

	SEPA vision document
	A single payments market, increasing competition?
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## Executive summary

The Netherlands Competition Authority (NMa) is greatly in favour of an effective Single Euro Payments Area (SEPA). A single European payments area, allowing free and unrestricted movement of goods, people and services, is a goal worth aiming at from a competition point of view. SEPA aims to promote trade, and therefore competition between enterprises in the European Union across borders of individual member states. A single European payments area has drastic consequences for payments within Europe and the market parties which offer services and products in this field. Competition between these parties, which are now mainly active within national borders, could increase significantly under SEPA, as this will create a European level playing field, removing entry barriers for offering cross-border products and services. The NMa considers an increase in competition vital in relation to payment transactions in the Netherlands.

The benefits resulting from a single European payments area are obvious. Whether these benefits will be realised is another matter. The NMa has closely followed developments and actions which have been, and are being, undertaken by the banking sector in particular over the past few months. In addition, the NMa has sent a consultation document to a number of market parties in November 2007<sup>1</sup>, in which the NMa asked the opinion of these parties about the consequences of SEPA for competition, their vision on the market and strategies of individual players. A possible future vision, which the NMa considers undesirable, emerged from a large percentage of the responses received by the NMa, as well as from the NMa's own observations. This picture presents a European payments market in which at most two parties dominate the market for credit as well as debit cards, and in which there is no room left for other payment card brands. Not because companies or consumers had no need for them, or because they were more expensive or less efficient, but because providers had chosen this option at an early stage. The NMa considers developments which might turn this picture into a reality undesirable, and identifies various threats in this vision document which could result in such a scenario from a competition perspective. Not all concerns or threats identified relate to a possible breach of the Competition Act. Concerns and threats which, in the opinion of the NMa, may result in an undesirable welfare loss are also identified in this vision document. The threats to competition and other threats identified in this vision document are briefly described below.

National and SEPA payment products will co-exist during the migration period to SEPA. The demand side of the market should determine which products ultimately survive, in the opinion of the NMa. Dutch banks and Currence have already announced that certain national products, such as payment brand PIN, will not exist under SEPA. The NMa considers this to be a threat to competition. Agreements between competitors to collectively restrict products offered while demand remains, may contravene the prohibition on cartels. This poses a considerable threat under competition law, not least when end dates are agreed in advance. In addition to direct methods to control demand through supply, there are also indirect methods which banks can use to promote migration to the new payment products, such as the choice whether or not implementing PIN on the EMV chip. Collective agreements about such indirect measures may also contravene the Competition Act.

Although an increase in competition is one of the most important aims of the introduction of SEPA, it would seem that the introduction of IBAN would impede such an increase, because it means that a bank and

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<sup>1</sup> Consultation document 'The route to the Single European Payments Area' is available online on the website of the Netherlands Competition Authority at: [http://www.nmanet.nl/Images/Consultatiedocument%20SEPA%20NL%20definitief\\_19798%20ENG\\_tcm16-109239.pdf](http://www.nmanet.nl/Images/Consultatiedocument%20SEPA%20NL%20definitief_19798%20ENG_tcm16-109239.pdf).

country code will become part of the account number. This will seriously impede number portability. The NMa therefore argues in favour of at least retaining the switching service. In this way, switching banks by account holders will then be no more difficult than is the case at present. As evaluation of the switching service shows that the effect is limited, the NMa still considers number portability to be the only real way of switching without barriers, allowing for an increase in competition. Unrestricted competition between European banks would seem a far prospect without a cross-border switching service or number portability. A joint decision by the banks to end the switching service may contravene competition law, unless it is shown that the switching service is no longer technically feasible.

Another standard which may well affect competition is the C-Tap protocol<sup>2</sup>. The decision by Dutch payment processors in favour of C-Tap as such would seem not to result in a restriction of competition in the market for payment processors. The fact that the C-Tap Authority intends to examine possible other payment processors who plan to use the protocol under a certification scheme may well result in a threat to competition. Considering the importance for potential and other market parties to be certificated or obtain a licence, the rules must in principle not give rise to objectively unjustified exclusion effects. The rules should therefore not incorporate any access barriers which are not strictly necessary to guarantee secure and reliable payments. In addition, the governance structure of the C-Tap Authority should guarantee that active market parties cannot influence entry to the market by potential competitors by determining the rules and examining potential entrants.

We also discuss the performance of the Naso's role<sup>3</sup> by the Netherlands Bankers' Association (NVB). Because the NVB cannot be said to be an independent organisation, the NVB's investigation of other market parties cannot be seen as anything other than undesirable from the point of view of the NMa. Particularly, as this opens up the possibility of active market parties impeding entry by other market parties. The NMa therefore recommends appointing an organisation other than the NVB as Naso.

Another topic which is raised in this vision document is the separation between payment schemes and infrastructure. The NMa identifies the threats of tied sales and cross-subsidization, and indicates that these possibilities are not excluded sufficiently by the rules set by the European Payments Council (EPC). If a payment card scheme is in a dominant position in the supply market of payment schemes, the methods referred to above may contravene article 24 of the Competition Act.

The last topic this vision document deals with is multilateral interchange fees (MIF). At the end of 2007, the European Commission concluded that specific MasterCard fallback<sup>4</sup> MIF restrict competition. In its decision, the Commission set out a new line for the anti-trust assessment of MIF. The mutually agreed fees, which banks pay each other in relation to various payment products, restrict competition in principle. The Commission argues in its decision that the interchange fees in question push up the transaction tariffs for merchants, as the MIF constitute a common cost element for all acquiring banks. This creates a floor for fees charged by banks to merchants (the Merchant Service Charge). MIF may in some cases fall under the (relatively stringent) exception criteria of the cartel prohibition. The respective parties will then have to show with the aid of an economic and empirical analysis that the claimed benefits of MIF are actually being

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<sup>2</sup> C-Tap is a protocol for communication between payment terminals and payment processors for payment card transactions.

<sup>3</sup> Naso stands for National Adherence Support Organisation. The Naso is responsible for guiding parties which plan to offer SEPA payment products.

<sup>4</sup> "Fallback" means that these interbank fees apply only if a bilateral agreement about fees has not been signed by two banks.

realised. MasterCard has in this case not been able to show that the interchange fees maximise output from the system because the MIF effect an equilibrium between the demand or need of card holders on the one hand, and merchants on the other, as MasterCard argued, due to the lack of a detailed and robust analysis based on empirical data and facts. The Commission established that the MIF mainly benefit MasterCard and its members. In addition, the Commission stated that MasterCard has not shown that a reasonable share of the claimed benefits of MIF accrues to the merchants because MIF are based on the cost of certain services by the card-issuing banks, which services exclusively or largely benefit cardholders. The NMa will in the future assess MIF which apply in the Netherlands in line with this decision.

In summary, we may say that important steps have already been taken in the migration to SEPA in the Netherlands, but that there is still a long way to go before there will be a single European payments area within which market parties, including banks and non-banking institutions, genuinely compete on a level playing field. In view of the threats to competition outlined above, and the importance of migration to SEPA from a competition point of view, the NMa will continue to closely monitor the Dutch migration process. The NMa calls on parties to halt any developments already initiated which may restrict competition, and to consult the NMa with regard to any doubt which may exist in this respect. The NMa will instigate an investigation into possible competition-restricting behaviour or competition-restricting agreements, if the need arises.

## 1. Introduction

### *The realisation of a European market for payment transactions*

The go-ahead for the unification of European payment transactions was given on 28 January 2008, when the transitional period to the Single Euro Payments Area (SEPA) commenced. Harmonisation of payment transactions in Europe is intended to simplify cross-border transactions via an account held by consumers and enterprises. This concerns payments with payment cards, direct debits and credit transfers. Unification will bring about economies of scale, increased competition and more efficient ways of payment, allowing costs and fees relating to payment transactions to be reduced. Possible effects of the unification of European payment transactions which may favourably affect competition include an increase in the number of parties supplying the market, the creation of a European level playing field and the removal of entry barriers for offering cross-border products and services. Consumers and entrepreneurs will be able to choose from providers across the whole of the Euro area for their payments, instead of from generally national suppliers up to now.

In order to realise an integrated European payments market, action is being taken at two fronts at European level. Firstly, a new European directive for payment services in the internal market, the so-called Payment Services Directive (PSD), was approved by the European Parliament in April 2007, and has subsequently been adopted by the Council of the European Union. This directive aims to harmonise the legal framework for payments within the European Union. The directive must be implemented in the national legislation of the member states by 1 November 2009.

Secondly, the European banking sector, united in the European Payments Council (EPC), has taken the initiative to develop SEPA, in response to the requirement by the European Commission and the European Central Bank to create a single integrated European financial market. The EPC has, amongst other things, laid down a set of rules with which SEPA payment instruments must comply. The rules for European credit transfers and for the European direct debit product are included in the SEPA Credit Transfer Scheme Rulebook<sup>5</sup> respectively the SEPA Direct Debit Scheme Rulebook<sup>6</sup>. The requirements with which payment cards in SEPA must comply, are listed in the SEPA Cards Framework<sup>7</sup> (SCF).

