

## **PAYMENT SYSTEMS REGULATION AND LEGAL RISK TO THE CENTRAL BANK**

This conference is divided in two big themes, the regulation of the payment systems by Banco de México and legal risk in which the Central Bank is exposed.

### **PAYMENT SYSTEMS REGULATION IN MEXICO**

According to its Law, Banco de México shall promote the financial system's sound development and the proper functioning of the payment systems. To reach these objectives it is empowered to regulate the payment systems, including funds transfer systems operated by banks or other firms.

At this respect, Banco de México designed, developed and issued the regulations for the payment and settlement systems.

Now a day, Banco de México principally manages two interbank exchange systems: Sistema de Atención a Cuentahabientes, known as SIAC-BANXICO (or simply SIAC), and Sistema Electrónico de Uso Ampliado, known as SPEUA. These two large value payment systems together with a securities settlement system, SIDV, constitute the backbone of the payment systems for financial transactions. Almost any financial transaction between banks and broker-dealers will be settled through one of these systems.

## **Sistema de Atención a Cuentahabientes (SIAC)**

This real time system is used to interchange information between Banco de México and its account holders, including instructions, which are processed on gross basis by SIAC, affecting immediately the current accounts of the users at Banco de México. Hence, it is a Real Time Gross Settlement System (RTGS) among account holders at the Central Bank. Banco de México allows banks to overdraw their accounts, provided they stay within previously set limits and have pledged enough collateral.

Payment instructions in SIAC do not include information to credit the money to third parties' accounts, so the beneficiaries of money transfers channeled through SIAC are the receiving institutions.

In order to understand in a easy manner the interrelation of the different payment systems in Mexico, we shall bear in mind that the principal stage in them is the settlement of the transaction, which is carried on through SIAC. That is why SIAC is the main system, being the following subsystems of the former:

- Large Value Payment System (SPEUA),
- Securities Settlement System (SIDV),
- Clearing House System (SICAM),
- Open Market Auction System (SUBAN),
- Auction System for Put-Options for Dollars (OPCI-BAN)
- Auction System for Determining the Equilibrium Interbank Rate Interest (TIIE-BAN), and
- Interbank payment.

## **Sistema de Pagos Electrónicos de Uso Ampliado (SPEUA)**

SPEUA is a large value payment system intended to serve financial institutions and their clients. The banks and the Central Bank are the only participants in the system. Broker-dealers, corporations and any other user of the system have to submit their payment orders through a participant.

SPEUA was designed in 1994, to substitute large value payments made by millionaire checks. Payments have to be for amounts equal or larger than MXP 50,000.<sup>1</sup>

The provisions that regulate SPEUA can be found in the Internet, in the Mexican Central Bank website.<sup>2</sup>

The participant institutions must send to SPEUA the payment orders their account holders solicit, during the following 30 minutes of receiving the solicitation.

On the other hand, the participant institution that receives a payment order through SPEUA, must accept it if the beneficiary of the payment order is such institution or an account holder which has demand deposits in it. The receiving participant institution must credit the order of payment during the following 30 minutes of its reception, in the account of the beneficiary.

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<sup>1</sup> Approximately five thousand American dollars.

<sup>2</sup> [www.banxico.org.mx](http://www.banxico.org.mx), Provisions, Circular 2019/95, M.84.

This transaction gives rise to the obligation of the sending participant institution to pay to the receiving participant institution, the amount established in the order of payment.

