RETAIL BANKING SECTOR INQUIRY

PRELIMINARY REPORT II

CONSULTATION FEEDBACK FORM

Name of organisation:

Sociedad Española de Sistemas de Pago, S.A. (Iberpay, hereinafter SESP)

Type of organisation:

Provider of clearing and settlement services

Address:

C/ Miguel Ángel, 23

28010 Madrid

Country:

Spain

Have you received a request for information as part of the sector inquiry:

☑ Yes

☐ No

Specific questions from Executive Summary:

A. Market structure and fragmentation

1. What are the main reasons for market fragmentation in Europe's retail banking sector? Please identify whether they are mainly of regulatory, structural or behavioural nature.

---

2. What are the main causes and implications of the different level of concentration in the EU retail banking markets?

B. Banks' financial performance and pricing

3. What are the main reasons for the varying rates of profitability and income in retail banking across the Member States?

C. Entry barriers in retail banking

4. Are there other types of entry barriers in retail banking that have not been identified in the preliminary report?

---

5. Where and how does competition law have a role in tackling barriers to entry in retail banking?

---

6. Access to credit databases and payment infrastructures are sometimes cited as a barrier to entry in retail banking markets. Are there significant barriers to access which merit further investigation?

D. Customer choice and mobility

7. What are the main reasons for the low mobility of retail banking customers?

E. Development of payment infrastructures in the context of the Single Euro Payment Area

8. Are there features of the payment industry that limit competition either at the level of provision of clearing and settlement services or the provision of retail banking services? Please indicate areas that merit further investigation.

---

9. Are interchange fees necessary for the development of payment instruments (credit transfers and direct debits) in the EU?

---

10. Are there issues related to industry initiatives in the context of SEPA that should be assessed from a competition view point?

F. Other issues

11. Please provide comments on any other competition-related issues in relation to retail banking markets.

---

1. Introduction and scope of responses

Sociedad Española de Sistemas de Pago, S.A. (Iberpay, hereinafter "**SESP**") is a non-profit orientated company which manages the Spanish retail payment system SNCE[1]. SESP is not involved in retail banking. Accordingly, SESP will limit its responses and comments to the issues related to payment systems and, in general, to Sections 8 and 9 of the Interim Report II ("**the Report**"). For this reason also, SESP is not responding to all the above questions individually but only to those directly or indirectly related to payment systems, including SEPA.

SESP response will focus on (i) the openness and competitiveness of the Spanish retail market; (ii) the contribution of the SNCE clearing and settlement system to foster competition in Spain; (iii) some aspects of the interchange fees in this country; and, (iv) certain SEPA-related issues. The response finalises with certain proposals for the drafting of the Commission's Final Report in this area.

2. Payment systems and barriers to entry in the Spanish retail banking market

As explained in detail below, the Spanish retail banking market is particularly open and competitive, without significant barriers for newcomers to create or develop their businesses.

[1] Sistema Nacional de Compensación Electrónica.

2.1. The Spanish banking market is particularly open and competitive

It is well established that the retail banking market in Spain is intensively dynamic and competitive. In this regard, the Report itself recognises the following facts:

(i) the Spanish market reveals one of the lowest concentration ratios of the EU (even including the new member States), both at national and at regional level[2];

(ii) not surprisingly, Spain's mobility of bank customers (churn) is remarkably high and ranges over 14%, well above the EU average[3]. In addition, the average growth rate of current accounts in Spain during the last four years (4%) almost doubled the EU average[4];

(iii) banks' commercial fees charged to customers in Spain are moderate as compared to EU standards[5]. Indeed, Spanish banks regularly engage in amply-publicised "fee wars" (i.e., commercial initiatives focused on the reduction or elimination of fees and commissions charged to customers for retail banking services) intended to win retail clients[6].

2.2. No significant barriers to entry the Spanish market exist

One of the key factors explaining the competitive and non-concentrated nature of the banking market in Spain is its openness to newcomers and lack of significant barriers to entry[7]. A very wide array of foreign banks (both EU and non-EU based) operate in

---

[2] Vid. in particular pp. 48-57 of the Report. Spain's low concentration ratio is sustained for the four measuring criteria used by the Commission, which eloquently concludes that "*The least concentrated countries seem to be Italy, Spain and, in particular, Germany*" (p. 57).

[3] Vid. p. 100 of the Report. In 2005, Spain ranged third in the EU (after Latvia and Slovakia) with an average customer mobility rate of 14,02%, the EU average being 9,40%.

[4] Vid. p. 101 of the Report.

[5] Vid. p. 89 of the Report.

[6] The most recent "fee wars" have been reported by the Spanish press. Vid. "Cinco Días" of 20.1.2006 ("*Banco Santander starts the zero-commission war. Caja de Ahorros del Mediterráneo responds with a similar offer*"); "La Gaceta de los Negocios" of 17.6.2006 ("*No commissions to win customers. Banco Santander's initiative has been followed by most of the main banks*"); "Expansión" of 20.9.2006 ("*Uno-e smashes the market with the best current account*").