### *Dutch dimension*

Steps are being taken to bring about the transition to SEPA at national level in the member states, as well as in Europe, through self-regulation. As the representative of the Dutch banks, the Netherlands Bankers' Association (NVB) established, together with the Nederlandsche Bank (DNB) and Currence<sup>8</sup>, the SEPA Migration NL Steering Group early in 2007. The steering group has listed the insights into migration to and

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<sup>5</sup> The SEPA Credit Transfer Scheme Rulebook (version 2.3 dated 19 June 2007) is available online on the EPC website at [http://www.europeanpaymentscouncil.eu/documents/EPC125\\_05%20ECT%20RB%20v2.3%20Approved.pdf](http://www.europeanpaymentscouncil.eu/documents/EPC125_05%20ECT%20RB%20v2.3%20Approved.pdf).

<sup>6</sup> The SEPA Credit Transfer Scheme Rulebook (version 2.3 dated 19 June 2007) is available online on the EPC website at <http://www.europeanpaymentscouncil.eu/documents/EPC016-06%20DD%20RB%20v.2.3%20Approved.pdf>.

<sup>7</sup> The SEPA Cards Framework (version 2.0 dated 8 March 2006) is available online on the EPC website at [http://www.europeanpaymentscouncil.eu/documents/SEPA%20Cardsframework\\_027\\_05\\_Version2%200.pdf](http://www.europeanpaymentscouncil.eu/documents/SEPA%20Cardsframework_027_05_Version2%200.pdf).

<sup>8</sup> Currence was established on 1 January 2005 at the initiative of eight Dutch banks (ING, ABN Amro, Rabobank, Fortis, SNS Bank, Friesland Bank, Van Lanschot Bankiers and BNG) and is the owner of the collective payment products PIN, Chipknip, Acceptgiro, Incasso/Machtigen and iDEAL.

the implementation of SEPA in the Netherlands in '*De overgang op SEPA*' ('Migration to SEPA'), the so-called migration plan.

The NMa looks at two aspects of the national dimension of SEPA in particular, as do the other national competition authorities in Europe. Firstly, this concerns the self-regulation which is fundamental to the migration plan referred to above, in which the transition process for the Netherlands is described. Secondly, this concerns the development of market relations as far as payment transactions in the Netherlands are concerned. These market relations co-determine the competition which is intended to actually take place at European level under SEPA.

#### *Objectives of the consultation and vision document*

The benefits which accompany a single European payments area are obvious. However, this does not alter the fact that the transition to SEPA must take place within competition rules. If these rules are complied with, the increase in competition intended to be achieved under SEPA, may be realised.

The task of the competition authorities, including the Netherlands Competition Authority (NMa), is to ensure that migration to SEPA complies with the competition rules. There are a number of issues at European level with possible interstate effects. These include, for instance, the interpretation of the rules in the Scheme Rulebooks and the SCF. The investigation of these issues from a competition perspective, and the dialogue about it with the EPC is conducted in principle by the European Commission. The NMa has, in this connection, shared its vision with the European Commission within the framework of the ECN SEPA Taskforce<sup>9</sup>. The document, which was compiled in a partnership between national competition authorities and DG Competition of the European Commission, serves as the background for the European Commission in its discussions with the EPC. The document discusses the following issues: (1) the governance structure of the EPC (2) the separation between payment schemes and infrastructure (3) access to payment schemes and infrastructure (4) interchange fees (5) standardisation, certification and compliance and (6) the migration period. A number of these subjects may also result in national restrictions on competition. These will be discussed specifically in relation to the situation in the Netherlands in this vision document.

The NMa sent a consultation document to a number of market parties in November 2007<sup>10</sup>, in order to obtain a thorough picture of the threats to competition which may accompany the transition to SEPA in the Netherlands. The document asked the market parties for their opinion on the effects of SEPA on competition, for their vision on the market and for strategies of individual players in the market.

By early February 2008, the NMa had received a response to the consultation from a total of thirty-three parties, divided amongst the various groups approached by the NMa. Not only representatives of banks and the retail trade, but also ministries, consumer organisations and payment processors have responded to the questions in the consultation document.

In general, the responses to the consultation agreed with and supplemented the picture the NMa already held of the market and of the possible consequences of SEPA.

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<sup>9</sup> The competition authorities within the European Union work together within the European Competition Network (ECN). A number of competition authorities and the Commission established the SEPA Task Force within the ECN. This project group deals with threats to competition under SEPA and collaborates in order to develop a clear-cut competition vision on the migration in individual European member states.

<sup>10</sup> Consultation document 'The route to the Single European Payments Area' is available online on the website of the Netherlands Competition Authority via: [http://www.nmanet.nl/Images/Consultatiedocument%20SEPA%20NL%20definitief\\_19798%20ENG\\_tcm16-109239.pdf](http://www.nmanet.nl/Images/Consultatiedocument%20SEPA%20NL%20definitief_19798%20ENG_tcm16-109239.pdf).

This vision document raises a number of issues which have been identified by respondents as important and possibly relevant to the Dutch market from a competition point of view. Backgrounds are described for each subject, as well as possible problems raised and/or threats outlined by respondents, followed by a risk analysis in relation to competition. The vision document is intended to sketch an unambiguous picture of the threats to competition, currently identified by the NMa, to market parties and other stakeholders, so that these can be addressed by the market.

The risk analyses referred to above have been carried out by the NMa within the framework of the sections of the law it enforces, including articles 6 and 24 of the Competition Act. The prohibition on cartel agreements is provided for in article 6 paragraph 1 of the Competition Act. Based on this so-called cartel prohibition, agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings are prohibited, if they are intended to, or result in, the prevention, restriction or distortion of competition in the Dutch market or part thereof.

This includes, amongst others, agreements relating to prices, division of the market and joint determination of production quantities. Other agreements between market parties which remove normal uncertainty about the behaviour of competitors may also contravene the Competition Act. Such agreements reduce the incentives for companies to innovate, and often result in higher prices for consumers.

Article 24 of the Competition Act prohibits undertakings from abusing a dominant position. A company holds a dominant position if it is in a position which is sufficiently strong for the company to conduct itself independently of its competitors and customers. The company may, for instance, determine prices without taking into account other providers.

There are various factors which together determine whether a company occupies a dominant position. One of these factors is the market share. If the company has a market share of more than 40%, it may be an indication that the company occupies a dominant position. However, a company cannot be said to occupy a dominant position on the basis of market share alone. Even if a company is the only provider in a market, it is possible for it not to occupy a dominant position. The company may feel the pressure of competition if other companies are able to easily enter the market and compete. The single provider must then take this into account. The latter may not be able to act independently of these potential competitors, and does not occupy a dominant position. Occupying a dominant position as such is not prohibited under the Competition Act. Abusing it, however, is. If a company occupies a dominant position, then the company is not allowed to 'exploit' or 'exclude' other undertakings.

#### *Vision document structure*

This vision document addresses a number of possible threats within the framework of migration to SEPA. As indicated above, this document first briefly outlines the background of each subject. The responses to the consultation document relating to the subject in question are then outlined in brief. The NMa subsequently identifies the main threats to competition, and indicates how it assesses the situation from a competition point of view. Finally, a conclusion is drawn for each subject.

Chapter 2 lists the threats and benefits of standards. Section 2.1 deals with the introduction of IBAN account numbers, and the possible consequences of the introduction of the C-Tap protocol are raised subsequently in section 2.2. C-Tap is a standard for communication between payment terminals and payment processors.

Chapter 3 describes the main effects on competition of migration to SEPA. Section 3.1 deals with the transition from national payment products to SEPA payment products. The role of the National Adherence

Support Organisation (Naso), and the effects of its implementation in the Netherlands are discussed in section 3.2.

Chapter 4 argues that strict separation between payment schemes and infrastructure is necessary for the realisation of increased competition in SEPA. There are two factors which may prevent this. Section 4.1 describes the threat of cross-subsidization, after which section 4.2 touches on product tying.

Multilateral interchange fees (MIF) are the focus of chapter 5. Now that the European Commission has issued a decision in December 2007 in the MasterCard case, the NMa makes it clear how MIF will be assessed in future in the Netherlands, and why MIF may restrict competition. Finally, the NMa draws a conclusion in chapter 6 on the consequences of SEPA for competition in payment transactions in the Netherlands. In addition, the main threats to competition discussed in this vision document will be listed.

Payments, and many topics which play a role in the migration to SEPA, are of a relatively technical nature. It is sometimes necessary to describe the complex and technical aspects and use jargon in order to ensure they are understood correctly. Terms are defined and matters explained in footnotes.

## 2. Standards

### Background

The NMa has paid specific attention to standardisation agreements in its consultation document. These mutual agreements between market parties are aimed at establishing technical requirements or quality requirements with which existing or future products, production processes or production methods must comply.

Standardisation agreements may relate to various aspects, for instance standardisation of various quality levels or technical specifications in markets in which compatibility and interoperability with other products or systems is essential. Conditions set for obtaining a particular quality mark or approval from a regulating agency may also be considered as standards.

Within the SEPA framework, agreements relating to standards are important to bring about harmonisation between various European payment products. Agreements relating to standards are necessary to realise interoperability and compatibility at European level. As already described above, the EPC has laid down the minimum rules with which European credit transfers and European direct debits and payment card systems must comply.