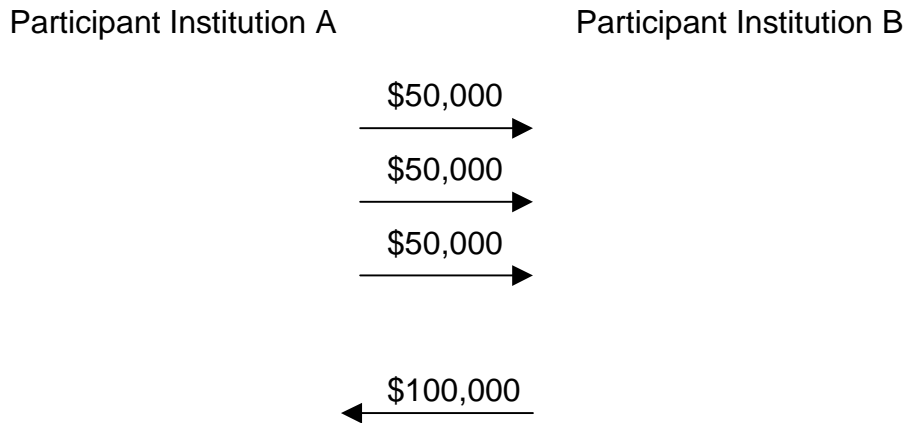
A relevant issue in the operation of SPEUA is the way in which the credit risk of the Central Bank was limited.

Every day, when SPEUA opens, each participant institution must establish a “risk limit exposure” in national currency applicable for that day, with respect of each of the participant institutions, and inform it to Banco de México. In order to avoid excessive limits, either in particular or to all the participant institutions, there were established certain ways to determine the maximum amount that the participant may establish to other participant institutions and to the whole of the participant institutions. This limit is determined taking into account its capital and its passive transactions.

The payment orders that exceed the multilateral net amount against an institution are stopped in the system, in order to be automatically processed, when the net amount against such institution diminished, otherwise they are cancelled by the participant institution that sent them through SPEUA.

The settlement of the payment orders sent through SPEUA is done through the following procedure:

Banco de México clears the obligations that two participant institutions have between each other arising from all the payment orders sent by them through SPEUA that day, in order to obtain the bilateral net amount between them.



Bilateral Net Amount (against)



Then, Banco de Mexico determines the multilateral net amount to give to or receive from each participant institution, subtracting the sum of the bilateral net amounts against a participant institution from the sum of the bilateral net amounts in its favor.

Participant Institution A:

Bilateral net amount in favor for \$50,000

Bilateral net bilateral against for \$100,000

(minus)

\*Bilateral net amount against for \$50,000

Multilateral Net Amount in favor for \$100,000

The procedure to calculate the netting of obligations are done automatically through SPEUA.

The participant institution that, at the end of the day, owes funds to other, shall pay the multilateral net amount against it, and the participant institution that, at the end of the day, has a credit, has the right to receive the multilateral net amount in its favor.

Banco de México settles the transactions through SIAC, charging or depositing the amount in the correspondent current accounts, for an amount equivalent to the multilateral net amount.

Due to the importance of the finality of these payments, the settlement through SPEUA is considered as a non-refutable transaction in SIAC.

In the SIAC, the credit institutions must not overdraft their accounts, unless they have pledged enough collateral. Nevertheless, if they incur in an overdraft due to the settlement of the payment orders sent through SPEUA, the transactions are not refused, in such case:

Banco de México sends an order of payment before the opening of SPEUA the following day, on behalf of the participant institution in favor of Banco de México, for an equal amount of the overdraft. This amount is credited to the current account of such participant institution.

That day, the other participant institutions cannot establish a “risk limit exposure” for an amount less than the proportionate part of such limit to the overdraft not collateralized in which the participant institution had incurred.

En the event that the following three business days, the participant institution incur in more overdrafts not collateralized in its current account in Banco de México, the other participant institutions shall pay to Banco de México through charges in their own current accounts the “additional settlement obligations”, which are the proportionate amount of the overdraft in relation with the risk limit exposure that each participant institution established during those three days.

Those participant institutions that comply with their “additional settlement obligations” shall have the rights that have established in the agreement entered into before establishing the risk limit exposure.

In may of this year the finality of the settlement transactions through SPEUA gave a big evolution, with the issuance of the new Bankruptcy Act.

The abrogated act prohibited netting bilateral obligations when one institution was bankrupt. The new law, permits such netting regarding monetary

obligations, considering final the settlement transactions made by Banco de México through SPEUA, reaching in this way, the legal security and certainty required by this kind of transactions.

