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1. ECB comments end-date proposal

On April 7th, 2011 the ECB has published its opinion on the proposed end-date regulation of the European Commission.¹ The ECB welcomes the proposal and restates its preference for “*ambitious but realistic end-dates to be set for migration to SEPA credit transfer and SEPA direct debit*”. As migration end-dates, the ECB proposes January 31 2013 for credit transfers and January 2014 for direct debits.

The ECB also highlights the importance of legal certainty with respect to direct debit interchange fees. It comments: “*the proposed regulation concerning interchange fees for direct debits contributes to achieving such legal certainty*”.

Following the general remarks, there is a detailed list of proposed changes:

First, the ECB wants large-value payment systems to be explicitly excluded from the provisions of the proposed regulation.

Second, the ECB would like to restrict the provisions of the regulation to payments in euro.

Third, the ECB would like to clarify the exemption of card payments. It proposes to include a definition of the term “payment card” in the regulation and waive all payment card transactions (Amendments 6 and 8).

Fourth, “*direct debit transactions initiated by a card at a point of sale*” can be waived by member states for a period of up to 60 months (Amendment 17).

¹ OPINION OF THE EUROPEAN CENTRAL BANK of 7 April 2011 on a proposal for a Regulation establishing technical requirements for credit transfers and direct debits in euro (CON/2011/32) (http://www.ecb.int/ecb/legal/pdf/en_con_2011_32_f_sign.pdf)

Fifth, when the Commission exercises its “*powers to adopt the delegated acts*” to amend the technical requirements it should co-operate with the Eurosystem and consult service providers and user representatives.

Our Comment

It does not come as a surprise that the ECB voices general support for the proposed end-date regulation. More interesting are the remarks with respect to the level of direct debit interchange fees. The wording of the ECB suggests that it is not entirely happy with the proposed solution of a zero interchange fee.

Apart from its general consent, the ECB makes a few valuable suggestions which also are important for the card payment sector. This applies, in particular, to Article 1(2)(c) of the proposed regulation. The Commission has proposed the following rule:

“This Regulation shall not apply to the following: [...] (c) payment transactions through a payment card, including cash withdrawals from a payment account, if they do not result in a credit transfer or direct debit to or from a payment account identified by the basic bank account number (BBAN) or the international bank account number (IBAN)”

As the ECB rightly points out, “card payments, with the exception of cash withdrawals from a payment account, always result in a credit transfer or direct debit to or from a payment account identified by its BBAN or IBAN.” Thus, given the initial wording, card payments would not have been exempted. Therefore, the proposal of the ECB is very helpful. But, at the same time, it also creates new uncertainties. In Amendment 17, which seems to address systems like ELV in Germany, it wants to provide member states with the right to waive the requirements of Article 5 (mandatory application of technical requirements for credit transfers and direct debits) for up to 60 months “for those payment transactions initiated through a payment card at the point of sale which result in a direct debit transaction”. On the one hand, the ECB notes that card payments always result in a credit transfers or direct debit but should never-the-less be exempted, on the other hand it proposes a waiver of 60 months for card payments which result in a direct debit.

2. German banking and business associations comment on end-date regulation

A number of banking and business associations have formulated a joint comment on the proposed end-date regulation.² The associations demand a number of important changes:

First, they would like to have longer migration periods.

Second, they demand a continuity regulation passed at the European level that allows for the use of existing direct debit mandates.

Third, they oppose any requirements that go beyond existing requirements for SCT and SDD.

Fourth, they oppose the provision that the Commission may change the technical requirements via adoptions of delegated acts. Rather, the development of existing standards should be left to the market.

The German Banking Federation (ZKA) has also issued its own, more detailed comment in the proposal. This comment includes a large number of proposed changes:

First, large-value payment systems should be excluded.

Second, the migration period should be extended to 48 months for direct debits and credit transfers.

Third, powers to revise the technical requirements should not be delegated to the Commission.

Fourth, there should be a migration of legacy mandates via a European continuity rule.

Fifth, all types of guaranteed card payments should be excluded.