Standardisation agreements may result in increased competition if market parties adopt the same standards and if it becomes easier for customers to switch suppliers. However, standards may also have a restrictive effect on competition, for instance when they impede entry into the market, or unnecessarily restrict the supply of products<sup>11</sup>.

Respondents to the NMa consultation reported two examples which may result in restricted competition, either directly or indirectly, in relation to the details pertaining to standards. The remainder of this chapter discusses these standards. Section 2.1 discusses the introduction of IBAN codes for account numbers. Section 2.2 describes C-Tap, as well as possible consequences for competition of this protocol for processing transactions<sup>12</sup> with payment cards.

In addition to the standards discussed, all kinds of market parties are currently working on the development of standards within the SEPA framework. The NMa has not been alerted to any issues about these standards, and we will therefore not discuss these. The NMa would also like to point out – perhaps unnecessarily – that these standard may also result in the same general threats to competition described below, which are linked to the establishment of standards and their control.

### 2.1 The introduction of IBAN codes for account numbers

With the introduction of SEPA, it will be necessary that accountholders start to use IBAN codes. According to the national SEPA migration plan, IBAN allows for more efficient, and therefore cheaper, payment transactions than is the case at present. IBAN account numbers comprise 18 digits. The name of the bank as well as the country of origin of the bank will be part of the account number by way of a code. Adding a

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<sup>11</sup> See also the Guidelines on Cooperation between Undertakings of the NMa dated 22 April 2008 ([www.nmanet.nl](http://www.nmanet.nl)) as well as the Guidelines relating to the applicability of article 81 EU on horizontal agreements dated 6 January 2001, Pb. 2001, C 3, p.2.

<sup>12</sup> A payment processor enables the technical processing of a card transaction. Payment processors, also called processors, take care of data conversion and settlement of the payment between the banks involved, amongst other things.

country and bank code to the account number may affect the switching behaviour of private individuals and SMEs.

The number of private and business account holders who switch banks is small in the Netherlands. Research by economic research bureau SEO in 2007 for the Ministry of Finance<sup>13</sup> shows that the Netherlands scores low in comparison with other countries, with a switching percentage of 4.17% for private individuals and 8.88% for SMEs. It also shows that the current account is a low interest product, in particular for consumers. On the other hand, current accounts comprise the core of the relationship between a bank and a customer, as all kinds of other products are linked to the current account. In addition, research by the European Commission<sup>14</sup> shows that the current account is the most effective cross-selling product of Dutch banks, after mortgages. On average, 2.29 other products are sold to a private individual who opens a current account at a Dutch bank. The current account is therefore important for banks.

The NMa has for years been concerned about the relatively low switching percentage, as there is little pressure on banks to be competitive in relation to all retail products, due to the lack of switching by private and SME customers. The product supply in the private as well as the SME market, which has a high degree of concentration, also shows little differentiation (in price and products). The NMa considers easy switching of banks by private individuals and SMEs a condition for increased competition in the banking retail market. The NMa has therefore been a fervent advocate of number portability<sup>15</sup> in relation to current accounts for years. Despite the fact that other organisations have also pleaded for number portability, the then minister of Finance took the view in 2002 that banks could confine themselves to the introduction of a standardised interbank switching service in the short term. Following evaluation of the functioning of the interbank switching service, a review would take place as to whether number portability would offer genuine added value.

The Dutch banks introduced this interbank switching service in 2004. This service allows account holders to switch banks, which reroutes money transfers and direct debits to the new account during a period of 13 months (the consumer will be given a new account number). Evaluation of the switching service shows that the potential mobility of account holders has increased as a result of the switching service, in the sense that switchers who have used the switching service indicate to be inclined to switch sooner due to the existence of the switching service. Nevertheless, the relative increase in mobility has been limited so far, as many customers are still not switching, despite the existence of the switching service. The evaluation report therefore recommends setting up a cost-benefit analysis for number portability as an objective, economic basis for further decisions in relation to number portability

### ***Responses to the consultation***

The use of IBAN account numbers is not more complicated than the use of present account numbers, according to various responses to the NMa consultation. Several banks indicate that services will be developed which will convert national account numbers to IBAN account numbers. It will therefore remain

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<sup>13</sup> Drempeelvrees? Investigation into switching barriers in the market for payment transactions and evaluation of the Switching service.

<sup>14</sup> European Commission (2007), DG Competition Report on Retail Banking Sector Inquiry, online available via [http://ec.europa.eu/comm/competition/antitrust/others/sector\\_inquiries/financial\\_services/sec\\_2007\\_106.pdf](http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/financial_services/sec_2007_106.pdf).

<sup>15</sup> Number portability is a facility which allows customers to keep their bank account number and take it with them when switching to a different bank.

possible in the short term for consumers to input the familiar Dutch account number, for instance when using Internet banking.

The NMa has received few responses on the effect of IBAN on competition in payment transactions. It was stated, however, that IBAN account numbers will make it more difficult to introduce number portability, due to the bank code in the number.

### *Risk analysis*

As indicated above, account holders' mobility promotes competition between banks. If customers can switch easily, and actually do so, then the pressure on banks to offer services efficiently and cheaply will grow. In order to maintain the pressure of competition on banks under SEPA as well, it would seem necessary that the Dutch interbank switching service is retained. A switching service at European level or European number portability would have to be introduced in order to allow genuine competition between all European banks in SEPA.

As indicated, the present account numbers will become longer, as they will also include bank codes. Use of such account numbers may have consequences for competition between banks. As the name and the country of origin of the account holder's bank are part of the IBAN account number, it is unlikely, in any case in the short-term, that number portability will be developed within Europe with which customers will be able to retain their account number when they switch banks. In addition, the migration plan states that there is still a question mark around the issue as to whether the Dutch switching service will be able to continue existing in SEPA, as this service is based on the collective use of a central processor which manages a central databank of all current accounts in the Netherlands and carries out interbank transactions.

From a competition point of view there may be problems should the Dutch banks jointly decide to end the interbank switching service, as this agreement could be regarded as a joint decision to restrict provision. As a result of such an agreement, the barrier to switching by account holders would be raised, which could result in a restriction on competition, as explained above. Such competition restriction may fall under the cartel prohibition, as laid down in Article 6 paragraph 1 Competition Act. Should research show that retention of the switching service is technically impossible, then it will be likely that a decision in favour of termination would come under the exception provision in Article 6 paragraph 3 Competition Act<sup>16</sup>.

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<sup>16</sup> In order for article 6 paragraph 3 of the Competition Act to apply, it is necessary that the agreement meets with four cumulative criteria. This is the case if (1) the agreement contributes to improvement of the production or distribution or promotion of technical or economic progress, (2) provided a reasonable share in the benefits arising accrues to users, and (3) without posing restrictions on the companies involved which are not essential to achieve these objectives, (4) without offering the opportunity to eliminate competition for a substantial part of the goods and services involved.

### ***Conclusion***

Although an increase in competition is one of the most important aims of the introduction of SEPA, it would seem that the introduction of IBAN would rather impede such an increase. The NMa therefore argues in favour of at least retaining the interbank switching service, if possible. In this way, switching banks by account holders will then be no more difficult than is the case at present. As the evaluation of the switching service shows that the effect on customer mobility has been limited so far, the NMa still considers number portability to be the only real way of switching without barriers, allowing for an increase in competition. The NMa is therefore pleased to back the recommendations from the evaluation investigation by SEO, which advise conducting a cost-benefit analysis of number portability. Unrestricted competition between European banks would seem a far prospect without a cross-border switching service or number portability.

A joint decision by the banks to end the switching service may contravene competition law, unless it is shown that the switching service is no longer technically feasible.

## **2.2 The C-Tap protocol**

A standard to which the Dutch migration plan does not refer but which a number of parties mention in their response to the NMa consultation as possibly affecting competition, is the Common Terminal Acquiring Protocol (C-Tap). C-Tap is in use in the Netherlands, Belgium and Luxembourg. This protocol for communication between payment terminals and payment processors relating to payment card transactions has been developed by the Belgian Banksys and Equens<sup>17</sup>, and has been imposed as a standard by payment processor Equens. The C-Tap protocol has been chosen by Equens as successor to the BEANET protocol, which is still being used for payment card transactions via the magnetic strip. The BEANET specifications do not meet with SCF requirements, compelling Equens to choose a new protocol.

The protocol is presently managed by the C-Tap Authority. The purpose of this foundation, established by Equens and CCV, is to create and maintain an open market model for the use of C-Tap specifications, according to the founders. As such, the C-Tap Authority issues licences to payment processors and certifies payment terminals.

Most Dutch payment transactions are processed by Equens, as most Dutch banks have signed a processing contract with Equens. As most merchants cannot do without Equens through their bank, and Equens has chosen in favour of the C-Tap protocol, merchants are compelled to purchase a C-Tap certified payment terminal when replacing their old terminal. The supply of C-Tap certified payment terminals has been extremely limited over the past few years, according to many respondents to the consultation document. The reasons were, according to the C-Tap Authority, the complexity of the C-Tap specifications which have resulted in long development periods for C-Tap applications, and the development of an infrastructure comprising special tools and a test set of approximately 1000 tests for certification.

Meanwhile, the situation seems to have changed and there are now several C-Tap certified payment terminal suppliers active in the Dutch market.