[7] This feature is explicitly admitted by the Spanish competition authorities: "*There are no legal barriers to entry apart from those derived from the requirements to incorporate a financial entity; access to market is free. The liberalisation of our financial system, mainly due to European harmonization, has produced the elimination of most barriers to entry. All players have access to necessary technology and information on prices is complete and available for all customers and entities. This process has created the necessary basis for fostering competition in the Spanish financial system*". Vid. Decision by the *Servicio de Defensa de la Competencia* of July 2006 "Banco Sabadell / Banco Urquijo".

Spain and fiercely compete with Spanish entities. As to 11 August 2006, the official Registry of the Banco de España[8] included up to 450 EU non-Spanish banks, 60 of which with physical branches within the Spanish territory[9].

More in particular, the traditional entry factor based upon physical presence (i.e., commercial branches, ATMs, etc.) in the country has lost some importance in the wake of the development of telecommunications and Internet penetration. Salient examples of this successful branchless entry model are:

(i) financial institutions specialised in immediate easy lending[10]; and,

(ii) on-line full-fledge banks which, as a result of the elimination of branch-related costs, offer attractive interests and zero (or very low) fees[11].

3. The functioning of SESP and of the payment system SNCE does not constitute a barrier to entry to the Spanish banking market; on the contrary, its very nature favours newcomers and contributes to foster inter-bank competition in Spain.

3.1. Participation in SNCE is not compulsory for retail banking in Spain

It must be recalled that a vast portion of inter-bank transactions in Spain (including direct debit, credit transfer and cheques) are not processed by SESP and are not cleared nor settled through SNCE. According to official data by the Banco de España, 44,35% of total transactions in 2005 (amounting to 75,51% in terms of value) was not processed via SNCE[12]. Moreover, and in addition to bilateral agreements, banks

[8] Vid. the Banco de España web page http://www.bde.es/regulacion/registros/registros.htm

[9] Including virtually all major EU banks.

[10] Vid. "La Gaceta de los Negocios" of 15.12.2005 ("*Quick loans gain volume. Cofidis compete with banks in the personal loans market. The strategy of Banco Cetelem is to supply one of the most competitive personal loans in a market where competition is more and more intense*"); "El Confidencial" of 14.8.2006 ("*Express loans put pressure on large banks. The main goal of this fierce advertising campaign in to win market share from financial institutions, such as Cofidis*"); "Expansión" of 28.1.2006 ("*General Electric and CAM launch quick loans with zero interest*").

[11] ING Direct is a clear example of this entry model. It is unanimously admitted that this entity has reaped in few years an extraordinary commercial success in Spain. Vid. "Cinco Días" of 24.9.2003 ("*ING Direct earns 7.4 million in one quarter while increasing profits and customers*"); "Expansión" of 10.8.2006 ("*ING smashes forecasts and earns 30% more via on-line banking*"); "La Gaceta de los Negocios" of 31.3.2005 ("*ING Direct reaches one million customers in Spain. Every three minutes, someone in Spain becomes ING customer, without branches and via telephone, Internet or mail*").

[12] Vid. Banco de España (División de Análisis de Sistemas de Liquidación): "Los pequeños pagos en España. Distribución por instrumento y sistema de proceso" (copy attached to SESP's response dated 29 March 2006 to the Commission's questionnaire). These operations are processed either internally in the books of the credit institutions or through agreements between entities or groups.

wishing to transfer funds to or from Spain may freely resort to the pan-EU payment system (such as, nowadays, EBA Clearing - Step 2).

3.2. No exclusivity for SESP members

As stated in SESP's response to the Commission questionnaire[13], its members may freely choose other systems or procedures (i.e., bilateral agreements, internalisation of payments within a banking group, use of EBA Step2, etc.) to clear and settle their payments. In fact, some participants simultaneously use different ways to clear and settle their operations. Therefore, no exclusivity is required to SESP members.

SESP rules are thus in full line with the Commission Proposal for a Directive on payment services (the so-called "New Legal Framework")[14].

3.3. Access to SNCE is open and transparent: types of membership depend on objective and non-discriminatory criteria which, in addition, encourage retail bank competition

As correctly indicated in the Report, access to SNCE may have two modalities: direct ("**associated members**") and indirect participation ("**represented members**"). Indirect participants are represented in SNCE by an associated member, which transmits the orders originating from the represented member and assumes full responsibility over the settlement of payments made by its represented entities. Therefore, and in order to access to SNCE, newcomers should reach a previous representation agreement with any present associated member. Currently there exist 24 associated members of SNCE among whom newcomers and incumbents may elect their preferred representative.

SESP does not intervene whatsoever in the content of the representation agreements, which are negotiated and concluded between direct and indirect participants on a bilateral basis. The parties freely decide in each case the rights and obligations assumed under the agreements, without SESP or its members collectively interfering in the negotiations.

Only associated members can be shareholders of SESP and their stake is strictly proportional to their level of activity in the system[15]. Admission of new members of SNCE must be approved by the Board of Directors of SESP[16].

