

SEPA legal framework from the Swiss perspective: market access through legal comparison

Since 2006, the attorney Martin Hess has been focusing on the Single Euro Payments Area (SEPA). As author of several reports for the financial centers Switzerland and Liechtenstein he is acknowledged as a Swiss SEPA expert. He was recently speaker at the Swiss Banking Law Day 2009 and author of the essay "Euro payments in accordance with the SEPA Rulebooks, particularly concerning the liability of banks" and co-author of the article "Payments in euro by Swiss banks according to the SEPA Rulebooks," which appeared in the Swiss Review of Business and Financial Market Law mid-2009.

CLEARIT: Mr. Hess, on the one hand SEPA is based on the self-regulation of the financial industry, represented by the EPC, while on the other hand, on the political will of the European Commission to introduce the standardization of payment transactions throughout Europe. What is the legal framework of the two endeavors, how do they interact and what is the legal nature of the regulations enacted by the EPC?

Martin Hess: SEPA is based on private legal agreements. These were concluded between an institution in accordance with Belgian law (EPC – European Payments Council) and each of the financial institutions. The framework for these agreements is the EU regulation on payments, generally known as the Payment Services Directive (PSD). The PSD sets out binding rules that must be implemented by each of the member states. They primarily regulate the relationship between the banks and their clients and broach the issues of transparency and consumer protection. The SEPA rulebooks cover other regulatory areas. They fundamentally deal with the relationship between financial institutions. Rules are thus defined that must be applied between the banks, and that only concern the relationship between banks and their customers in a very indirect way. However, certain standards can only be adhered to if the bank's customers also follow the SEPA standards, especially in the case of direct debits. Although the SEPA rulebooks definitely have an influence on the relationship to the customers, they do not directly regulate it. It must be clearly stated that without the PSD there would be no SEPA rulebooks. Conversely, as self-regulation initiatives, these rulebooks are, of course, also an instrument of the European financial industry to hinder any binding EU standards that prescribe in great detail what individual banks are allowed to do and what not. The banking industry was keen to prevent that in any case. Any textual deviation between the SEPA rulebooks and the

PSD is unthinkable. The only room to maneuver is there where the PSD does not prescribe anything. Thus any SEPA participation is either directly or indirectly subject to PSD regulations.

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The Swiss financial institutions are part of SEPA, even though Switzerland is neither an EU nor an EEA member country. Who made the decision and which prerequisites did Switzerland have to fulfill in order to be accepted as a SEPA participant?

Switzerland was a member of the EPC right from the start. That is actually amazing and is largely due to the excellent personal contacts between the Swiss and the European financial institutions. Nevertheless, there were some reservations and the Swiss financial center had to satisfy three requirements in order to participate in SEPA:

1. Swiss financial institutions had to assure that they are capable of fulfilling the obligations defined in the SEPA rulebooks.
2. Our country must have a level playing field with other European countries.
3. The central PSD regulations regarding the relationship between financial institutions and customers must be effectively represented in Swiss law or in equally binding practice.

With regard to the level playing field, in Brussels we had to demonstrate that Swiss financial institutions do not simply operate in a vacuum but are required to behave like EU banks in all respects, for instance with regard to money laundering. By demonstrating the parity of Swiss regulations, we dispelled any concerns regarding the idea that Switzerland has a locational advantage and that the SEPA rulebooks could not be legally binding.

In contrast to the EU, there is no law governing payment transactions in Switzerland. To which degree can the legal situation even be compared?

The PSD prescribes the framework for payments in Europe. It must be implemented under national law. The PSD is a special sectoral law, like so many in the EU. Switzerland has fewer of these special laws. We have our general codifications, the Swiss Civil Code and the Swiss Code of Obligations. These do not specifically cover payment transactions. In addition, we have the Federal Court practice, the cantonal court practice and the traditional tenets. These have always stood us in good stead. In contrast to other European countries, Switzerland is also aware of the general principle of "good faith." In some cases Switzerland endorses European law and enacts corresponding regulations in a spirit of autonomous adaptation. As regulations regarding payments in Switzerland are to be found scattered among various laws, we first need to explain these to other countries in Europe. Although we can testify to the parity of Swiss and EU law with a good conscience, how can we expect Europeans whose market we wish to penetrate to understand the complex Swiss legal situation? In the end we have to admit that although our legal system functions well, it is not always as simple to convince others of this fact.

The EPC rulebook prescribes that participants are required to provide evidence that the PSD regulations relevant for SEPA credit transfers and direct debits are effectively represented in national law or are based on a substantially equivalent binding practice. What does "substantially equivalent binding practice" precisely mean?

After exhaustive preparation on the part of the Swiss financial industry, we were able to demonstrate in Brussels how payment transactions are made in our country. We compared the Swiss regulations with those of the PSD, paragraph for paragraph. In doing so we were successful in plausibly convincing the EPC members that the legal system in Switzerland is essentially equivalent to that of the EU.