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<sup>17</sup> At that time Equens was still called Interpay. Interpay merged with the German Transactionsinstitut in 2006 and became Equens. Equens is a Dutch payment processor of PIN transactions, amongst others.

### *Responses to the consultation*

As national payment processors or processors in different countries have opted for different communication protocols, payment terminals cannot be supplied in multiple countries, according to a number of responses. Several responses indicated that the supply of C-Tap payment terminals was extremely limited until recently, and that these terminals were also more expensive than terminals without this protocol.

Large companies in particular, which are active in many European countries, have indicated to have encountered difficulties due to the fact that it is not possible for them to purchase a single uniform payment infrastructure as a result of the different communication protocols in Europe. In addition, they express the wish that the same protocol is used for the connection between the terminal and the payment processor as between the terminal and the till. The fact that this is currently not the case, results in unnecessarily high costs for them, according to these companies.

### *Risk analysis*

Competition between payment processors for Dutch payment transactions is limited. Equens still possesses an extremely high market share in the market for payment processing in the Netherlands. As a result of SEPA, other payment processors will probably try and enter the Dutch market. Whether, and to what extent this will take place depends on a number of factors. At the time other payment processors start entering the market, the question will be as to whether these payment processors will also want to use the C-Tap protocol for the Dutch market, or another protocol. If the C-Tap protocol is chosen, then the payment processor in question can obtain a licence from the C-Tap Authority.

As shown above, the C-Tap Authority will lay down rules under which companies who plan to use the C-Tap protocol can enter the national market for payment processing and the payment terminal market. As indicated by the C-Tap Authority, a company must possess a certificate or licence in order to become active in the different markets. Conditions listed above can therefore be categorised as a so-called certification scheme. Such schemes may, similar to recognition schemes, in principle be aimed at promotion of the quality and security of products.

Now that companies can only then become active in one of the markets referred to above if they meet with the rules laid down by the C-Tap Authority, and possess a licence issued by the C-Tap Authority or a certificate, these rules may in practice act as a barrier to entry and result in exclusion. The conditions must therefore meet with the requirements which European and national competition rules demand from such schemes, including their application in practice.<sup>18</sup>

Considering the importance for potential and other market parties to be certificated or obtain a licence, the rules must in principle not give rise to objectively unjustified exclusion effects. The rules should therefore not incorporate any barriers to entry which are not strictly necessary to guarantee secure and reliable payments.

In order to prevent exclusion without objective justification, and to guarantee that anyone who meets the requirements of the certification scheme is eligible for a licence or certificate, the rules for certification and licensing must meet with the following conditions:

- the scheme must have an open character

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<sup>18</sup> See also the Guidelines on Cooperation between Undertakings of the NMa dated 22 April 2008 ([www.nmanet.nl](http://www.nmanet.nl)) as well as the Guidelines relating to the applicability of article 81 EU on horizontal agreements dated 6 January 2001, Pb. 2001, C 3, p.2.

- the requirements laid down by the scheme must be objective, non-discriminatory and in particular, transparent in advance
- the (admission)procedure for certification/licensing must be transparent
- The (admission)procedure for certification/licensing must provide for an independent decision about admission upon the first assessment or, after recognition has been refused, on appeal

If the scheme meets with these conditions, then the scheme will, as such, not normally result in a restriction of competition as referred to in article 6, first paragraph of the Competition Act, or article 81, paragraph 1 EC Treaty.<sup>19</sup>

In addition, it is vital from the point of view of competition that the C-Tap Authority can and will interpret its tasks independently and autonomously. The governance structure of the C-Tap Authority plays a crucial role in this context. In this connection we note that the Advisory Council of the C-Tap Authority will comprise market parties who have already obtained a licence, and the Council can itself rule that it is authorised to decide on certain decisions by the Board to be chosen by the Council itself. The Advisory Council will therefore comprise representatives of already active market parties. In this context it is important that the Board of the C-Tap Authority can and will decide independently on all matters related to the testing of potential licence and certificate holders. Indicative in this context is the fact that the governance structure of the C-Tap Authority and the decision-making procedures must guarantee that the influence of the Advisory Council does not stretch so far that other (innovative) market parties – either by means of the interpretation and testing of rules or otherwise – are denied entry to the market on improper grounds, or have their entry made more difficult. If this is the case, it could result in contravention of article 6 or 24 of the Competition Act.

As most Dutch banks have currently signed a contract with Equens, the effects of a choice of payment processor in favour of the C-Tap protocol are considerable. The choice in favour of C-Tap has consequences for the payment processing market, but also for the payment terminals market. As the current active payment processors in the Netherlands have both opted for C-Tap, merchants must ensure that the payment terminal in their shop also functions via this protocol. Many (cheap) foreign payment terminals are therefore not eligible for the Dutch market, rendering competition in the market for payment terminals relatively limited.

We cannot predict what the future of C-Tap in the Netherlands looks like on the basis of information provided to the NMa. It is clear that things will depend largely on the entry of foreign payment processors and their choice in favour of a different protocol or otherwise. In addition, it is also possible that C-Tap will act as a European standard, when the restrictions now felt will most probably largely disappear.

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<sup>19</sup> Rotterdam Court of Law dated 25 March 2004, *UNETO-VNI*, MEDED 02/796-HRK and case 2157/VNI, reviewed decision on appeal of the d-g Netherlands Competition Authority dated 22 July 2004, rno. 18; Decision by the European Commission dated 29 November 1995, *SCK/FNK*, Pb. 1995, L 312/79, ov. 23-30, confirmed by the court of first instance of the European conservancies on 22 October 1997, *SCK/FNK*, T-213/95 and T-18/96, Jur. 1997, II-1739, r.o. 145-149; Decision by the European Commission dated 29 November 1995, *SCK/FNK*, Pb. 1985, L 219/35, ov. 47-51, confirmed by the Court of Justice of the European conservancies on 20 May 1987, *ANTIB t. Commission*, Jur. 1987,p. 2201, , r.o. 16-24; Decision by the European Commission dated 7 April 1999, *EPI-code of conduct*, Pb. 1999, L106/14, ov. 30 and 38.

***Conclusion***

The decision by the Dutch payment processors in favour of C-Tap as such would seem not to result in a restriction of competition in the market for payment processors. The fact that the C-Tap Authority intends to examine possible other payment processors who plan to use the protocol under a certification scheme may well result in a threat to competition. Considering the importance for potential and other market parties to be certificated or obtain a licence, the rules must in principle not give rise to objectively unjustified exclusion effects. The rules must not contain any entry barriers which are not strictly necessary in order to ensure secure and reliable payment transactions. In addition, the governance structure of the C-Tap Authority should guarantee that active market parties, either by means of the actual rules and control, or otherwise, cannot influence entry to the market by potential competitors.

### 3. The migration to SEPA

#### Background

The transition from the current national payment instruments to SEPA payment instruments will not occur overnight. This requires a transitional period, during which present and new payment instruments will co-exist. As the migration and the plan based on migration are based on agreements between competing companies, the way in which the migration is being shaped is sufficient reason in itself to view it critically from a competition point of view.

The migration to SEPA is intended to bring about an increase in competition, as the market parties start to compete with each other at European level, while currently competition takes place mainly within national borders. An increase in efficiency and economies of scale will allow prices to fall, in any case in the medium term. However, several responses to the NMa consultation show that there are concerns that migration to SEPA is being seized on to increase prices, and that competition will be reduced. There is a fear in several EU member states, including the Netherlands, of price rises as a result of the transition from national to European payment systems.

Section 3.1 will discuss the migration of the current national payment products to SEPA-compliant products. We will touch in particular on the conduct of market parties which may result in competition restrictions instead of an increase in competition. This includes, for instance, the planned termination date for national payment instruments, and we will touch on a demand-or supply-led transition to SEPA and the role of EMV and the liability shift<sup>20</sup> this entails. Finally, we will discuss the Dutch interpretation of the National Adherence Support Organisation (Naso) during the migration period in section 3.2.

#### 3.1 The migration of national payment products to SEPA-compliant<sup>21</sup> products

The NMa has posed a number of questions in its consultation document issued in November about end dates of national payment products. During the transition period, SEPA payment products will be introduced which will act in the first instance side-by-side with the present national products. The Dutch migration plan announces a review by mid-2009 as to what final termination dates can be determined, in consultation with stakeholders, and based on actual use of SEPA credit transfers, SEPA direct debits, and the status of issue and acceptance of SCF-compliant<sup>22</sup> giro cheques. As a result of the migration plan, this means in concrete terms that *“dates will be determined on which the domestic transfer and direct debits will be removed from the market and the PIN product will cease to exist”* by mid-2009.

This implies that it has already been decided that the national payment products of credit transfer, direct debit and PIN will no longer be offered in the long-term.

#### *Specific issues in relation to the migration of debit cards*

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<sup>20</sup> The liability shift is a measure intended to promote the market-led switch from the magnetic strip to the more secure EMV standard (chip), and therefore to combat fraud. The introduction of the liability shift means that the fraud risk of the card-issuing bank transfers to the acquiring bank if the payment terminal of the acceptant cannot yet accept the EMV chip, and the consumer holds a card containing an EMV chip. The acquiring bank may decide to pass the fraud risk on to the acceptant.