---

[13] Vid. p. 7.

[14] Proposal for a Directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 97/7/EC, 2000/12/EC and 2002/65/EC, of 1.12.2005 COM(2005) 603 final. Article 23.1 a) reads "*Payment systems may not impose any of the following requirements: (a) a ban on participation in other payment systems*".

[15] This is a legal principle as it is expressly incorporated in Article 18(1) of Law 41/1999, of 12 November. It is also included in Article 9 of the By-Laws of SESP.

[16] As stated in SESP's response to the questionnaire (vid. p. 8), no application for membership has been rejected so far.

Notwithstanding the above, it is important to stress that the status of direct participant (or associated member) in SNCE depends on an entirely objective, transparent and non-discriminatory factor such as the level of activity done in the system. This requirement is imposed by regulation: rules on the functioning of SNCE establish that participation in the system as an associated member is subject to a requirement of achieving a minimum level of activity[17].

In particular, the status of direct participant may be automatically requested and obtained by any financial institution which attains at least 0.25%[18] of the total number of transactions of SNCE, irrespective of its nationality or its physical presence in Spain[19].

The "minimum level of activity" requirement for being admitted as a direct participant in SNCE, apart from being objective and non-discriminatory in nature, fosters inter-bank retail competition in Spain: newcomers interested in directly participating in SNCE and becoming associated members have thus an incentive to increase its retail activity in the Spanish market (to the expense of incumbent banks) in order to reach the 0.25% threshold.

In this connection, it should be stressed that SESP rules do not prevent entities from entering into association or pooling agreements in order to accumulate their individual transactions within SNCE and jointly reach the 0.25% threshold. In fact, this has already occurred in the past, thereby allowing a wide array of smaller operators to achieve their goals within the SNCE system; in particular, 17 financial institutions - including major EU[20] and international[21] banks - grouped around JP Morgan and were jointly recognised as associated members and operated under this condition between 1999 and 2004.

Furthermore, the presence in the Board of Directors of SESP is also subject to an objective and non-discriminatory condition. As indicated by SESP in its response to the Commission's questionnaire[22], any associated member having at least 5% of the

---

[17] Vid. Rule nº 11. The minimum level of activity is also needed for operational reasons. As noted in Section 3.5 below, the functioning of SNCE is decentralised and based on bilateral dealings; if the number of direct participants in this type of bilateral system is not limited its efficiency would be seriously undermined.

[18] It should be noted that SESP's response to the Commission questionnaire contained a mistake in this regard, insofar as the threshold for minimum level of activity was wrongly reported to be 0,5% (vid. paragraph 3.1.5 of the response). The correct threshold is 0.25%.

[19] Foreign operators such as Deutsche Bank or Barclays Bank are currently direct participants in SNCE.

[20] Such as Commerzbank and Citibank.

[21] Such as The Bank of Tokyo-Mitsubishi.

[22] Vid. p. 2 of the response.

shares of the Company is entitled to one seat in the Board. Given that - as noted above - ownership of SESP shares is strictly proportional to the level of activity of members, any entity participating in SNCE will be entitled to be present in the Board of Directors of SESP if it attains at least 5% of the total number of transactions of SNCE, again irrespective of its nationality or its physical presence in Spain.

It should be concluded that the membership structure of SESP and access to the SNCE payment system do not favour Spanish incumbent banks or hinder the entry of newcomers to the retail banking market through the admission to the SNCE system. Quite on the contrary, the open nature of the system and the minimum activity criteria foster enhanced retail competition by newcomers.

3.4. The system fees charged by SESP are not capable of distorting competition in the retail market and, in addition, grant preferential treatment to indirect participants

As to annual fees charged by SESP, their amount is considerably higher for associated members than for represented members. In this regard, and for year 2005, each direct participant paid an annual fee of 50,000 Euro while indirect participants paid only 750 Euro per year. It follows that, as far as annual fees are concerned, SNCE involves a clear advantage for indirect participants vis-à-vis associated members.

Regarding per-transaction fees, SESP only charges to associate members but not to indirect participants since, for SNCE functioning purposes, transactions contributed by one represented member are fully attributed to its representative[23]. Nonetheless, nothing impedes the parties to a representation contract from agreeing that the indirect participant will assume part of the SESP fees and hence reimburse the associate member a part of the fees corresponding to the relevant transactions.

SESP is certainly not aware of the content of the representation agreements and of the portion of the per-transaction fees that associated members actually manage to pass over to their represented entities. In any event, it may be observed that candidates to indirect participants in SNCE might have an advantageous position vis-à-vis associate members when negotiating the corresponding representation agreements. Such advantage would stem not only from the ample number of possible representatives (i.e., 24 entities nowadays) eligible by candidates, but also from the fact that SNCE transactions originating from an indirect participant are entirely attributed to its representative in the system, with the result that the activity by a represented member directly contributes to its representative's attaining volume discounts on SESP fees[24]. In this context, it would appear that associate members are under a strong incentive for entering into representation agreements with as many indirect participants as possible and that, consequently, newcomers have a negotiation leverage vis-à-vis associate

[23] Accordingly, volume rebates granted by SESP (vid. response to the Commission's questionnaire, p. 10) are only applicable to associate members.

