

5 July 2013

Decision of the Bundesrat

Proposal for a Directive of the European Parliament and of the Council on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features

COM(2013) 266 final

At its 912th meeting on 5 July 2013, in accordance with §§ 3 and 5 of the Law on cooperation between the Federation and the *Länder* in European Union Affairs (EUZBLG), the Bundesrat adopted the following opinion:

1. The Bundesrat endorses the Commission's intention to increase consumer protection in the area of payment services and to create a binding legal right of access to a payment account with clearly defined basic features, thereby avoiding any *de facto* discrimination within the EU on the basis of irrelevant criteria such as place of residence, origin, and general financial situation.

It also welcomes the fact that the Commission intends through its proposal to enhance the transparency and comparability of information on payment accounts and make it easier to switch between payment accounts offered by various providers.

2. The Bundesrat agrees in particular with the fact highlighted by the Commission in its impact assessment that the legal framework at both European and national levels, and particularly in Germany, require efforts to be made by national governments to establish binding legal bases for access for consumers to a payment account.

Just as a competitive social market economy and protection against social exclusion and discrimination are among the fundamental values and main objectives of EU law enshrined in Article 3(3) TEU, and Articles 26 and 27 TFEU require the EU to take the necessary measures to establish the internal market in accordance with the Treaties, the economic constitution reflected at national level in Articles 2(1), 9(1) and (3), 12 and 14 of the Basic Law (*Grundgesetz* - GG), in conjunction with the principle of the social State enshrined in Article 20(1) GG, requires the German Government to provide all men and women with adequate opportunity to participate in industry and business.

3. The Bundesrat notes that the legal basis in Germany lags behind Commission Recommendation 2011/442/EU of 18 July 2011 on access to a basic payment account (OJ L 190, 21.7.2011, p. 87) to the extent that only certain individual savings-bank acts under *Land* law provide for the relevant legal right of consumers to access to a basic payment account. Moreover, credit institutions are merely encouraged to make voluntary commitments to offer and operate such accounts.
4. It also notes that the motives and aims of the proposal for a Directive as regards the principles contained therein on establishing a binding legal right to a payment account with basic features are in accordance with the motives underlying the decision of the Bundesrat on the draft Act establishing a right to open a basic current account (*GiroGuBaG*), BR-Document No 320/13 (Decision).
5. In view of this national legislative procedure, it should be ensured, as the European legislative procedure evolves, that it remains permissible in the Member States to adopt, where necessary, consumer protection provisions which are more stringent than those provided for in the proposal for a Directive (no full harmonisation).
6. Since the introduction of the SEPA credit transfer, payment service providers have no longer been required under European legislation to check the name of the beneficiary against the account number on the remittance slip. Consumers must therefore pay close attention when using number and character codes. They will as a rule bear the costs of any incorrect entries as a result of numerical errors, for instance. The EU should use the opportunity to correct this unfavourable development arising from EU law, and require banks to inform customers where the account number of the beneficiary of the transfer clearly does not match the name of the account holder indicated.
7. The Bundesrat calls on the Federal Government to require payment service providers - on the basis of the proposed Directive - to provide information in accordance with Article 4(6) and Article 5 thereof on the interest payable on overdraft facilities within the meaning of Article 3(d) of Directive 2008/48/EC.

The inclusion of interest rates on overdrafts in the fee information and statement of fees leads to better informed customers and greater competition between credit institutions. While interest on overdraft facilities granted is not a charge for payment services, the use of such facilities is so closely linked with the use of a payment account that its inclusion in the proposal for a Directive should be considered appropriate.

8. Article 15(1)(2) and (3)(a) and Article 18(2)(d) of the proposal do not appear to be sufficiently coordinated. Article 15(1) and (2) in conjunction with Article 14 give the impression that all consumers are entitled to one payment account with basic features in each Member State and may thus ask for a total of (currently) 28 such payment accounts to be opened. Accordingly, pursuant to Article 18(2)(d) there is a right to termination only where the consumer has opened "a second payment account in the Member State where he already holds a payment account with basic features". In contrast, Article 15(3)(a) restricts the right to open a payment account where a consumer already holds an account in his Member State of origin regardless of whether it is a standard payment account or a basic payment account. In this way, if consumers hold an account or basic payment account in their Member State of origin, they can be prevented from opening 27 basic payment accounts in the remaining Member States. However, if they do not hold a standard payment account or a basic payment account in their Member State of origin, they may exercise their right pursuant to Article 15(1) in all other Member States. Thus, consumers who open an account in their Member State of origin are disadvantaged compared with those who have opened an account abroad. There is no objective justification for this distinction.
9. The Bundesrat considers the proposal to introduce a payment account with basic features in EU Member States as inadequate. According to recital 28, access to such accounts should not be overly difficult. Against this backdrop, the resulting provision in Article 15(1) that the Member States should ensure that at least one payment provider offers consumers a payment account with basic features appears to not go far enough, since it does not ensure that this offer is available nationwide. The requirement in recital 28 that Member States consider factors such as the location of the designated payment service providers in their territory is not sufficient to ensure the nationwide availability of the offer to all consumers. In addition, the fact that only one payment service provider is required to offer this kind of account distorts competition, although this aspect is acknowledged in point 3.3 of the grounds of the proposal for a Directive.
10. The Bundesrat does not therefore share the Commission's view as regards the details of the legal right provided for by Article 15 of the proposal. This Article on the one hand requires merely that Member States ensure that at least one payment

service provider on their territory is required to offer a payment account with basic features, but on the other hand provides for only two very limited exceptions to the right of access to such an account, namely where the consumer already has access to a comparable payment account and where the identification requirements for the purpose of tackling money laundering have not been met. The Bundesrat endorses the rigorous approach of the Commission's proposal in so far as it is recognised that the exceptions to the right of access to a payment account should be used very restrictively. Exemptions which are too far-reaching or have the potential to become obstacles would be at odds with the purpose of the proposal and would jeopardise the achievement of its aim.