<sup>21</sup> SEPA-compliant products are defined as payment products which meet the requirements laid down by the EPC in the Rulebooks and the SCF.

<sup>22</sup> SCF-compliant means that the payment card product meets with the requirements of the SEPA Cards Frameworks of the EPC.

Section 1.1 of the SEPA Cards Framework states that: *"No general purpose card scheme designed exclusively for use in a single country, ... should exist any longer"*. This would mean that strictly national schemes must disappear.

The migration of national payment traffic to SEPA means that every existing payment scheme must decide whether it will become SEPA-compliant or not. This decision must therefore also be made by the PIN scheme. The owner of PIN is Currence. Currence has announced on its website that the Dutch PIN product already meets the SCF technical requirements, which means that it can continue to function in the Dutch market after 2010<sup>23</sup>. However, according to the SEPA migration plan, PIN will not grow into a pan-European product because the Dutch payment market is too small in size.

Each bank which issues debit cards (issuing) or signs contracts with merchants to accept payment brands (acquiring), must in this context individually decide until when, as issuer, they will incorporate the PIN product on payment cards, and, as acquirer, sell to merchants. As a result of the migration plan, PIN will continue to exist until all banks have cancelled their licences. In addition, individual banks will have to decide how they will ensure they will start to issue SEPA-compliant payment cards. Banks have a choice from several possibilities.

The SEPA Cards Framework lists three possibilities to become SEPA-compliant, namely:

1. replacement of the national payment brand with an international brand which is already SEPA-compliant
2. expansion of the national payment brand and/or interconnection of different national payment brands
3. co-branding<sup>24</sup>

In the long-term, it would seem in view of the wording in the migration plan, that it has been decided that option 1 will be implemented in the Netherlands, as the national payment brand will continue to exist under options 2 and 3.

Despite the fact that the migration plan states that end dates will be determined at a later stage, the NMa has ascertained that it is suggested through various comments by influential parties in the media and on public occasions that PIN will in time disappear, while a definite year is already being mentioned.

#### *Market-driven transition to SEPA*

In relation to the topic of possible end dates for the present national products, the question whether the migration to SEPA will be demand- or supply-driven is also topical. If the market functions well, demand on the part of customers and the migration to SEPA payment products will be created automatically, as these instruments have at least the same quality and low price as the present national payment products. In this scenario it is not necessary for present national and new SEPA payment products to co-exist over a long period, which reduces the cost of two co-existing payment systems. By customer we do not mean merely the consumer as a private customer; demand on the part of business customers (merchants in the case of

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<sup>23</sup> See Currence website at [http://www.currence.nl/Currence.nl/coll\\_pin.html](http://www.currence.nl/Currence.nl/coll_pin.html).

<sup>24</sup> Co-branding means that several payment brands are listed on a single payment card. The payment card holder or acceptant may then choose via which payment brand payment will be conducted, for each transaction. Placing a restricted accepted payment brand on the card (for instance a national payment brand) in addition to an international payment brand, offers the possibility of paying with the restricted accepted payment brand within the restricted area, and outside it with the internationally accepted brand.

payment card transactions, all kinds of companies in the case of credit transfers and direct debit payments) is also relevant. If the SEPA payment products are not characterised by at least the same quality and low price as the present payment products, then demand by customers for new products will not automatically arise.

*The role of the EMV chip<sup>25</sup> and the liability shift in the migration process*

In the Netherlands, most electronic payment card transactions are paid with PIN. The debit card is swiped in the card reader during a transaction, after which the card is recognised via the magnetic strip, and payment processed. As magnetic strip technology is fraud-sensitive, the magnetic strip is replaced in SEPA by the EMV chip. The EPC has decided this and laid it down in the SCF. In effect, this means that each payment brand must be implemented on the chip in order to become SEPA-compliant. In addition, a liability shift must be introduced for each SEPA-compliant payment brand, according to the SCF.

There are various parties who issue payment cards in the Netherlands, the majority of them are banks. These banks must make various choices in relation to the issue of cards under SEPA. The main choice as far as competition is concerned, relates to the question as to which payment brands are being implemented on the EMV chip on payment cards issued by the bank. If PIN is not placed on the EMV chip by a number of large card-issuing banks, then it will in all probability have considerable consequences for the expected life of PIN. At the moment, one of the largest card-issuing banks, namely ING Bank, has announced that it will not implement PIN on the EMV chip. This could result in accelerated phasing out of PIN, in combination with the liability shift described below. If PIN becomes SEPA-compliant and is placed on the EMV chip, Currence will have to implement a liability shift for PIN according to the SEPA Cards Framework.

A number of Dutch banks are already issuing payment cards with an EMV chip and a magnetic strip. Increasing numbers of consumers therefore possess a SEPA-compliant<sup>26</sup> debit or credit card. It is also necessary for a payment transaction via the EMV chip that the merchants have a payment terminal which can read out the EMV chip, a so-called EMV terminal. As long as retailers do not yet possess EMV payment terminals, payment takes place via the magnetic strip. The introduction of the liability shift means that the fraud risk of the card-issuing bank transfers to the acquiring bank if the payment terminal of the acceptant cannot yet accept the EMV chip and the consumer does have a card containing an EMV chip. In this case the transaction is still conducted via the fraud-sensitive magnetic strip. By the way, the acquiring bank may itself consider to pass on the fraud risk to the acceptant, if the latter does not yet possess an EMV terminal.

If EMV migration takes place quickly in the Netherlands, then it may also have a positive effect on competition. Visa's debit card brand V-Pay works only via this chip, and not via the magnetic strip. Competition between payment brands may therefore increase, as demand for V-Pay possibly increases if more merchants can accept EMV transactions. In this context it is desirable that PIN also gets a place on the EMV chip, so that competition can take place in any event between the three different payment brands.

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<sup>25</sup> EMV (Europay MasterCard Visa) is an international standard for payment with credit and debit cards. The EMV standard ensures that the magnetic strip on cards is being replaced by a chip with pin code, in order to reduce fraud.

<sup>26</sup> SEPA-compliant means that a payment product (cards, credit transfers and direct debits) meets with the SEPA requirements. These requirements are described in the 'SEPA Cards Framework', the 'Credit Transfer Rulebook' and the 'Direct Debit Rulebook', compiled by the EPC.

### *Responses to the consultation*

There is a general fear on the part of various market parties that the introduction of SEPA will result in the disappearance of several cheap national payment products, such as the Dutch direct debit or the national debit card brand PIN, to be replaced by more expensive European alternatives. It may be attractive for banks to change over to these more expensive alternatives, as the profit margins for these products may be higher. Responses to the consultation document in relation to payment cards have shown that most parties hope for the arrival of a new payment scheme in addition to Visa and MasterCard. However, according to a few respondents, the question is whether competition will indeed increase due to entry of a new payment card brand, as MasterCard and Visa are presently already SEPA-compliant. It will most likely require a considerable amount of time and investment to be able to compete with these existing payment brands.

One of the main concerns emerging from the responses to the NMa consultation is the fact that consumers and business users ultimately are disadvantaged by SEPA, particularly if the migration proves to be supply-driven instead of demand-driven. According to respondents, SEPA may result in the disappearance of efficient, cheap national products, to be replaced by expensive SEPA payment products in this scenario. Establishing strict end dates, as described above, will prevent a market-driven transition according to respondents, as clients as well as suppliers in this case will work towards these dates. End dates will only be obvious after the event in a market-driven transition.

Retailers fear that the liability shift will result in them having to make early investments in EMV payment terminals while their present terminals are still certified for a number of years, and replacement is not yet opportune, as a result of agreements arrived at with the banks, in view of the economic life of the payment terminals. They may be faced with high costs for fraud if they are not investing now. The liability shift therefore constitutes an important incentive for merchants to acquire EMV terminals as soon as possible. Costs for the early investments will in all probability ultimately be passed on to the consumer via shop prices.

The problem of the liability shift for payment involving debit cards in the Netherlands is presently still relatively small, as most payment card transactions take place via PIN, which does not have a liability shift. The fraud risk therefore falls to the issuing bank in the case of PIN transactions. When PIN becomes SEPA-compliant, then it must be implemented on the EMV chip and according to the SEPA Cards Framework, a liability shift must also be introduced for PIN. At present the fraud risk only falls to acceptants if they accept credit card transactions and Maestro debit card transactions which take place via the magnetic strip, while the payment brands in question are also on the chip. However, this currently concerns a small percentage of the total number of payment transactions in the Netherlands. Merchants who accept credit card payments (for which the liability shift has already been introduced) state that they are currently already facing high costs for fraud.

The main incentive which can be offered by card schemes to promote the migration to EMV is the application of different fees. By quoting lower fees for EMV transactions than for magnetic strip transactions, it may become attractive for merchants to invest in new payment terminals. The rapid migration to EMV terminals is being hampered, however, by a limited supply of EMV-suitable payment terminals which also comply with the C-Tap referred to earlier, according to respondents.

Another threat mentioned by respondents to the consultation document, is that the introduction of the EMV chip may result in the disappearance of national payment brand PIN. Banks are currently issuing payment

cards with magnetic strips as well as EMV chips. When banks opt to place PIN on the fraud-sensitive magnetic strip, rather than on the EMV chip, as ING Bank has announced it plans to do, while other debit card brands such as Maestro or V-Pay are placed on the chip, then PIN will in any case disappear when the magnetic strip disappears.