[24] Discounts on per-transaction fees which are applicable to associate members depend on total SNCE volume attributed to them, which includes transactions originating from their represented entities.

members which should normally use in order to limit their financial contribution to SESP's fees.

This assumption seems to be confirmed by factual evidence. Mobility in the representation of entities within SNCE is not an infrequent event, in the sense that indirect participants do change representatives[25]. This circumstance clearly reveals a strong level of competition in the representation activity.

Finally, and as of 19 July 2006, SESP charges the following joining one-off fees to participants: 12,000 Euros to associated members and 1,200 Euros to represented members. SESP therefore grants a significantly more favourable treatment to indirect participants (i.e., newcomers and niche players) as compared to associated members (i.e., incumbents) as far as joining fees are concerned.

In this connection, it is also noted that newcomers using SNCE have not been required to compensate SESP's shareholders for the significant investment made in order to grant SNCE the necessary technical and operational means (i.e., systems, processing networks, technological platforms, etc.) needed to conduct real-time clearing and settlement. Such stranded costs borne by shareholders have not been shared with represented members.

In the light of the above, it follows that the fee structure applied by SESP for usage of the SNCE system is more favourable to indirect participants (i.e., smaller players) than to associate members. Fees therefore not only do not deter entrance to the system but rather encourage access by new members. In any event, the amount of fees charged by SESP to SNCE participants is very modest (consistently with its non-profit nature) and represents a truly negligible part of the banks' global operation costs. Reasonably efficient operators wishing to enter the Spanish retail market should not be significantly hampered or impaired by an annual fee amounting to 750 Euro.

3.5. The functioning of SNCE is largely decentralised and based on bilateral dealings

As far as the operation of SNCE is concerned, and as stated in the Blue Book on Payment and Securities Settlement Systems in the European Union, June 2001 (p. 203):

> "*The SNCE has adopted an intermediate solution which is neither a completely centralised nor a completely decentralised clearing and settlement system. Information is exchanged bilaterally between the parties involved. If no discrepancies are found, the settlement can take place in a centralised way on the RTGS accounts which each credit institution holds with the Banco de España. All communications are carried out on a private virtual network which complies with a set of security standards*".

[25] SESP is aware of such changes since indirect participants must obviously inform the system of the current identity of their representatives.

This description is still valid. In SNCE, all files containing payment information are exchanged bilaterally between the direct participants in the system. The relevant pair of banks report their bilateral net balances to the system, SESP verifies the correct matching of the payments and eliminates all possible discrepancies following a pre-established criteria. Once all bilateral balances are reported, SESP obtains a net balance of each direct participant in the system; finally, this credit or debit position is sent to the Banco de España to be settled in the accounts of the direct participants in the Central Bank.

It follows that, rather than a highly centralised system which might stifle competition between the intervening banks, SNCE simply clears and settles transactions which have been previously and bilaterally entered into by the payer's and the payee's respective banks. In other words, the remainder of the financial institutions participating in SNCE may not - either directly or through the system operator - intervene or influence the terms and conditions actually governing each specific transaction between each specific pair of banks. Retail competition is hence not hindered but fostered.

3.6. The participation model in SNCE (based on representation agreements between direct and indirect participants) does not require nor favour that competitive relevant information be exchanged or disclosed

As noted above, SESP does not intervene in the negotiation of the representation agreements concluded between direct and indirect participants on a bilateral basis. The actual content of each agreement (including the type of information to be exchanged between the associated and the represented member) is freely decided in each case by the parties.

In any event, SESP notes that, for an indirect participant to join the system, it suffices that its payment orders and files are transmitted by a direct participant and that such a direct participant assumes full responsibility over the settlement of payments made by its represented entities. Neither the direct participant nor SNCE need to obtain strategic or competition-sensitive information (i.e., cost structure, client lists, investment and commercial plans, strategic initiatives, etc.) from the represented member[26].

Finally, it does not appear that indirect participants could be reasonably forced or pressed by associated members to disclose valuable commercial information and data which could be subsequently used as a competitive advantage. As already explained, newcomers enjoy an advantageous bargaining position vis-à-vis associated members:

[26] From the technical perspective, it should be noted that the standard form used for transmitting the payment information within SNCE is based on the so-called "CCC code" (current account reference), which is similar to the IBAN code. The CCC code identifies customers with a 10-digit code of their accounts without need to disclose their names and personal details.

it may be presumed that newcomers are capable of effectively protecting their business secrets when negotiating representation agreements with associated members.

4. Interchange fees

Intense competition in retail banking renders interchange fees largely irrelevant from a competition policy viewpoint. In SESP's opinion, the existence of interchange fees in inter-bank transactions (either multilaterally or bilaterally fixed) may only pose policy concerns in case of insufficient competition in the retail banking market, since paying banks will more likely pass the fee over retail customers. Conversely, in dynamic and highly competitive markets banks will face commercial difficulties in transferring inter-bank fees to downstream clients, who may always find efficient and competitive providers of financial services. In other words, an intense and lively rivalry in retail banking activities effectively shields customers from the impact of interchange fees.