However, in accordance with the principle of freedom of contract inherent to a competitive social market economy within the meaning of Article 3(3) TEU, as well as the basic rights of payment service providers within the EU under Articles 16 and 17 of the EU Charter of Fundamental Rights in conjunction with Article 6(1) TEU, any intervention in the freedom of contract should be limited to the extent necessary by the introduction of a State-imposed service obligation, and service providers should not be burdened with any unreasonable contractual relationships.

The Directive should differentiate to a greater extent in this regard. In particular, as regards Article 15(1) to (3) of the proposal, the Bundesrat would prefer a provision which does not link the right of access to a basic payment account Europe-wide merely to a minimum of one provider depending on the arrangements in the Member State concerned, thus allowing for almost no exemptions. Such a provision would instead impose the obligation (to provide a basic payment account) on all payment services providers offering standard payment accounts on the market, but in order to ensure fairness in individual cases, would establish the threshold for what can reasonably be expected in the form of exemptions to be fine-tuned.

11. Article 15(3)(a) of the proposal for a Directive contains a manifestly incorrect reference. The provision should refer to Article 16(1) rather than Article 17(1) of the proposal.
12. The Bundesrat calls upon the Federal Government to work towards a provision obliging Member States to require all payment services providers to introduce a payment account with basic features in order to serve the interests of both consumers and payment services providers. This would ensure that consumers would have local access to at least one payment account with basic features and they could, in some cases, have a choice of local service providers.
13. The instances of non-compliance with legislation on money laundering and the financing of terrorism referred to by the Commission in the proposal are undoubtedly grounds for limiting access to a payment account also in specific

cases. However, the Directive should also ensure an equitable balance of interests in cases in which the customer knowingly makes false declarations in relation to the contractual relationship or in which an account subject to charges, in accordance with Article 17(1) of the proposal, has no credit over a considerable period of time and the account holder, in spite of being asked to do so, fails to credit the account.

14. The Bundesrat would also ask the Federal Government in its further consultations within EU committees to work on exemptions from the obligation on the part of payment service providers to operate a payment account with basic features. It takes the view that a payment services provider should not be required to operate such an account if it is unreasonable for it to do so. This is the case in particular where:

- the account holder has misused services offered by the payment services provider;
- the account holder has harassed or endangered staff or customers of the payment service provider;
- the account has no credit and the account holder fails to credit it despite being asked to do so;
- it is not ensured that the payment services provider receives the agreed usual payment for operation and use of the account; or
- the provider cannot be expected to enter into a business relationship for other reasons in individual cases. The Bundesrat would refer to Article 1, No 2(b) of BR-Document 320/13 (Decision) (§ 675f, paragraph 7 BGB) as a general example in this regard.

15. It calls for reasonable charges for payment accounts with basic features to be standardised, so that consumers are not prevented from opening an account owing to the costs involved. As a minimum, the Member States should be expressly authorised to this end.

According to Article 15, Member States must ensure that access to a basic payment account is not excessively difficult or burdensome. This provision should, however, also stipulate that charges should be reasonable, notwithstanding the fact that this issue is acknowledged in recital 31, which states that basic payment accounts should be offered free of charge or for a reasonable fee.

16. Article 17 also stipulates that payment services providers must offer services associated with the opening or use of payment accounts with basic features free of charge or for a reasonable fee. The Bundesrat takes the view that the charges for the account which is required to be offered must not exceed the amount normally charged for other current accounts with corresponding features. It calls upon the

Federal Government to raise this matter in the continuation of the advisory procedure.

17. The Bundesrat also requests that it be made clear that payment services providers are obliged only to use the official language of the Member State in which they are required to provide the basic payment account in all information and communications related to that account.

The biggest difficulty experienced by consumers in obtaining banking services in another Member State is usually the language barrier. Nonetheless, the provision of information and communications in every Member State in each of the 23 official EU languages would impose a considerable and disproportionate financial burden on financial service providers. In the Bundesrat's opinion, the fact that information and communications are not offered in all 23 official EU languages is not an excessive difficulty or burden within the meaning of Article 15(2), second sentence, of the proposal for a Directive.

18. It would ask the Federal Government to take steps to ensure that the Member States continue to have the option, as provided for in Article 45(6) of Directive, to allow customers to terminate a payment services framework contract without charge, even where the account switching service is used. The majority of the obligations referred to in Article 10, paragraphs 4, 5 and 6, correspond in the event of an account switch to necessary services, for which providers in Germany are not permitted to charge.
19. The Bundesrat would ask that it be made clear that persons residing where they work and with a second residence in another Member State must have access to a payment account with basic features in both Member States.
20. It calls on the federal legislator, when transposing the Directive into national law, to require all payment services providers within the meaning of this Directive to offer the appropriate accounts.
21. The Bundesrat is forwarding this opinion directly to the Commission.