Sixth, German banks propose a large number of changes to the technical requirements in the annex of the proposed regulation.

Our Comment

Mandate migration for direct debits remains the largest head-ache for the players in the German payments market. Both banks and non-banks want regulators to step in. And

² Gemeinsame Position von Wirtschaftsverbänden zum Vorschlag für eine EU-Verordnung zur Festlegung der technischen Vorschriften für Überweisungen und Lastschriften in Euro, supported by Bankenfachverband, Bundesverband der Deutschen Industrie, Bundesverband der Deutschen Volksbanken und Raiffeisenbanken, Bundesverband der Energie- und Wasserwirtschaft, Bundesverband deutscher Banken, Bundesverband Deutscher Leasing-Unternehmen, Bundesverband Öffentlicher Banken Deutschlands, BVI Bundesverband Investment und Asset Management, Deutscher Sparkassen- und Giroverband, GdW Bundesverband deutscher Wohnungs- und Immobilienunternehmen, Gesamtverband der Deutschen Versicherungswirtschaft, Zentralverband des Deutschen Handwerks, Berlin, 15. April 2011.

whereas, in the past, these demands have been addressed to the German government, this time the European Commission is asked to act. At the moment, it is still unclear what will happen. But without a solution, SDD will meet stiff resistance in Germany.

There also seems to be a fairly broad agreement that the migration period should be longer. Particularly noteworthy is that banks and non-banks jointly oppose the delegated powers for the commission to change the technical requirements. As the ECB, the German banks also have spotted the ambiguous wording with respect to card payments. They are proposing to simply exempt "guaranteed card payments". This would leave bank-initiated schemes like Cartes Bancaires and ec cash out of scope whereas ELV (a signature based, non-guaranteed card payment) would be in scope (possibly profiting from a waiver of up to 60 months). However, DSGVO recently published a concept for further development of ec cash into a scheme "ec cash 2", which would offer the merchant on a per transaction basis a choice to get a payment guarantee or not. Following this approach ec cash 2 would be a scheme which processes guaranteed card payments as well as un-guaranteed card payments. So, it appears to be not entirely clear what an exemption of guaranteed card payments - as proposed by ZKA - actually would mean.

3. "Overlay systems": the view of German anti-trust authorities

In early 2010, the German internet payment provider giroipay sued its competitor Payments Network AG³ (provider of the service "sofortüberweisung.de")⁴. giroipay, which is owned by German banks (savings banks, co-operative banks and Postbank), argued that use sofortüberweisung.de implied a misuse of PIN and TAN codes. According to the argument of giroipay, customers were violating terms and conditions in their banking contracts. Moreover, such a service threatened to imperil the safety of German online banking. While the process went on, the German cartel office (Bundeskartellamt) announced that it would comment on the case. In March 2011, the cartel office came up with its findings. It argues that the terms and conditions of German banks were formulated in such a way as to restrict competition of third party payment services such as sofortüberweisung.de. The Bundeskartellamt acknowledges that safety is important but argues that there are less restrictive means to

³ <http://www.wiwo.de/unternehmen-maerkte/internet-bezahldienst-giroipay-verklagt-sofortueberweisung-de-418646/>

⁴ Services like sofortüberweisung.de are known as „overlay services“. They provide merchants with the information that payment has been made and they do not have a contractual relationship with the banks involved (bank of the payer and bank of the payee). See http://www.dnb.nl/en/binaries/overlay_tcm47-223391.pdf

achieve this goal. The opinion is a blow for giro pay. However the company announced that it would not withdraw the lawsuit.

Our Comment

The case between giro pay and sofortüberweisung.de raises important questions with respect to the regulation of payment systems. Banks have traditionally been the core providers of payment services. The standard bank account is the main payment hub. Controlling access to the bank account is a bit like controlling the last mile in telecommunications.

Obviously, security is vital when it comes to such an important part of the payment system. But at the same time, competition also enjoys a high priority in a market economy. Unlike in the past, today, anti-trust authorities are much less likely to accept mutual agreements between banks or between banks and service providers without proper scrutiny. Such agreements have to comply with anti-trust rules – just as agreements in other areas of the economy.