As noted above, Spain's banking retail market is characterised by an intense competition. In fact, several banks operating in Spain charge zero commission to their clients for transmitting or receiving debits or credits or for cashing cheques[27]. In other words, these operators entirely absorb interchange fees payable for these types of transactions.

In more general terms, a transmission of funds between persons who are not clients of the same bank necessarily requires cooperation between the two intervening banks and a corresponding inter-bank relationship must be established. Such a cooperation involves an effective provision of services between the banks and, indirectly, to their respective clients. For instance, the actual receipt of funds in the payee's current account requires that his or her bank previously registers the payment order, annotates the precise income in its client's account and confirms reception to the payer's bank. Similarly, the actual transmission of funds from the payer's to the payee's account also requires that the transmitting bank carries out specific tasks vis-à-vis its own customer and the payee's bank. The provision of such inter-bank services may be remunerated by an inter-bank commission (interchange fee)[28].

[27] According to the economic press, and as a consequence of the "fee war" mentioned above, several financial entities (including Banco Santander, BBVA, Caja Madrid, Caja de Ahorros del Mediterráneo, Bancaja, ING, Caja Sur, Uno-e, etc.) currently charge no commission for these services to a large part of their customers. Vid. "Cinco Días" of 21.1.2006, "Expansión" of 20.1.2006, "El Comercio" of 29.1.2006, "La Gaceta de los Negocios" of 16.5.2006, "Cinco Días" of 2.2.2006, "ABC" of 25.2.2006 and "Expansión" of 20.9.2006.

[28] The recent Scheme Rulebook (8 March 2006) adopted by the European Payments Council on SEPA direct debit considers that compliance with any agreed Interchange Fee Agreement is a pre-condition to become a participant in the scheme. Vid. p 68 of the Direct Debit Scheme Rulebook.

It should be also noted that inter-bank commissions applicable in Spain for credit transfers and direct debits have significantly evolved over time. Aside from a substantial and continued reduction of their amount during the last years, Spanish interchange fees apply by default (i.e., in the absence of fees bilaterally agreed between banks), are no longer broken down in tranches (depending for example on the size of the transaction or the economic sectors involved) and are more cost-oriented (as shown by the fact that fully automatic STP transactions bear a marginal fee).

The Commission has consistently admitted that multilaterally-fixed default inter-bank fees applicable to payments and transactions between customers of different banks are compatible with EU competition rules:

> "***Multilateral interbank commission***
>
> *(46) Technically speaking, a uniform acceptance giro system, i.e. a payment system which payees and drawees can use irrespective of the bank with which they have an account, can exist only on a specific multilateral basis. Accordingly, joint agreements on technical specifications and procedural aspects of transaction processing are necessary in order to ensure that the system functions properly. In practice, it is also necessary for the banks involved in the transaction to reach an agreement on the levying of charges: whether to charge or not, and, in the affirmative, how much. In view of the particular characteristics of a payment system such as the acceptance giro system, it goes without saying that such negotiations have to be conducted in advance before the payment system is actually used by the banks to process their customers' payment transactions. The nature of a payment system means that, as from the time at which the payment transaction is launched, the drawees and payees need to be certain that it will be implemented immediately by the banks concerned. Since the choice of banks implementing the transaction is determined by their respective account holders using the acceptance giro product, the banks are from that time obliged to cooperate with each other as partners. Price negotiations can therefore be effective only in so far as they take place beforehand. If the banks decide to introduce an interbank commission, agreement on the amount can in principle be reached either bilaterally or multilaterally*"[29]

One final comment is appropriate. Interchange fees on credit transfers are the natural consequence of EU legislation. As explained in detail at Section 5 (ii) below, Directive 97/5/EC obliges banks to accept the payer's decision on who should bear the applicable commission (i.e., the payer, the payee or both). In the first two cases, only one of the intervening banks (i.e., the payer's or the payee's, respectively) earns a commission - which in fact is the full commission applicable to the transaction -, the

[29] Commission Decision of 8 September 1999 in cases IV/34.010 "Nederlandse Vereniging van Banken (acuerdo GSA 1991)", IV/33.793 "Nederlandse Postorderbond", IV/34.234 "Verenigde Nederlandse Uitgeversbedrijven" y IV/34.888 "Nederlandse Organisatie van Tijdschriften Uitgevers / Nederlandse Christelijke Radio Vereniging". Vid also Commission Decisions in cases 87/13 "Association Belge des Banques"; 87/103 "Asociazzione Bancaria Italiana"; 89/512 "Nederlandse Banken" and IV/30.717 "Uniform Eurocheques".

other being legally impeded from charging fees to its client. Therefore, the second bank (which effectively provides services and incurs costs necessary for completing the transaction) should be entitled to obtain compensation from the first bank, which has charged a full commission on its own customer. In this context, an inter-bank payment (i.e., an interchange fee) must arise in order that both banks' services are remunerated. Conversely, if the payer elects the third possibility - and hence decides that the transaction commission is to be shared between payer and payee - an inter-bank fee should not arise[30].

