

The European Commission consults on draft guidance for the antitrust assessment of multilateral interbank fees (“MIF”) within the Single Euro Payments Area (SEPA)

On 3 November 2009, the European Commission (“Commission”) invited comments on a draft guidance to participants in the SEPA Direct Debit (“SDD”) scheme for the assessment of MIFs under EC competition rules on anti-competitive agreements.

In presenting the draft guidance, Competition Commissioner Neelie Kroes stated:

“Today we provide further clarity to all stakeholders so that SEPA Direct Debit will be well-equipped for its successful development. SEPA should bring real benefits to European consumers and businesses, but it is important that it complies with the competition rules so that the full benefits can be achieved without adverse effects on banks’ customers. The Commission looks forward to receiving input from stakeholders to refine our analysis”

The deadline for contributions is close of business on 14 December 2009.

Background: SEPA, SDD and MIFs

SEPA is an initiative of the European banking industry, with the support of the Commission and the European Central Bank, which seeks to create an integrated euro payments area and ensure that cross-border payments are as easy and efficient as domestic ones. SEPA covers credit transfers, payment cards and direct debit. Although the UK is not within the euro payments area, SEPA’s geographical scope extends beyond the eurozone to encompass all EU Member States (as well as Norway, Iceland, Liechtenstein, Switzerland and Monaco) and the UK is therefore actively engaged in its implementation.

The SDD scheme, launched by the European Payments Council on 2 November 2009, allows consumers and businesses, for the first time, to make cross-border debit payments to and from bank accounts in any of the 32 European countries participating in SEPA (the 27

EU Member States, Norway, Switzerland, Iceland, Liechtenstein and Monaco). The SDD scheme can be used to pay recurring invoices, such as rent, mortgage, energy and telephone bills and magazine subscriptions. It can also be used to pay national direct debits and, over time, all euro direct debits are expected to migrate to the new SDD.

Some of the SDD participants have contemplated introducing collectively agreed MIFs for the SDD scheme. This is because the legacy schemes of some EU Member States, in which the SDD is to operate, provide for per-transaction MIFs, and so-called R-transaction MIFs – these concern transactions that cannot be properly executed, because, for example, there are insufficient funds in the payer’s account or because the account number is wrong.

The Commission’s draft guidance considers whether these MIFs may infringe the EC competition rules prohibiting anti-competitive agreements.

EC prohibition on anti-competitive agreements

The EC prohibition on anti-competitive agreements is contained in Article 81 of the EC Treaty.

Article 81(1) prohibits agreements whose object or effect is to restrict competition to an appreciable extent and which affect trade between the EU Member States. Under Article 81(2), these types of agreement are void and unenforceable as a matter of national law. However, under Article 81(3), an agreement may qualify for exemption from the prohibition if the efficiencies it generates outweigh its anti-competitive effects.

Accordingly, MIFs arrangements which are caught by Article 81(1) and do not qualify for exemption will expose the SDD participants to antitrust risks - their arrangement may be declared void and unenforceable, each may be liable for financial penalties up to 10% of

its global group turnover and may face third party actions to recover damages for losses suffered as a result of the agreement.

MIFs are likely to infringe Article 81(1) EC, unless exempt under Article 81(3) EC

The Commission's draft guidance indicates the Commission's view that per-transaction MIFs will likely infringe Article 81(1) EC, because they fix a floor for the prices banks charge to companies and therefore have the aim and effect of restricting competition – this view is consistent with the Commission's decision-making practice to date in relation to MIFs for payment cards.¹

The draft guidance indicates the Commission's view that R-transaction MIFs will also likely infringe Article 81(1) EC, because they fix a common cost floor for the price payee banks charge to companies. However, they may qualify for exemption if they meet certain specific conditions. For example, their level should not exceed the actual cost of an R-transaction – to avoid the scheme participants being overcharged relative to the actual cost they have imposed on the system causing an R-transaction: their costs should be allocated to the responsible party; their arrangements should aim to protect the more vulnerable party; and they should be as simple as possible.

Transitory arrangement under Regulation 924/2009

Banks from certain EU Member States still apply per-transaction MIFs and are seen to have a lower incentive to abandon their systems in exchange for a per-transaction MIF-free SDD scheme. Accordingly, the Council and the European Parliament adopted Regulation 924/2009, which provides that domestic legacy MIFs can be maintained at their current levels until 31 October 2012. However, this is said to be without prejudice to ongoing and future proceedings under the competition rules.²

The Commission draft guidance sends a strong message that transitional per-transaction MIFs should eventually be reduced or eliminated from the SDD scheme.

Conclusion

SDD participants are encouraged to reduce or abandon per transaction MIFs by 31 October 2012, at the latest. R-transaction MIFs may be maintained, but they will need to be closely assessed and justified under specific conditions, in order to make sure that they comply with Article 81(3) EC.

Mayer Brown has a wealth of experience representing clients in all types of competition law proceedings. If you have any questions about the above news item, or would like to discuss any aspect of your own business conduct in confidence, please contact Gillian Sproul or Matthew Lawson:

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Footnotes

- 1 See in particular cases COMP/34.579 MasterCard, COMP/36.518 EuroCommerce, and COMP/38.580 Commercial Cards. In such cases, a defence of per transaction MIFs in payment cards markets was that they allow to address an imbalance between payer and payee. However, the Commission believes that such a defence would not apply to direct debit schemes.
- 2 In its draft guidance, the Commission indicates that "some of the per transaction MIF arrangements in domestic legacy schemes are under antitrust scrutiny by national competition authorities". However, it does not name the countries or parties involved as some of these proceedings are not yet in the public domain.

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