For, banks life has become more complicated. They have to comply with the rules of payment regulators like the Eurosystem or DG Internal Market of the European Commission and they have to comply with the rules of anti-trust authorities. The former seem to lean more towards safety whereas, the latter understandably stress competition.

Whereas the Bundeskartellamt has been strengthening the case of an overlay service, the Dutch Central Banks has expressed concern with respect to overlay systems.⁵ Similarly, in its 7th Progress Report, the ECB voiced concerns with respect to such services.⁶

But even the European Central Bank has, at times, contemplated a regime with relatively wide access rights of third parties to bank-based authorisation systems. In September 2008, Gertrude Tumpel-Gugerell (member of the Executive Board) stressed the need to remove obstacles for newcomers. In particular, she stated: “Finally, for non-bank driven initiatives to be developed, direct access to the current account for payment institutions, at reasonable price is an essential element.”⁷ This statement was largely made with a view towards new

⁵ DNB's position on overlay payment services. Press release, 15 October 2009.
<http://www.dnb.nl/en/news-and-publications/news-and-archive/persberichten-2009/dnb223392.jsp>

⁶ European Central Bank: Single European Payments Area. 7th SEPA Progress Report. Beyond Theory into Practice, October 2010, p. 34.

<http://www.ecb.int/pub/pdf/other/singleeuropaymentsarea201010en.pdf>

⁷ SEPA for cards. Speech by Gertrude Tumpel-Gugerell, Member of the Executive Board of the ECB, EFMA Conference on Cards and Payments, Paris, 9 September 2008
(<http://www.ecb.int/press/key/date/2008/html/sp080909.en.html>)

initiatives for a European card system. However, the principle can also be applied to internet payments.⁸

Thus, regulators need to re-think access: Where should it end, who should have access, how are the terms for access set. Ideally, they should be on the basis of mutual consultation between supervisors and anti-trust authorities.

4. Proposed German AML rules threaten to kill anonymous prepaid

The German government has proposed a law to optimise current anti money laundering measures (Gesetz zur Optimierung der Geldwäscheprävention). The law has been proposed in order to implement changes suggested by a FATF report on AML and ATF prevention in Germany.⁹ This law may have far reaching implications for certain e-money products that, so far, have been subject to simplified customer due diligence (CDD).

Currently, e-money issuers do not have to identify customers in the case of rechargeable instruments with a limit of EUR 2,500 on the total amount transacted in a calendar year, except when an amount of EUR 1,000 or more is redeemed in that same calendar year by the bearer (KWG § 25d(1)b). This provision of the German banking code is in line with the Third Anti-Money-Laundering Directive (2005/60/EC). It basically allows to issue anonymous e-money products like prepaid credit cards, prepaid e-purses like "white" GeldKarte, prepaid accounts like PaySafeCard or Ukash balances – all of which can be purchased with cash.

One of the suggested changes is that e-money issuers have to record the amount of e-money issued to a particular customer. It is not clear how e-money issuers are supposed to keep records per customer if they have not identified their customers. Thus, this provision could be the end of anonymous prepaid products.

Our Comment

For the moment, the proposal has entered the normal steps of the legislative process. If, however, the final law should contain the new CDD provisions, this could well be the end on anonymous prepaid in Germany.

⁸ Obviously, "reasonable price" is a crucial term in her statement. However, this is an issue for anti-trust authorities rather than central banks.

⁹ FATF: Anti-Money Laundering and Combating the Financing of Terrorism. GERMANY, 19 February 2010. <http://www.fatf-gafi.org/dataoecd/44/19/44886008.pdf>

Indeed, other countries might follow. After all, the German government argues that it is only implementing suggestions of the FATF. For now, most EU Member states define "simplified CDD" in the sense of applying no CDD at all. However, FATF has criticised this practice.¹⁰ Thus, the future of anonymous prepaid products seems uncertain.

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¹⁰ See FATF: Money Laundering Using New Payment Methods, October 2010.
<http://www.oecd.org/dataoecd/4/56/46705859.pdf>