and SEPA transfers with an international bank account number (IBAN) will be carried out. The SEPA card payment framework of the EPC specifies the criteria for SEPA conformity.

### Options for Influencing the Political Process

Leading Directorate General: DG Internal Market

Consultation procedure: Each citizen may deliver a statement. The procedure was closed on 11 April 2012.

[http://ec.europa.eu/justice\\_home/news/consulting\\_public/news\\_consulting\\_public\\_en.htm](http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_public_en.htm)

## ASSESSMENT

### Economic Impact Assessment

The Green Paper suggests that the Commission has a preference for legislative regulation. **In four key aspects – inter-bank fees (MIF), the “No Discrimination Rule”, the “Honour All Cards Rule” and the separation of card schemes and payment transaction companies – a regulatory market interference is only justifiable if an “non-contestable market power” exists;** in other words, the market entry of other providers would be prevented in advance due to very high economies of scale and networks. In all other cases, the possibilities of market power abuse are limited by potential competition of substitute providers. **As long as a non-contestable market power and its misuse is not proven, the ex-post control through competition authorities suffices.**

Aspects in detail:

The inter-bank fees fixed by the card schemes [“multilateral interchange fees” (MIF)] allow for efficiencies, as acquirers and issuers save transaction costs. However, these are also accompanied by restrictive effects on competition: since the MIF is the minimum threshold for merchants’ fees, it restricts the merchants’ negotiation power vis-à-vis the acquirer.

**The fact that the level of MIF differs from one Member State to another** or between national and cross-border payments **does not justify the regulation of MIF.**

The preferences of consumers, the intensity of competition and the requirements e.g. regarding security standards all differ from one Member State to another. Hence, different national MIF can make sense. Only where card schemes hold a non-contestable market power position and have very high MIF could they misuse their market power. Some argue that such a market power does exist due to the large economies of scale and of networks which make it difficult for new card schemes to enter the market. Others argue that it does not, since alternative payment instruments exist which in the case of high credit card MIF (and accordingly high merchant fees) gain in attractiveness as substitutes.

**The “No Discrimination Rule” of card schemes** is similar to the principle of the most-favoured: a merchant must grant rebates granted to a customer when using their card scheme, even when the customer uses other card schemes. Thus rebates become uninteresting to merchants. Hence, the “No Discrimination Rule” **can** have a considerable impact on **restricting competition between card schemes** with regard to the MIF amount. **If the market power of card schemes can be attacked by other payment methods, this is, however, unproblematic and regulation is unnecessary.**

**The “Honour all Cards Rule”,** by which a card scheme may oblige merchants to accept all cards of their scheme, **leads to a bundling of products. This is only problematic with a non-contestable market power.** For apart from this case, no merchant is forced to enter the scheme.

The card scheme requirement that acquirers and issuers carry out payment transactions in the subsidiaries of card schemes prevents competition in the payment transaction market and slows down investments in innovation. However, this is only problematic, if the card scheme holds a non-contestable market power in the card market. Hence, a **general prohibition of such a bundling of payment schemes and processing entities is to be rejected under ordoliberal terms.**

**Cross-border acquiring can boost the competition for merchant fees**, since it provides a greater variety of acquirers to merchants. **The precondition for this is, however, that the amount of merchant fees can be freely negotiated by merchants and acquirers.** Furthermore, foreign acquirers depend on the cooperation of national issuers. Competition authorities are to ensure that they do not misuse the resulting market power to demand excessive MIF from foreign acquirers. The less international an issuer operates, the greater is this danger.

**Competition is strengthened where new “alternative” payment schemes receive access to information on the financial situation of customers** and thus can carry out the services which hitherto have been carried out by banks. However, it is vital that they are subjected to the same requirements regarding payment safety and data protection, in order to create a level playing field. Fees charged for the use of bank infrastructures should be freely negotiated between service providers and banks.

## Legal Assessment

### Competency

Legal harmonisation in the internal market by the EU can be generally based on Art. 114 TFEU. A precondition is, however, that the internal market is impeded by existing or pending national rules. Nothing is known about this officially.

### Subsidiarity

Not to be assessed until a competency exists.

### Proportionality

Depends on the shaping of the measures.

### Compatibility with EU Law

Depending on which form they take, MIF can come under the anti-trust provision of Art. 101 TFEU as “decisions by associations of undertakings” or as “agreements between undertakings” [COMP/29.373 of 24.7.2002 (Visa International); COMP/34.579, COMP/36.518, COMP/38.580 of 19 December 2007 (MasterCard)]. On 24 March 2012, the General Court of the EU approved the Commission’s decision according to which the MasterCard MIF applicable to the European Economic Area and the Euro zone were deemed anticompetitive. MasterCard has already announced to bring an appeal against that judgement before the Court of Justice of the EU. (T-111/08, MasterCard et al./Commission)

In the case of infringements of the anti-trust provision (Art. 101 TFEU) or the prohibition of misusing a market-dominating position (Art. 102 TFEU), the Commission may, for this purpose, by decision in individual cases impose “structural remedies” which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end [Art. 7 VO (EG) No. 1/2003].

A general legal ownership unbundling of payment schemes and processing entities infringes the property right (Art. 17 Charter of Fundamental Rights of the EU) or entrepreneurial freedom (Art. 16 Charter of Fundamental Rights of the EU). An operational separation also infringes Art. 16 Charter of Fundamental Rights of the EU. For – irrespective of the economic concerns expressed above – the market entry of processing entities could also be facilitated by less restrictive means, namely if card schemes could no longer force their participants to use their subsidiaries for processing payments.

## Possible Follow-up Actions by the EU

The Commission wishes to publish further actions in the second quarter of 2012. Possible proposals are planned for the end of 2012.

## Conclusion

With regard to four key aspects – inter-bank fees (MIF), the “No Discrimination Rule”, the “Honour All Cards Rule” and payment schemes and processing entities – a regulatory market interference is only justifiable if a company misuses “non-contestable market power”. As long as the non-contestable market power status and its misuse is not proven, the ex-post control by the antitrust authorities suffices. In particular, there is no justification for regulating the MIF only because they differ in levels. Cross-border acquiring can boost the competition for merchant fees. The precondition is, however, that the level of merchant fees be freely negotiated between merchants and acquirers. Competition is strengthened where new “alternative” payment schemes receive access to information on the financial situation of customers.