### **Security infrastructure for the use of electronic signature**

The Credit Institutions Act and the Securities Exchange Act permit to use electronic media by banks and broker dealers. In such acts it is established that the financial intermediaries can enter into transactions and services with their customers through automated equipment and systems. The contracts must establish the procedures to identify the transactions and the customers, the liabilities in which each party incurs, as well as the ways in which it can be demonstrated the creation, transmission, modification or extinction of the rights and obligations inherent to such transactions and services.

Such provisions establish that the use of the identification media in place of the signature, will produce the same effects that the laws provide to the documents, and thus, will have the same weight for proving its validity.

Additionally, on May 29 2000 several acts were amended, taking into account the principles established by UNCITRAL, to regulate the electronic commerce in Mexico. The amended acts are the following:

- Federal Civil Code.- To consider as “express consent” not only the one expressed orally or written, but the one expressed using electronic media.

The messages sent through electronic media are given the same legal treatment as those in paper.

- Federal Code of Civil Procedure.- To give legal proof to the information sent through electronic media. In order to establish its specific weight it will be considered the credibility of the method in which it was created, sent or filed, and the possibility to print the message and to access to it for further consultation.
- Commercial Code.- To regulate the electronic commerce. It allows to use electronic media in entering into commercial transactions.

It establishes the presumption that the information comes from the sender if it has been sent using identification media or through an information system programmed by the sender to operate automatically.

It also permits to enter into contracts electronically if the documents can be accessed for further consultation.

Finally, it allows to use as evidence the information sent through electronic media.

- Federal Consumer Protection Act.- To establish the rights the customers have in those transactions entered into electronically. The law specifies that the information given by the customer to the seller is confidential, unless the

customer has given his or her consent or in the event that the competent authority solicits it. It is established that the seller shall avoid deceptive commercial practices regarding the characteristics of the products.

### **The role of the Central Bank arising from the legal amendments that allow the use of electronic media**

In the financial sector, Banco de México is promoting a security infrastructure for the use of identification means in electronic messages. Such infrastructure is based in asymmetric cryptographic systems under which two mathematically related keys are created, one is known, and the other is secret. The former, known as public key, is used to verify that the secret key has been used. The latter is used to recognize oneself as the author of the message.

Banco de México is sufficiently empowered to establish the use of electronic media and security systems in the payment systems, in the transactions, either active or passive of the banks, and in the services that such banks provide to their customers.

- In order to foster the creation of trustworthy transactions through electronic media, it was established a mechanism known as Extended Security Infrastructure, to create, send, receive and file information. Such infrastructure enables to identify the author of a document, because in order to prove the association between the public and the private keys it is issued a digital certificate, which is public.

Using these digital certificates, there can be sent open messages electronically signed or closed messages.

Due to the great number of public keys, it is necessary to establish an infrastructure to administer and distribute the public keys of the users and to guarantee, through the issuance of digital certificates, that it exists a credible association between a certain public key and one person.

The way in which such Extended Security Infrastructure will work, will be the following:

The Central Registration Agency will be in charged of supervising the way in which the infrastructure functions, registering the public keys and authorizing the operations of the other entities that form part of the system. Under this agency we find the Certification Agency and the Registration Agency.

The Certification Agency will have under its duties to identify the Certification Agent, to check the unity of keys and to issue and register the certificate. This certificate will be issued taking into account the precertificate given by the Certification Agent.

The Certification Agents will identify the users and will verify the relationship between the keys and will issue the precertificate above mentioned.

The Registration Agency will register, publish and revoke the certificates

Banco de México will participate as Central Registration Agency in the transactions entered into with the credit institutions in SIAC, specifically in SPEUA and SUBAN.

Therefore, the corresponding contracts, operation manuals and provisions will be amended in order to incorporate the Extended Security Infrastructure to permit the creation of the public and private keys of the credit institutions, and to establish the characteristics the software must fulfill, the procedure to obtain the certificate, the registration process of the public keys in Banco de México, the people that will act as Certification Agents and the technical requirements to establish a link with Banco de México.

In order to avoid a rushed implementation of the Extended Security Infrastructure, it is being established that the new provisions will be effective little by little.

During the first stage, the system will operate with few financial institutions, operating with the rest little by little.