### *Risk analysis*

#### *End dates national payment products*

From the point of view of competition, there is a great risk involved in participating banks jointly deciding to take a payment product out of the market at any time. In such a case, a collective arrangement is being agreed between competitors in order to limit the supply of products, which contravenes article 6 paragraph 1 of the Competition Act.

Establishing end dates for old payment products may result in efficiency benefits at the time a large percentage of the market has switched to new payment products and high costs are incurred for a small percentage of the market. In this case there may be arguments in favour for the parties involved to apply the exception criteria provided for in article 6 paragraph 3 of the Competition Act. This is the case if the agreement contributes to improvement of the production or distribution or promotion of technical or economic progress, provided a reasonable share in the benefits arising accrues to users, and without posing restrictions on the companies involved which are not essential to achieve these objectives, or offering the opportunity to eliminate competition for a substantial part of the goods and services involved.

However, it is not desirable that these dates are determined in advance, thus removing mutual uncertainty between competitors.

There would presently not seem to be any clear-cut arguments supporting the need for such an agreement, partly in view of the fact that there is still abundant demand for these products (on the part of consumers as well as business users). From a competition point of view, the creation of certainty for market parties cannot be considered to be sufficient reason to consider such an agreement as essential.

#### *Agreements relating to the specific phasing out of PIN*

As already indicated above, a joint decision to phase out the PIN payment brand may qualify as a collective agreement with the object, and/or the effect of a restriction of the product supply, which contravenes article 6 paragraph 1 of the Competition Act. Such an agreement may result in a reduction of choices on the part of consumers and merchants. They will then only be able to opt for the international payment brands, while PIN could be a possible competing product in future also in relation to these brands. Such an agreement might result in the fact that issuing and acquiring banks can no longer offer the PIN product, which restricts these banks in their commercial freedom. This agreement would possibly also come under the exception provision in article 6 paragraph 3 of the Competition Act. However, in this case the question is whether potential benefits and the necessity of such an agreement can presently be sufficiently proven.

As indicated above, the SEPA migration plan states that PIN will not grow into a pan-European product because the Dutch payment market is too small in size. The migration plan seems to refer to section 1.1 of the SCF which states that general payment card schemes which have been designed only for a national market should no longer be in existence. The question is whether PIN is indeed a payment card scheme which has been developed only for the Dutch market. According to Currence, its owner, this is not the case as PIN has been technically rendered SEPA-compliant and it is therefore technically possible that PIN is

accepted in other member states. The necessity of a stricter interpretation of section 1.1 is also disputed by the European Commission, which in the person of Euro Commissioner Kroes indicated early in December<sup>27</sup> that national payment brands can co-exist with the international brands, as long as it is technically possible that national brands are accepted abroad. The NMa considers it unlikely that the implementation of section 1.1 SCF would necessarily result in PIN being phased out, in view of the above.

Finally, NMa notes that comments by persons in authority or organisations relating to concrete termination dates for the PIN product may affect the conduct of market parties, and as such already reduce the competitiveness of PIN in relation to international payment brands. It is not unlikely that the termination dates mentioned will serve as point of orientation for market parties, to which investment decisions and choices will be related. This may affect the choices which must be made individually and on the basis of people's own business cases, which in turn may result in reduced competition between banking market parties and payment brands.

#### *Supply control*

As banks take the initiative in the migration to SEPA, there is a risk that the transition will be mainly supply-driven, while customer need should be the driving force. The Netherlands Competition Authority (NMa) is greatly in favour of a demand-led migration. Supply control does in itself not contravene the competition rules but may do so in certain situations.

Coordinated actions on the part of supplying market parties which are intended to control the supply of payment products to the extent that only the most profitable products are offered by them and that other products are no longer offered, at the cost of choice for the end user, may well fall under the prohibition in article 6 of the Competition Act. This may include direct actions such as the determination of end dates as well as more indirect ones such as agreements between issuers about not placing PIN on the EMV chip.

We do not need to point out that not only actions or agreements which manifest themselves as having been decided or made collectively by market parties may contravene the competition rules. This also applies to decisions which may have a restrictive effect on competition, and which have been decided by a single enterprise. It includes, for instance, companies which occupy a dominant position, such as Currence and the C-Tap Authority. Conduct which abuses of dominant positions as well as conduct influenced by market parties, for instance via shareholdership or membership of a Supervisory Board, or Advisory Council, with the purpose of, or which results in competition being restricted, may contravene the Competition Act.

#### ***Conclusion***

From the point of view of competition, there is a great risk involved in participating banks jointly deciding to take a payment product out of the market at any time. In such a case, a collective arrangement is being agreed between competitors, which limits the supply of products, which in turn may contravene article 6 paragraph 1 of the Competition Act. Establishing end dates for present national payment products may result in efficiency benefits at the time a large percentage of the market has switched to new payment products and high costs are incurred for a small percentage of the market. In this case there may be arguments in favour for the parties involved to apply the exception criteria provided for in article 6 paragraph 3 of the Competition Act. This does not seem to be true for PIN in any case at present, as valid arguments in support of the benefits and the need for such an agreements seem absent.

<sup>27</sup> Euro Commissioner Mrs Kroes (2007), 'Key Challenges and trends for Europe's retail payment systems', Brussels, 3 December 2007.

### 3.2 The role of the Naso during the transition to SEPA

#### Background

Together with the national banking sector, the EPC has determined that the Netherlands Bankers' Association NVB takes on the role of Naso in the Netherlands. According to the '*SEPA Scheme Management Internal Rules*' (p. 18) <sup>28</sup>, the Naso is responsible for guiding parties who plan to offer SEPA-payment instruments and for other tasks which may be imposed by the EPC. When a party wants to become eligible for entry to a payment scheme via the EPC, it must complete an '*adherence*'-form to indicate it meets all conditions. The Naso may also conduct an initial and provisional test to check whether the applicant does indeed meet the conditions.

#### *Responses to the consultation*

The Naso is involved in access to SEPA payment standards by new parties. As the Dutch banks may be involved via the NVB in access by other parties to payment transactions, most respondents indicate that they consider the present arrangements in the Netherlands under Naso not suitable. It may not be in the interests of the incumbent parties that new competitors have access to payment transactions, which represents an incentive to apply entry criteria in a non-transparent and discriminatory fashion. An independent party might possibly do a better job in fulfilling the Naso role. Another possibility would be for important stakeholders such as end users or government to become involved in this process.

#### *Risk analysis*

Exactly because the idea of SEPA is to increase competition, and because in the long term non-banking institutions may also plan to participate in payment transactions, it is undesirable from a competition point of view that banks should influence entry within the NVB. Based on its objectives, let alone other aspects, the NVB cannot be said to be an independent organisation. Testing of other market parties by the NVB cannot be considered other than undesirable from this perspective. As soon as the NVB starts to take on a decisive role as Naso in the form of testing conditions, amongst other things, in relation to entry by other parties, the NVB must, similarly to the C-Tap Authority described above, be able to perform this task independently and autonomously, as far as competition is concerned. We refer to section 2.2 for the requirements which are imposed on such an organisation in relation to competition. The minute independence and autonomy of active market parties can no longer be guaranteed, a risk arises as far as competition is concerned. The NMa therefore recommends appointing an organisation other than the NVB as Naso. We should add that the conduct of the NVB as Naso will only contravene the competition rules if it actually implements decisions which restrict competition, or which have the purpose of restricting competition.

The NMa has presently no indications that banks within the *NVB* actually put obstacles in the way of open access based on non-discriminatory conditions.

#### ***Conclusion***

It is undesirable from a competition point of view if banks within the NVB can influence entry by competing market parties. Based on its objectives, let alone other aspects, the NVB cannot be said to be an independent organisation. Testing of other market parties by the NVB cannot be considered other than undesirable from this perspective. The NMa therefore recommends appointing an organisation other than the NVB as Naso.

<sup>28</sup> The SEPA Scheme Management Internal Rules (version 1.6 dated 19 June 2007) are available online on the website of the EPC as attachment to the SEPA Credit Transfer Scheme Rulebook and the SEPA Direct Debit Scheme Rulebook.

## 4. Separation of payment schemes and infrastructure

### Background

The transition to SEPA is intended to promote an increase in competition at all levels of the payment chain. Competition between payment processors may also increase. These parties enable the technical processing of a payment card transaction. The major share of these transactions in the Netherlands are processed by Equens at present. Payment processors are competing for the favour of banks in this market. Harmonisation of payment traffic in Europe may result in national payment processors trying to expand their activities into Europe. This may bring about economies of scale, which could result in lower fees for payment processing. It is likely that the market for payment processing will consolidate and ultimately leave a limited number of processors, as economies of scale would not be achieved otherwise. Parties who already have a large market share in Europe have an advantage over competitors and may have an easier time surviving under SEPA, as they will be able to immediately benefit from economies of scale.

A number of payment card schemes such as MasterCard and Visa are not only active in the payment scheme market but can also provide processing services to banks. These parties may wish to seize the opportunity in the arrival of SEPA to expand their position in the market for payment processing. If such a party is in a dominant position, then it is not allowed to abuse it. The remainder of this section touches on two problems which may arise, even when services are offered separately of each other. Section 4.1 discusses cross-subsidizing. Section 4.2 looks at product tying.