5. Comments on specific statements contained in the Report regarding the Spanish market

On p. 141 of the Report one can read three specific statements regarding alleged competition barriers in Spain:

(i) Payment fees as a percentage of the value of the transaction

The Report reads that "*For example in Spain market participants highlighted two problems concerning access to clearing and settlement facilities. Firstly, on customer charges for payments, market participants alleged that Spanish banks are alone in the EU in charging payment fees as a percentage of the value of the transaction. They alleged that the fees charged were not proportionate to transaction costs and created uncertainty about the level of payment fees*".

It is not at all clear for SESP how the pricing policy allegedly applied by Spanish banks to its retail customers could amount to a problem for "*access to clearing and settlement facilities*". As noted above, access to SNCE is essentially open, flexible and non-discriminatory, as well as totally unrelated to the manner in which banks price their retail services.

Notwithstanding the above, a percentage-based commission would not seem disproportionate or unreasonable in general terms. Under Spanish Law, banks bear a especially strict (quasi-objective) financial liability vis-à-vis their customers as regards payments and transactions[31]. In addition, Directive 97/5/EC of 27 January 1997 on cross-border credit transfers rendered banks directly and immediately liable for the proper and timely execution of transactions ordered by their customers[32]. Banks' financial liability directly depends on the actual amount of the transaction[33].

---

[30] Since in this case each of the two intervening banks would earn, from its respective customers, a part of the overall applicable commission.

[31] Vid. Judgment of the Supreme Court of 15 July 1988 (RJ 1988\5717).

[32] "*The originator's institution shall execute the cross-border credit transfer in question within the time limit agreed with the originator. Where the agreed time limit in not complied with or, in the absence of any such time limit, where, at the end of the fifth banking business day following the date of acceptance of the cross-border credit transfer order, the funds have not been credited to the the account of the beneficiary's institution, the originator's institution shall compensate the originator*" (Article 6(1) of the Directive). This obligation has

Therefore, and as long as banks assume a risk which is directly proportional to the size of the executed transaction, a variable (rather than fixed) commission charged to customers hence seems the most reasonable and logical mechanism to approach the described financial risk.

In any event, and assuming that a variable fee for retail banking services amounts to a barrier to entry in the Spanish market, it cannot be seen why newcomers could not simply apply a fixed fee for their retail services in order to win market share by offering customers enhanced certainty about the level of payment fees. No barrier to entry seems thus to exist.

(ii) Alleged plans to establish a shared commissions system

The Report states that "*Market participants also alleged that the recently privatized clearing system was seeking to set up a shared commissions system among banks which would allow them to charge customers on received transfers. Concerns were expressed that this arrangement would suppress price competition for clearing services and harm consumers*".

This must be a mistake insofar as the expression "*recently privatized clearing system*" intends to refer to SESP. SESP has never sought to set up any system permitting that banks agree to charge the customer receiving the funds. SESP is only concerned with clearing and settlement tasks and does not intervene whatsoever in the commercial relationships between its members and their respective retail clients.

Notwithstanding the above, and for the sake of clarity, it should be recalled that cited Directive 97/5/EC expressly gives the payer the right to decide who should bear the transaction costs (i.e., the payer, the payee or both[34]). In addition, Regulation (EC) Nº 2560/2001 of 19 December 2001 requires that charges for cross-border payments in euro are the same as those for payments in euro within a Member State. It follows that payment systems in all Member States must, for both cross-border and domestic euro transactions, ensure that - at the payer's request - both customers bear the transaction costs and hence share the applicable commission. Therefore, a system making possible such a commission sharing scheme between the two customers when the payer so requests directly derives from EU legislation.

Furthermore, it is noted that Article 57 of the New Legal Framework reads as follows:

---

been expressly endorsed by Article 5(1) of Law 9/1999, of 12 April, which implements the Directive into Spanish Law.

[33] "*Compensation shall comprise the payment of interest calculated by applying the reference rate of interest to the amount of the cross-border credit transfer*". (Article 6(1) of the Directive). Under Spanish Law, vid. Art. 5(2) of Law 9/1999.

[34] Vid. in particular Articles 4 and 7.1 of the Directive. Accordingly, when the payer decides that both parties will bear the transaction costs the applicable bank commission is shared between payer and payee.

"Article 57. Fees

Where a payment transaction is carried out solely in the currency of a Member State and does not involve any currency exchanges and where the payment service providers of both the payer and the payee are located in the Community, Member States shall require that any fees be levied directly on the payer and the payee by their respective payment service providers, and that they each bear their own fees".

The current wording of draft Article 57 bans crossed commissions and sets up the principle that each of the banks intervening in a payment transaction should only charge its own client and not the other's client. This would mean, in practice, that the payee must bear his own fees, which would be charged by his bank according to the prior agreements between the bank and its customer. It therefore seems that the future EU Directive would not only allow, but even require, that customers receiving funds could be charged a commission only by their banks.