The following sub-systems of SIAC would not be included:

- SICAM
- TIIE-BAN
- OPCI-BAN

Regarding the transactions among the banks and their clients, Banco de México has not issued any provision to regulate the electronic signature in this kind of transactions. Nevertheless the lack of regulation does not impede the development of the systems, since the Banking Act allows the banks to enter into transactions with their customers using electronic media.

Finally, the Central Bank is being evaluating the possibility to create a corporation that conducts the functions of the Central Registration Agency. Banco de México would have the majority of its stocks, with the possibility of selling them in the future.

This corporation would permit to broaden the application of the Extended Security Infrastructure to the public and private sectors.

### **LEGAL RISK TO THE CENTRAL BANK**

The legal risk that Banco de Mexico may incur arises principally from the liability in which its funcionarios may be liable, thus I will analyze the legal framework ruling such provisions.

Article 28 of the Constitution states that the persons in charge of the conduction of the Central Bank may be subject to Political Judgment (impeachment procedure) pursuant to article 110 of the Constitution.

Regarding the above, article 110 of the Constitution establishes a list of public servants that may be subject to Political Judgment when, in the exercise of their

functions, the servants have committed acts or omissions in detriment to the fundamental public interest, or to their own best interest. Additionally, such article states that the penalties will consist in the loss of status of public servant and leave the penalized person unable to discharge any function, employment, duty or commission of any nature in the public service.

Pursuant to article 109 of the Constitution, the Congress of the Union and the Legislatures of the States, within the limits of their respective jurisdictions, shall make laws of responsibilities of public servants and any other standards for sanctioning the public servants that incur in liability, in accordance with the following considerations:

- a) It will impose, by means of Political Judgment, the penalties indicated in article 110 on the public servants designated therein, when in the exercise of their functions the servants have committed acts or omissions in detriment to the fundamental public interest, or to their own best interest;
- b) The commission of crimes by any public servant will be prosecuted and sanctioned in the terms of the criminal law, and
- c) Administrative penalties will be applied to public servants for acts and omissions that go against the legality, honesty, loyalty, impartiality and efficiency that should be observed in the discharge of their employment, duties or commissions.

Procedures for the application of the penalties mentioned above will be developed independently. Penalties may not be imposed twice for a single violation of the same nature.

Said laws shall determine the cases and circumstances in which public servants should be criminally penalized by illicit enrichment during the time of their duties, when they substantially increase their wealth, acquire goods or use goods as their owners, when there is no legal justification to do so. The criminal laws will impose the penalties of confiscation and seizure of these goods, besides any other appropriate penalties.

It is important to mention that any citizen, under his or her most strict responsibility and by means of presentation of elements of proof, may make an accusation before the Chamber of Deputies with respect to the conducts mentioned above.

### **Legal standards applicable to all public authorities**

In 1982, with the creation of the Secretariat of General Comptroller of the Federation and the promulgation of the Federal Law of Public Servants' Responsibilities, the Mexican Government tried to centralize and consolidate the functions of control and surveillance over public administration.

The mentioned Law is the legal framework, which gathers, in one single document, regulations regarding public servants' behavior.

Such Law sets up the subjects of responsibility; the duties and obligations of the public servants; typifies administrative illicits with its corresponding sanctions; establishes the competent authorities and the procedures with respect to the criminal process of the public servants who have privilege, and sets the standards and provisions that govern the use of public funds.

This system of responsibilities provides the key principles of the public service. Such principles are as follows: legality, honesty, loyalty, impartiality and efficiency. In order to observe them, three kinds of responsibility for public servants were set up: administrative, criminal and civil liability.

According to the Constitution, the members of the Board of Governors of Banco de México and the Bank's personnel are not public servants. However, by statute, the responsibilities established in the Federal Law of Public Servants' Responsibilities are applicable to said officers and employees.