The Swiss financial institutions were admitted the SEPA, even though Switzerland is not part of the EU, which is a great achievement. However, no one can tell whether it will remain that way in the long run. As soon as a law is amended somewhere in an EU state it can have an



Short biography

Martin Hess is currently Managing Partner of Wenger & Vieli AG. His practice focuses on financial services law, mergers & acquisitions and information technology law. He advises Swiss and foreign financial institutions on all matters with respect to financial services and capital markets law, both relating to regulatory law as well as private law. He has been involved in structuring the legal basis for electronic funds transfer systems and securities clearing systems as well as for central counterparties for stock exchange transactions. He further contributed as an expert to the legislation in Switzerland on securities law and netting.

Martin Hess obtained his doctorate degree in law from the University of Zurich in 1984. In 1987, he was admitted to the Bar Association of Canton Zurich. Before joining private practice in 1994, he was Research Assistant at the Faculty of Law of the University of Zurich and, later, served as Legal Counsel to the Swiss National Bank. In 1994 and 1997, he was a member of International Monetary Fund missions to countries in Eastern Europe. Martin Hess has regularly published articles on the subject areas of his practice and contributed as co-author to one of the leading legal commentaries on Swiss banking law.

influence on the “equivalent practice.” A legal comparison cannot be compared with an international treaty: the latter remains valid as long as it is not renegotiated. It can also be clearly stated that the EPC members are extremely reluctant to grapple with Swiss law. It is up to Switzerland to provide evidence that Swiss law is equivalent in the respective areas.

The SEPA Credit Transfer Scheme has been well accepted by banking clients in Switzerland. The proportion of international SEPA payments is far above average in comparison with other countries. To which degree is the PSD also binding for these transactions?

Payments within Switzerland are not subject to the PSD, no more than are cross-border payments between Switzerland and the EU or the EEA. However, when it comes to the following payment chain, caution is recommended: as soon as a payment transferred to Switzerland from the EU leaves Switzerland for the EU, the transaction becomes subject to the PSD. The Swiss bank as link will then have to voluntarily observe the PSD regulations if it does not want to lose its mandate as correspondence bank.

The SEPA Direct Debit Scheme was introduced on November 2nd. Are there essential differences to credit transfers from a legal point of view?

The legal fundamentals are the same, but with regard to the authorization to debit, SEPA direct debits are handled

differently to Swiss direct debit payments. Whereas in the case of an LSV+ or BDD transaction the debtor gives his or her bank the explicit authorization to debit the account, in the case of a SEPA direct debit the creditor gives the debit order to his or her bank, which then passes it on to the debtor’s bank. That is something new in Switzerland.

“Is Switzerland really autonomous if it declares EU law as being inapplicable in what are actually technical areas? In this case I refer to the Settlement Finality Directive, the Financial Collateral Arrangements Directive and the PSD. Aren’t we already interpreting EU law autonomously and therefore actually not autonomous at all?”

Switzerland has had a currency union with Liechtenstein since 1921. As an EEA country Liechtenstein has implemented the PSD in national law. Does that cause legal problems to arise in bilateral payment transactions or in card processing?

Regulatory basis of SEPA

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| EU Parliament and Council | European Payments Council |
| <ul style="list-style-type: none"> • EU Payment Services Directive (PSD) 2007 • Regulation on cross-border payments in euro 2001 • (EU Directive cross-corder credit transfers 1997) | <ul style="list-style-type: none"> • EU law as SEPA Rulebooks basis • SEPA Rulebooks = multi-lateral contracts under Belgian law • Rules governing the relationship between financial institutions and not with regard to bank/customer |
| Binding legal acts (also for the relationship between financial institution and customer) | Contract governed by private law (in principle only for the relationship between financial institutions) |
| Addressee: States | Addressee: Financial institutions |

This subject is highly interesting, but also complex. In this case we have three different areas: the currency area (Swiss francs), the legal area (EU/EEA) and the payment system for Swiss francs (SIC) used in Switzerland under Swiss law.

The question now is, how to achieve compatibility between these three areas. For example – the credit card business is currently a topic of discussion – certain services could then no longer be provided from Switzerland. In any case, a payment in Swiss francs from Liechtenstein to Frankfurt, for example, is subject to the PSD and for that reason the corresponding regulations must be observed, even if a Swiss payment system such as SIC is used. Geographically, Switzerland is situated in the middle of Western Europe. In the case of international payment transactions the interfaces resulting from non-membership of the EU or the EEA are shown transparently. Is Switzerland really autonomous if it declares EU law as being inapplicable in what are actually technical areas? In this case I refer to the Settlement Finality Directive, the Financial Collateral Arrangements Directive and the PSD. Aren't we already interpreting EU law autonomously and therefore actually not autonomous at all? Market access through legal comparison works as long as our laws prove to be equivalent. This is far easier when the actual conditions such as in the case of payment transactions are basically similar. The future will show whether this method will endure or whether more binding regulations have to be made with the EU. <

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Debit authorization in comparison

