



EUROPEAN COMMISSION

Brussels,
C(2013)

final

Dear President,

The Commission would like to thank the Bundesrat for its Opinion concerning the proposal for a Directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC (COM(2013)547 final) (hereinafter: PSD2).

The Commission is pleased to note that the Bundesrat supports the overall objectives of the Commission to modernise the legal framework on payment services in light of a rapidly changing landscape in payments with the emergence of new payment services and payment methods. The remarks provided are very constructive and will provide a useful contribution for the further debate on this file.

Regarding the specific issues raised by the Bundesrat, the Commission would like to make the following comments:

Charges by ATM (automated teller machines) providers for cash withdrawals

The proposal of the Bundesrat to cap the charges for ATM withdrawals is an interesting proposal that the Commission will have the opportunity to discuss in the further negotiations in the European Council with the co-legislators. The Commission is aware that, in some countries, bank-owned ATM networks have redesigned their business model and charge high withdrawal fees to those consumers who do not hold an account with the banks participating in the ATM network, while terminating their contracts with card schemes or card issuers. A similar trend towards increasing withdrawal fees has been noticed for independent ATM providers, which will now fall under the scope of the PSD2 and hence under that of Regulation EU/924/2009 as well. Regulation EU/924/2009 aligns the cross-border charges for payments in the Eurozone on the charges applied for domestic euro transactions. While this change in scope will incentivise independent ATM providers to enter into agreements with a card scheme or with the Payment Service Providers (PSPs) holding accounts of the users to offer ATM services, it will not remedy concerns arising in relation to the bank-owned ATM networks which are already covered by the Payment Services Directive (PSD).

Limiting payer's liability for unauthorised payments

Article 66 of the PSD2 limits the payer's liability for unauthorised payment transactions to a maximum of EUR 50 (versus EUR 150 in the current PSD). The payer, however, does not bear any financial losses resulting from the use of a lost, stolen or misappropriated payment

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instrument after he has notified the PSP of the unauthorised use. In fact, the payer only assumes full liability in cases of fraud or when having acted with intent or gross negligence when using his payment instrument. The burden of proof with regard the fraudulent use and gross negligence is with the PSP. Moreover, for payment transactions made online where the PSP does not require strong customer authentication, the liability for an unauthorised payment lies fully with the PSP (the EUR 50 franchise does not apply), except when the payer has acted fraudulently. In the Commission's view, these liability rules thus strike the right balance between the responsibilities of the payer for risks that are within his sphere and the responsibilities of the PSPs.

Unconditional refund in case of direct debits

On the occasion of the adoption of the Single European Payments Area (SEPA) End-Date Regulation, the European Parliament has asked the Commission to assess the impact of the current refund rules in Articles 62 and 63 of the PSD, in light of the prevailing market situation and the necessity to ensure a high level of consumer protection (see Regulation (EU) No 260/2012, recital 32). The results of this analysis can be found in the evaluation report of the Commission that has been published together with the proposed PSD2. All stakeholders consulted (Member States, consumer and retail associations, PSPs and merchants) share the view that harmonised refund rules are beneficial for all parties concerned (payers, as well as the PSPs and payees). As regards the rules defined in PSD, certain stakeholders were rather positive about the impact of the PSD rules on refund, while others were rather sceptical, which seem to be dependent on the way direct debits and refund rights were used and regulated within their own country.

In view of the outcome of the stakeholders' consultation, the PSD2 proposal seeks to improve the consumer protection while having regard to the position of the payee for whom after a refund it may be difficult to claim back the goods or services once consumed (e.g. music or films, lottery tickets that are no longer of value after the draw). Article 67(1) defines clearly in which cases an unconditional refund can be claimed in case of direct debits, instead – as is the case now - of leaving this entirely to the PSP and the payer. This, of course, leaves aside that in practice the PSP may decide to grant more favourable terms to the payer.

Protection of payer's credentials and use of payment initiation services

The PSD2 proposal contains specific provisions with regard to the use of the personal security features of a payer (i.e. Personal Identification Numbers (PINs) and Transaction Authentication Numbers (TANs)) by a third party payment service provider (TPP). As a ground rule, it cannot be held against the payer that he allows the TPP's software to make use of his PIN and TAN to contact the payment service provider holding his account, if the payer applies his normal duties of care with regard to the payment instrument (see Article 61). The fact that the payer cannot be held liable for allowing access to his credentials when using TPP services has to be seen against the background of the enhanced security requirements that are imposed by PSD2 on TPPs. The TPP has an enhanced duty of care with regard to the payer's credentials. The TPP should not make these data accessible to other parties nor store or keep them (Article 58). Furthermore, in order to be licensed, the TPP (as any other PSP) shall put in place a security policy, a risk management mechanism and implementing security measures to ensure that the initiation and execution of the payment is safe and secure (See Articles 5, and particularly under (g) and 85-87). These measures should provide sufficient safeguards that the payer's credentials cannot be accessed and abused by third parties.

Security requirements

One of the key innovations in the proposal is the introduction of enhanced security requirements for the PSPs. A licence as payment institutions is only granted to PSPs which have put in place a security policy, a risk assessment as well as a risk and incident management and reporting procedure in relation to their payment activities (Article 5). The security measures to be taken in accordance with articles 85-87 are embedded in the general framework on cybersecurity, which has been proposed by the Commission in February this year (COM(2013) 48 final). The PSP is required to report security incidents to the relevant competent authorities. Moreover, if a security incident might potentially harm the financial interest of its payment service users, the PSP shall without undue delay notify these users of the incident.

The Bundesrat proposes to include a provision which explicitly excludes payer's liability in the case where the unauthorised payment is caused by a certain type of security attack, which was already known by the PSP but which the PSP has not addressed adequately. This proposal is noteworthy, as it would contribute to refining the interplay in the PSD2 between the payments liability framework and the reporting duties for the PSPs. The Commission welcomes a further discussion on this issue in the forthcoming political dialogue on the PSD2 proposal.

Currency conversion

The Commission has also read with interest the proposal of the Bundesrat to enhance the transparency and information rules with regard to currency conversion costs and with regard to the allocation of these costs between the payer and payee (depending on the approach chosen by the payer). The PSP should provide this information prior to the payment transaction, which would put the payer in a better position to decide for a regular payment transaction or an "OUR" transaction.

The Commission hopes that these clarifications address the concerns raised by the Bundesrat and looks forward to continuing our political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*