### **Administrative liability**

This responsibility is sustained in a catalogue of obligations and a code of conduct, which all public servants must observe in accordance with article 47 of the Federal Law of Public Servants' Responsibilities. Some of the public servants obligations are:

1. To fulfil with maximum diligence the duty assigned and abstain from any act or omission that causes the suspension of, or deficiency in such service, or

imply the abuse or improper discharge of an employment, office or commission;

2. Legally draft and execute, as applicable, the plans, programs and budgets within the sphere of their competency, and comply with the laws and other standards that govern the management of public economic resources;
3. Use the resources assigned to perform the duties of their post, position or commission, exercise the powers assigned to them, or make use of the confidential information to which they have access because of their function exclusively for the purposes for which they are subject;
4. Hold in their custody the documentation and information that, by reason of their post, position or commission, they have under their charge or to which they have access, preventing or avoiding its improper use, subtraction, destruction, hiding or damage;
5. Abstain in the course of their functions from requesting, accepting or receiving, for themselves or through another party, money, objects through their transfer to them at a price notoriously lower than on the ordinary market of the goods involved, or any donation, post, position or commission which involve conflicting interests. This prevention is applicable for up to one year after having left the post, position or commission, and
6. Submit in a timely and truthful manner the assets statement under the terms established in law.

Pursuant to article 53 of the mentioned Law, in case of violations to any of the administrative obligations, a legal procedure will be followed to determine its corresponding sanctions (consequences of liability), which could be:

- Private or public warning;
- Private or public admonition;
- Suspension;
- Removal from office;
- Economic sanction, and
- Temporary ineligibility to hold posts, positions or commissions in the public service.

According to the Constitution and the referred Law, some public servants, due to their hierarchy or the importance of their functions, are responsible for acts or omissions that interfere with the fundamental public interest.

This type of responsibility is subject to Political Judgment, in the terms above mentioned. Such judgment may only be initiated while the public servant is in exercise of his or her functions and up to one year after having left his or her post, position or commission.

### **Criminal liability**

The public servants subject to this type of responsibility are those who, while performing their duties, commit crimes sanctioned by the Criminal Code in its title "*Crimes Committed by Public Servants*" (Articles 212 to 224). This title considers as crimes, among others, the following conducts: inadequate exercise of the public service; abuse of authority; coalition of public servants; illegal use of powers; abuse of functions; bribery, and illegal enrichment. The Criminal

Code also contains provisions that sanction those public servants that obstruct the implementation of justice.

The corresponding sanctions foreseen for this type of crimes are imprisonment, fines and permanent or temporal disability to hold any public office.

Since the Central Bank's officers and employees are not considered as public servants for purpose of the aforesaid title of the Criminal Code, it is not applicable to them. Nevertheless, they might be subject to the crimes established in the referred Code.

### **Civil liability**

The public servants, as well as all the citizens, are subject to civil liability (torts liability), which is the state of being legally obligated for civil damages caused by a person acting illegally or against the good customs.

The State, as an entity, is responsible for the acts of its public servants and according to article 1927 of the Civil Code, it has the obligation to respond for the harm caused by them while exercising official duties. This responsibility will be effective directly against the State when there is a fraudulent illicit committed by the public servant. In the other cases, according to the Civil Code, such responsibility can only be effective against the State when the public servant responsible is unable to repair with his or her own means the harm caused.

### **Specific statutory provisions on the liability of Banco de México**

Pursuant to article 58 of its Law, Banco de México, the members of the Board of Governors, as well as the Bank's officials and employees shall be responsible for the violation of the banking and fiduciary secrecy as established by the Banking Act.

Additionally, in accordance with the article 61 of Banco de México Law, the Federal Law of Public Servants' Responsibilities shall apply to members of the Board of Governors and to the Bank's personnel, subject to the following:

The application of the aforementioned Law and the strict enforcement thereof, excluding instances of Political Judgment to which members of the Board of Governors may be subject, shall be the concern of an internal Responsibilities Commission, which shall be made up by the member of the Board of Governors appointed by the Board and by the heads of the Bank's legal and comptroller departments.

The Board of Governors shall determine the accountability regarding violations perpetrated by members of the Board of Governors or by officials holding any of the three highest-ranking positions, and impose the corresponding sanction. For this purpose, the Responsibilities Commission shall submit the relevant dossier to the Board.