### 4.1 Cross-subsidizing

The SEPA cards framework states that tying the payment product to processing is not allowed, and that separate fees for both services must be quoted. The NMa consultation document describes that this does not automatically exclude the possibility of cross-subsidization.

#### *Responses to the consultation*

Payment card schemes which also provide processing services would in theory be able to offer lower rates than other payment processors, via cross-subsidization from the revenues which the scheme generates. In this way competition in the market for payment processing could be impeded.

Responses to the consultation document vary about this possibility. On the one hand it is stated that banks will not accept such practices from payment card schemes and payment processors. On the other hand, there are respondents who do consider this a real risk. As an example, MasterCard is mentioned which in the spring of 2006 reduced its processing rates, while the rates for use of the payment scheme (the brand fee) were raised. We note that this does not necessarily involve cross-subsidies. It is not known whether MasterCard has actually strengthened its position in the market for payment processing by this means.

#### *Risk analysis*

If a payment card scheme offers its processing services at low rates and cross-subsidizes it with higher rates for use of the payment scheme, then it may result in contravention of article 24 of the Competition Act if the company occupies a dominant position. This may be the case if the party in question offers its processing services at rates below the marginal cost price over a long period, in order to oust other payment processors from the market. If a market party occupies a dominant position and is able to increase its rates for payment processing again after a period of time, without losing the market share it secured, then this party may be abusing its dominant position.

## 4.2 Product tying

The SEPA cards framework states that tying the payment product to processing is not allowed, as described in the previous section. Nevertheless, this behaviour may not be completely excluded with the introduction of SEPA.

### *Risk analysis*

Even if a payment card scheme does not explicitly demand that processing services must also be purchased, we may be dealing with conduct restricting competition. Upon use of its payment brand, the scheme may demand that fallback payment processing must be possible via its network. In this way a market party does not demand explicitly that the customer (generally a bank) purchases processing services in addition to its payment product. However, a participating bank is then compelled to invest in the infrastructure of the payment scheme's processing, which may make it attractive to have the payment processing conducted via the scheme as standard in all cases. A payment card scheme may exclude other payment processors via this route and so strengthen its position in this market.

Such a requirement may indirectly restrict competition if the payment card scheme in question occupies a dominant position in the market for payment card schemes. A payment card scheme which imposes such a requirement may argue that such a requirement is justified as a fallback requirement guarantees the certainty of secure payments and therefore the quality level of the payment scheme. If such a case would occur, a judgement will have to be made based on the specific facts as to whether there are indeed reasons for justifying such a requirement.

### *Conclusion*

Despite the fact that the SCF states that tying the payment brand to processing is not allowed, it is theoretically possible under SEPA that a payment card scheme can render the purchase of processing services in addition to the payment product very attractive, by certain actions. This may be done by cross-subsidizing, for instance. If the payment card system occupies a dominant position in the market in which payment brands are offered, such behaviour may contravene article 24 of the Competition Act.

## 5. Multilateral interchange fees

The NMa did not consider it opportune in the consultation document issued in November 2007 to raise the subject of multilateral interchange fees (MIF), although the latter is often central to the discussion about restrictions on competition in payment transactions, due to their collective nature. The reason for this was that the European Commission had at the time not yet decided in the matter about the MIF-levels of MasterCard.

The European Commission decided in December 2007 that the fallback MIF used by MasterCard for domestic and cross-border transactions are not permitted, and that the MIF-levels announced for SEPA at that time also contravene the competition rules. Now that the Commission has made a decision in this matter, NMa considers it desirable to discuss this decision in detail in this chapter as the contravening nature of MIF in respect of the competition rules are crucial for organising payment transactions in SEPA.

Firstly we will briefly define MIF in section 5.1. Section 5.2 describes why MIF should be qualified as restricting competition in general according to the European Commission, and finally, section 5.3 expands on the consequences of the decision in the MasterCard case for the Netherlands, and broadly, how the NMa will look upon MIF in future.

### 5.1 What are MIF?

MIF are multilaterally agreed payments transferred between the bank of the cardholder and the bank of the merchant. This may include payments relating to direct debits, withdrawals, credit transfers etc. but the most frequent ones include transfers following payments involving debit or credit cards. The merchant's bank usually pays an amount to the cardholder's bank for each card transaction. In the past, different arguments have been proffered as a reason, such as reimbursing costs which the cardholder's bank incurs, or promoting efficient payment behaviour. The interchange payment may, in theory, allow the price for a transaction to remain low for the cardholder, and use by consumers of payment instruments may be promoted, while merchants are willing to pay higher costs as they attribute more benefit to payment via the payment instrument.

### 5.2 How can MIF restrict competition?

The Commission assessed the 'fallback' levels of MIF in the case against MasterCard<sup>29</sup>. A fallback MIF refers to payments which apply if two banks have not agreed alternative bilateral payments.

MIF are generally determined by the banks which participate in the payment scheme in question. The Commission judged in the MasterCard case that all banks which issue MasterCard or Maestro (the MasterCard debit card brand) payment cards and are tied to MasterCard via membership, jointly decided on these fall-back MIF-levels. This qualifies the MIF as an agreement between undertakings and the Commission assesses it under Article 81 of the EU treaty which provides for the European prohibition on cartels.

In practice, the MasterCard MIF fall-back levels apply to nearly all cross-border payment card transactions in Europe and in eight European countries in which domestic payments are also transferred by the MasterCard

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<sup>29</sup> European Commission (2007), Antitrust Case: MasterCard COMP/34.579 Europay (Eurocard-MasterCard)

or Maestro (the MasterCard debit card brand) network. The decision therefore deals not only with MIF for credit cards but also for debit cards.

The European Commission refers to three arguments in its decision as to why the MasterCard MIF have a restrictive effect on competition in the acquiring market. The MIF for all associated banks determined the interbank payments due to the lack of bilaterally negotiated fees. Banks had no incentive to negotiate lower payments as they could always obtain the higher MIF. This resulted in the rate which was charged by these banks to merchants (the Merchant Service Charge) being largely determined by the MIF which constituted a floor. This significantly restricted competition between these banks. The rates for merchants would be lower if no multilateral agreement existed.

The Commission also states that a price-raising effect arises from competition between different payment brands. As revenues are generated by card-issuing banks via MIF, it is attractive to issue payment cards with payment brands carrying the highest MIF. In order to be attractive for these banks, payment brands raise their MIF in a competitive struggle, resulting in continuously increasing costs for merchants and ultimately also for consumers. In addition, the Commission has investigated the elasticity of the demand by merchants and concluded that the latter cannot exert sufficient pressure on the rates charged. The reason lies in the fact that they are afraid to lose sales if they refuse MasterCard/Maestro transactions, as competing merchants may accept the transactions instead.

The Commission then investigated whether the exception criteria in article 81 paragraph 3 (the European equivalent of article 6 paragraph 3 of the Dutch Competition Act) have been met. Its conclusion is, however, that this is not the case here, as MasterCard has not been able to prove that the MIF, as it stated, maximise the revenues of the system as the MIF bring about an equilibrium in the demand or need of cardholders and merchants, due to the lack of a detailed robust analysis based on empirical data and facts. The Commission has concluded that the fees mainly benefit MasterCard and its members. In addition, the Commission stated that MasterCard has not shown that a reasonable share of the claimed benefits of the MIF benefit merchants as the payments are based on the costs of certain services by the card-issuing banks, which services exclusively or largely benefit cardholders. Neither has MasterCard sufficiently proven the necessity of the MIF. The Commission refers in its decision to a number of countries where payment systems without MIF function efficiently, including PIN in the Netherlands, in support of this point.

### **5.3 Consequences for the Netherlands and the future of the MIF**

Although the number of transactions with credit cards in the Netherlands is relatively low, and most domestic debit card transactions do not involve Maestro but the national PIN brand, the decision also affects the Netherlands. Harmonisation of European payment transactions may well help to increase the role of MasterCard (Maestro) in domestic transactions. As the Commission has decided that the announced SEPA MIF of MasterCard are also prohibited, the threat of sharply rising transaction costs for Maestro transactions has disappeared for the time being. In addition, national competition authorities must decide in line with the decisions by the European Commission, and the NMa will therefore follow the general line set out in this decision for all MIF in the Netherlands<sup>30</sup>. We should note that the line of this decision does not

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<sup>30</sup> According to chapter 1 of the explanatory memorandum to the Competition Act, the European decision practice and case law serves as a guide for the interpretation of article 6 of the Competition Act. The legislator has expressly chosen for close harmonisation of the national competition rules with the European rules. The explanatory memorandum to the Competition Act indicates that the

vary significantly from the line already taken by NMa since 2003<sup>31</sup>. In cases dealt with by the NMa since, the NMa has stated that parties must add arguments to quantitatively support the claimed benefits of the MIF, as well as the share of these benefits which would be passed on to users, amongst other things.