In fact, the Commission itself has not only identified shared commissions between payer and payee as the most efficient approach but even request Member States to ensure that commissions are directly charged on both customers:

"*With regard to fees, experience has shown that the sharing of fees between payer and payee is the most efficient system since it facilitates the straight-through processing of payments. Provision should therefore be made for fees to be levied directly on the payer and the payee by their respective payment service providers*" [35].

In short, Spain is obliged (as any other Member State) to permit that, also for domestic transactions, applicable commissions are shared by both customers at the payer's request. In this case, and given that crossed commissions will be banned by the New Legal Framework, the intervening banks would obviously charge their respective clients the portion of the applicable commission to be borne by each of them. Any arrangement made by payment systems solely aiming at permitting this result is fully compliant with EU law.

(iii) Clearing and settlement fees

Finally, the Report reads that "*A second concern was expressed regarding clearing and settlement fees in Spain. Market participants believed that the inter-bank fees applied to larger transactions (over 3,000 €) were disproportionate to the processing costs and ultimately pushed up prices for consumers*".

[35] Paragraph 26 of the Preamble of the New Legal Framework.

Again, this is a mistake if it refers to clearing and settlement fees applied by SESP. As stated in the response to the Commission questionnaire, per-transaction fees charged by SESP to banks for clearing and settlement services ranges between 0.0003 to 0.0012 Euro irrespective of the value of the transaction.

If, on the contrary, the above paragraph intends to refer to interchange fees applicable between banks, it cannot be seen how this factor could hamper "*access to clearing and settlement facilities*" as stated by the Report. As already noted, access to SNCE is unrelated to banks' fees and prices. In addition, a hypothetical general high level of interchange fees in Spain could not amount to a barrier to entry in the retail market; quite on the contrary, it would make easier for newcomers wishing to win market share at the expense of incumbents to charge lower fees and hence reduce costs and retail prices.

In any event, and in a more general tone, it would not appear unreasonable to apply distinct interchange fees depending on the actual amount of the transaction. As noted above, Spanish Law imposes on banks an immediate financial liability in connection with inter-bank transactions, such a liability being directly proportional to the actual amount being transferred. In other words: the higher the transferred amount, the bigger financial risk banks are forced to assume. It would thus seem legitimate and reasonable that banks earn a comparatively higher inter-bank remuneration on a per-transaction basis when the financial risk (and hence the contingent cost) assumed is also higher.

In addition, it would also seem reasonable that different fees apply to different banking services. In particular, direct debits and credit transfers are quite distinct transactions in nature[36]: while direct debits typically consist of recurrent small-sized payments which are pre-authorised "en bloc" by the payer, credit transfers amount to one-off large payments which must be authorised on a case-by-case basis. Services rendered by intervening banks (and the corresponding associated costs) differ for each type of transaction, and hence interchange fees should vary as well. It follows that a comparatively higher interchange fee for credit transfers above an objective and pre-determined value would *prima facie* appear appropriate and justified, provided of course that such an objective value equally applies to all intervening banks.

6. SEPA-related issues

Question nº 10 of this Consultation refers to SEPA-related industry issues which merits investigation under antitrust rules. One of the basic principles underpinning the introduction of SEPA in direct debit and credit transfer transactions is "*to ensure an*

[36] "*With credit transfer we refer to a payment order (or sometimes a sequence of payment orders, which is referred to as standing orders) made for the purpose of placing funds at the disposal of the beneficiary. With direct debit we refer to a pre-authorised debit on the payer's bank account initiated by the payee*". Vid. footnote 186 of the Report.

optimal balance between competition and cooperation *amongst banks*"[37]. More in particular, the EPC has most recently referred to this balance in the following terms:

> "***Where does competition fit in?:*** *The business architecture of the SEPA deliverables is based on several different layers of activity. First there will be the competitive bank layer in which banks provide SEPA products and services for customer use. The second layer relates to the scheme co-operation. This defines the basis on which banks co-operate to provide standards, rules and interoperability. The third layer relates to the processing infrastructure. This layer is primarily competitive as between various competing channels, although communities of banks can and do cooperate to meet common needs*"[38].

In SESP's view, the EPC has rightly summarised the interplay between competition and cooperation in the context of SEPA. Commercial relationships between banks and their retail clients should not in principle be subject to inter-bank cooperation and competition rules directly apply. The natural place for cooperation between banks is the so-called "second layer", i.e., the common application of a set of rules, practices and industry standards that ensures the implementation of SEPA-compliant payment instruments. Finally, the "third layer" (i.e., providers of clearing and settlement infrastructure and services) should be partially competitive and partially cooperative[39].

More in particular, "second layer" cooperation between banks is highly regulated by the Scheme Rulebooks already adopted by the EPC and to which participating banks should adhere. As far as direct debit and credit transfer are concerned, very detailed Scheme Rulebooks have been adopted on 8 March 2006. Indeed, the rules adopted by the EPC leave virtually no room for banks to establish additional decisions or standards. In other words, very little further inter-bank cooperation will be needed for the second layer so the application of competition rules appears to be largely irrelevant in this respect[40].