The Commission has concluded that the multilateral agreements between banks about MIF contravene the cartel prohibition in this case. At present, there are no MIF for PIN in the Netherlands, but they do exist for a number of other payment products. If banks are of the opinion that multilateral agreements about MIF will become necessary in future, then they will have to show that all exception criteria relating to the cartel prohibition are being met, in other words that the competition restriction does not go further than is strictly necessary; that the competition is not being completely eliminated; that a reasonable share of the benefits is passed on to the consumer/merchant and that it will improve production or distribution, or that it will promote technical progress.

We can deduce from the decision by the Commission that there is no reason to assume that the MIF-levels results automatically in efficiency benefits, amongst other things. Parties must show via a detailed economic and empirical analysis that this is the case in practice. They must also show that the benefits will for a reasonable part accrue to users on both sides of the market.

The EPC has stated in the SCF that interchange fees have proved to be a necessary mechanism for the functioning and development of a card payment scheme. The EPC also states that every payment card brand is responsible for the justification of its levels of interchange fees, in particular where multilateral fall-back levels are concerned. The Direct Debit Scheme Rulebook, which describes the standards which the European direct debit is required to meet, describes that there will also be a fall-back MIF established for this product. The parties involved will need to assure themselves in these cases that (the level of) the MIF meets with the exception criteria of the cartel prohibition.

#### ***Conclusion***

In principle, MIF restrict competition. The Commission argues in the MasterCard decision that the MIF in question drive up the basic price of fees for merchants, as the MIF constitute a joint cost element for all acquiring banks. The joint cost element of the acquiring banks creates a floor for the fees which these banks charge to merchants (the Merchant Service Charge). MIF may in some cases fall under the (relatively stringent) exception criteria of the prohibition on cartels. The parties involved will then have to show by way of economic and empirical analysis that the claimed benefits of the MIF are actually being achieved and that a reasonable share is passed on to users on both sides of the market, amongst other things. The NMa will in future assess the interbank fees which apply in the Netherlands in line with this decision.

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Competition Act will not be stricter, or less strict, than the European competition rules. House of Representatives, session 1995-1996, 24707, no. 3, pp. 10 and onwards.

<sup>31</sup> See, for instance, NMa-cases 3035 (Overeenkomst Dooradvisering Telegiro) and 3673 (Ontheffingsverzoek MIV PIN)

## 6. Conclusion

The NMa is greatly in favour of an efficient Single Euro Payments Area (SEPA). A single European payments area allowing free and unrestricted movement of goods, people and services is a goal to be aimed at as far as competition is concerned. SEPA is intended to promote trade, and therefore competition, between enterprises in the European Union across the borders of individual member states, in the broadest sense of the word. A single European payments area has considerable consequences for payment transactions within Europe, and for the market parties who offer services and products in this field. The competition between these parties, who are now mainly active within national borders, may increase significantly due to SEPA, as it creates a level playing field at European level, so removing entry barriers for offering cross-border products and services. If the objectives of SEPA are brought about, they may realise economies of scale, increased competition and a more efficient use of payment instruments, allowing costs and fees relating to payment transactions to be reduced.

An increase in competition relating to payment transactions in the Netherlands is considered very important by the NMa. The financial sector has been designated a priority sector by the NMa since 2003. The reason for this priority lies in the considerable economic importance of the sector, the market structure and the intransparent and complex nature of many financial products. The payments market has constituted a submarket within the financial sector since 2002, to which the NMa devotes considerable attention. The reason for the special focus lies in the fact that the nature of the payment transactions demands considerable cooperation between market parties. This cooperation is in this context aimed at the development of standards, the development of collective products and the interchange fee structure. These are accompanied by threats to competition.

The route to a European payment system is very important from the point of view of competition, for two reasons. Firstly, because efficient implementation will be decisive for the question as to whether the planned increase of competition is actually being realised. Secondly, because competing market parties are cooperating for the implementation process. This happens within the EPC but also at national level. Agreements between market parties which influence market behaviour or entry to the market, or restrict competition in any other way, may result either directly or indirectly.

The benefits which accompany a single European payments area are obvious. Whether these benefits will be realised, however, is still uncertain. The NMa has closely followed developments around the implementation over the past few months. The NMa also sent a consultation document to a number of market parties in November 2007, in which the NMa asked these parties for their opinion on the effects of SEPA on competition, their vision for the market and strategies of individual players in the market. A large part of the responses to this consultation which NMa received, and observations on the part of NMa itself, have produced a possible future picture which is deemed to be undesirable by NMa. This possible picture shows, amongst other things, a European payments market in which at most two parties dominate the payment market for credit as well as debit cards, and in which there is no longer any place for other payment card brands. Not because there is no demand for them by companies or consumers, or because they are more expensive or less efficient, but because parties offering these cards have made this choice at an early stage. The NMa considers developments which might convert this picture into reality undesirable, and mentions various threats in this vision document which might result in this scenario as far as competition is concerned. Not all concerns or threats listed relate to a possible contravention of the Competition Act. Such concerns and threats are also listed in this vision document, due to the undesirable welfare loss which may

arise from these developments, in the opinion of the NMa. The threats to competition are briefly described below in this vision document.

The threats listed in chapter 2 relate to the detailing of standards and control. We describe how a competition problem may arise when a standard (developed or established jointly by market parties) results in restricted entry to the market as a result of its contents or through the conduct of the owner or manager. In this context we discuss the certification or recognition schemes, and the necessity of strict independence on the part of certifying bodies. The NMa specifically points out that the rules must in principle not lead to any objectively unjustified exclusion effects, in view of the importance for (potential) market parties. The rules must not contain any entry barriers which are not strictly necessary in order to ensure secure and reliable payment transactions. In addition, the governance structure of the certifying bodies must guarantee that active market parties - either by means of the organisation and testing of the rules or otherwise - cannot exert influence on entry into the market by potential competitors.

Chapter 3 of this document discusses the migration to SEPA of national payment products in great detail. Particular attention is paid to the PIN payment product, as many responses to the consultation relate to this product. In general, we may say that a joint decision by market parties to remove national payment products from the market may come under the prohibition provided for in article 6 paragraph 1 of the Competition Act, as this decision may directly result in restriction of the competition between suppliers of payment brands. Such a decision may fall under the statutory exception to the prohibition as provided for in article 6 paragraph 3 of the Competition Act. However, this requires that the four exception criteria listed in the article are met. Whether this is the case in the present situation for all three of the products is questionable, as doubts remain as to whether a decision in favour of abolishment is already resulting in efficiencies and is actually necessary. The announcement of the determination of end dates may also have a restrictive effect on competition, as it undermines the competitiveness of the product in question and partly removes the normal uncertainty of market parties about expected market behaviour of competitors. Determining end dates for payment products at the time a large part of the market has switched to new payment products may produce efficiency benefits, but there is no question of this at present. Finally, the NMa has pointed out in this context that migration should be a demand-led process in its opinion, rather than a supply-driven process, within which every supplier of payment instruments individually decides which payment instruments they will be offering within SEPA, based on customer demand and their own business case.

The same chapter discusses the performance of the Naso role by the NVB. We conclude that it is undesirable from a competition point of view if banks within the NVB could influence entry of competing market parties. As the NVB cannot be considered to be an independent organisation, the testing of other market parties by the NVB cannot be considered other than undesirable, from the point of view of the NMa. The NMa therefore recommends appointing an organisation other than the NVB as Naso.

Despite the fact that the SCF states that tying the payment scheme to processing is not allowed, we note in chapter 4 that it is theoretically possible under SEPA that a payment card scheme can render the purchase of processing services in addition to the payment product very attractive, by certain actions. This may be done by cross-subsidizing, for instance. If the payment card system occupies a dominant position in the market in which payment schemes are offered, such behaviour may contravene article 24 of the Competition Act.

Finally, we look at the consequences of the decision by the European Commission in the MasterCard case. We conclude in chapter 5 that MIF in general must be seen as restricting competition. The Commission argues in its decision that the MIF in question raise the basic price of fees for merchants, as the interbank

payments constitute a joint cost element for all acquiring banks. This creates a floor for the fees which banks charge to merchants (the Merchant Service Charge). MIF may in some cases fall under the (relatively stringent) exception criteria of the prohibition on cartels. The parties involved will then have to show by way of economic and empirical analysis that the claimed benefits of the MIF are actually being achieved. In this case, MasterCard has not been able to show that the MIF, as stated by them, maximise revenues because the MIF bring about an equilibrium in the demand or need of cardholders and merchants, due to the lack of a detailed robust analysis based on empirical data and facts. The Commission has concluded that the fees mainly benefit MasterCard and its members. In addition, the Commission stated that MasterCard has not shown that a reasonable share of the claimed benefits of the MIF benefits merchants as the fees are based on the cost of certain services of the card-issuing banks, which services exclusively or largely benefit cardholders. The NMa will in future assess the MIF which apply in the Netherlands in line with this decision.

In summary, we may say that important steps have already been taken towards migration to SEPA in the Netherlands, but that there is still a long way to go before there will be a question of a single European payments area within which market parties, including banks and non-banking institutions, are genuinely competing on a level playing field. In view of the threats to competition outlined above, and the importance of migration to SEPA as far as competition is concerned, the NMa will continue to closely monitor the Dutch migration process, and calls on all parties to halt any developments already initiated which may restrict competition, and if there is any doubt about this to consult the NMa. The NMa will initiate an investigation into conduct or agreements which may restrict competition, if deemed necessary.