As to the application of competition rules to the "third layer" (clearing and settlement infrastructure), the most recent document by EPC[41] states that access to and

---

[37] "Making SEPA a Reality". European Payments Council, 17 August 2006, p. 35.

[38] Ibid. p. 3.

[39] Ibid., pp. 37-38.

[40] The compatibility of the EPC's Scheme Rulebooks setting inter-bank cooperation in SEPA direct debit and credit transfer with competition rules must be presumed given the close involvement of the European Commission (and in particular DG COMP) in the approval process: "*A legal review on competition issues and initial legal review by external legal counsel was completed by end-November in readiness for possible amendments and next steps e.g. dialogue with DG Competition. Completion is end November 2005*" (vid. Consultative Paper on SEPA Incentives". European Commission, 13 February 2006, p. 11).

[41] "Making SEPA a Reality", cit.

functioning of clearing and settlement systems must be open, transparent and non-discriminatory[42]. SESP considers that, as noted above, the membership structure and operating functioning of SNCE strictly adheres to these principles. No need to apply competition rules therefore arises.

Notwithstanding the above, a decentralised system based on a number of national clearing and settlement houses - with full reciprocal interoperability - is not only an efficient model from the technical and commercial perspective under SEPA, but also the most pro-competitive alternative, even if it requires certain cooperative agreements between the members of this multi-point network. A multi-entity system would favour a sustained reduction of clearing and settlement fees, since the most efficient clearing houses will naturally set the relevant industry benchmark for all participants for both domestic and cross-border transactions, given that SEPA guarantees that national and international transactions must be equally treated by payment systems.

SESP is particularly well suited for competing within this proposed multi-entity model, since it is cost-efficient[43] and privately-held.

[42] Vid. p. 38.

[43] As an example, SESP currently has a staff of 16 persons only, in contrast with other European clearing houses (with hundreds of employees).

7. Conclusions

1. **The Spanish retail banking market is remarkably open and competitive, as confirmed by the Report itself. No significant barriers to entry have been identified in the Report since, in fact, they do not exist.**

2. **The functioning of SESP and of the payment system SNCE does not constitute a barrier to entry to the Spanish banking market and, in fact, favours newcomers and contributes to foster inter-bank competition in Spain:**

   (i) Participation in SNCE is not compulsory for retail banking in Spain.

   (ii) No exclusivity is imposed upon SESP members.

   (iii) Access to SNCE is open and based on objective, transparent and non-discriminatory criteria.

   (iv) SESP fees cannot deter entry and even grant preferential treatment to indirect participants.

   (v) Participation in SNCE does not require nor facilitates the exchange of competitive information between banks.

3. **The Report wrongly suggests that SESP would have allegedly sought to set up a system under which banks agree to charge customers for receiving funds. SESP has not done so. In any event, EU Law requires that, at the payer's request, the transaction commission should be borne by both customers and Article 57 of the New Legal Framework contemplates that the payee may be charged a commission only by his own bank.**

4. **A decentralised model based on a number of national clearing houses with full interoperability is positive both from the technical and the antitrust perspectives.**

8. Suggested revisions for the Final Report

SESP respectfully requests the Commission not to include in its Final Report the paragraph currently contained in p. 141 of the Interim Report and starting with the words "*Some banks have identified …*". As indicated in this response, the statements quoted by the Commission in that paragraph are profoundly incorrect and improperly describe the role and functioning of the Spanish clearing and settlement system and must be removed from the Final Report text.

Alternatively, and in case the Commission wishes to maintain a reference to the wrong assertions made by some banks and to which the relevant paragraph refers, SESP respectfully requests the Commission to add the following words:

"*Nonetheless, the above factors do not seem to have significantly hindered entry or successful access to the Spanish bank retail market, as proved by the low concentration ratio, very large number of players and high customer mobility which characterise this market in Spain. It may be also noted that fees charged by Spanish banks on retail customers have no relationship with access to clearing and settlement facilities such as SNCE. Finally, the Spanish clearing system has confirmed that it has merely sought to create a system aimed at ensuring that the principle consisting of customers being charged a commission only by their own bank may be implemented*".

General questions:

1. Did you find the content of the report easily accessible and understandable?

- [x] Yes, fully
- [ ] The report was too general
- [ ] The report was too technical

2. Did you find that the level of detail in the report was:

- [x] about right
- [ ] not sufficiently detailed
- [ ] too detailed

3. Did the information contained in the report was:

- [x] generally new to you/the retail banking industry;
- [ ] mostly known to you/the retail banking industry.

4. Did the market analysis in the report:

- [ ] confirm your views on the operation of the retail banking market;
- [ ] challenge your/industry's views on the operation of the retail banking market
- [x] represent a mix of both aspects

5. Did the report raise the right policy issues;

- [x] yes, covered most of the key issues;
- [ ] no, there were some significant issues left out.