

I

(Resolutions, recommendations and opinions)

OPINIONS

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 6 January 2009

on a proposal for a Regulation of the European Parliament and of the Council on cross-border payments in the Community

(CON/2009/1)

(2009/C 21/01)

Introduction and legal basis

On 31 October 2008, the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a proposal for a Regulation of the European Parliament and of the Council on cross-border payments in the Community ⁽¹⁾, replacing and repealing Regulation (EC) No 2560/2001 ⁽²⁾ (hereinafter the 'proposed regulation').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and Article 3.1, Article 4(a) and Article 5 of the Statute of the European System of Central Banks and the European Central Bank, as the proposed regulation contains provisions concerning the smooth operation of payment systems and the collection of balance of payments statistics. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

General observations

The ECB notes that the scope of the proposed regulation covers not only cross-border electronic payment transactions and credit transfers but also cross-border direct debits. This is in line with efforts to achieve the Internal Market for payment services and with the launch of the Single Euro Payment Area (SEPA) in particular, and is highly welcomed by the ECB. However, the proposed regulation also raises some issues, set out in more detail below, which require careful consideration.

Specific observations

1. *Provisions on the balance of payments reporting*

- 1.1. With respect to the proposed provisions on the reporting for balance of payments (b.o.p.) purposes, the ECB considers it essential that a solution is found that puts at risk neither the essential user needs for euro area and national balance of payments statistics nor the timely emergence of SEPA.

⁽¹⁾ COM(2008) 640 final.

⁽²⁾ Regulation (EC) No 2560/2001 of the European Parliament and of the Council of 19 December 2001 on cross-border payments in euro (OJ L 344, 28.12.2001, p. 13).

- 1.2. The development of SEPA implies that b.o.p. reporting systems mainly based on payments data cannot be maintained as they are, regarding payments in euro within the EU. The reform of those systems may involve not only substantially lower reporting obligations for banks ⁽¹⁾ but also an increase in the reporting burden on non-banks, which should be limited to the extent possible (e.g. by applying proper survey and sampling techniques). At the same time, it should be ensured that b.o.p. statistics can continue to be compiled with the high reliability, frequency and timeliness that are required for ECB monetary policy-making.
- 1.3. The ECB welcomes the proposal in Article 5(1) to increase the exemption threshold for b.o.p. reporting to EUR 50 000 and acknowledges that it is already in place in the majority of Member States, which have already fully shifted or have taken steps to collect data by means of alternative sources (administrative data, or surveys/direct reporting) rather than from payments systems, or developed complementary sources to payments data.
- 1.4. Large companies play a crucial role in the compilation of b.o.p. statistics. However, they tend to centralise their payments in specialised entities, so that their payments are increasingly disconnected from their economic transactions. As a consequence, these large companies have to be fully covered in a survey-based approach. Smaller entities may be addressed on the basis of sampling.
- 1.5. In order to benchmark and to focus the scope of surveys related to b.o.p. reporting, the ECB suggests that other administrative and statistical data sources, such as VAT data files, INTRASTAT, Company Registers and Structural Business Statistics, are enhanced where needed and possible, so that they can be used for the identification of the entities to be surveyed or for collecting information on cross-border transactions. Good practices on the usage of such data may already be exchanged among b.o.p. compilers. Conversely, without prejudice to the burden on respondents, the regulations related to those sources should enable a better identification of cross-border transactions, especially as regards services.
- 1.6. The ECB welcomes the introduction of Article 5(3), clarifying that statistical requirements which have no impact on the straight through processing of SEPA payments by payment service providers, and can be fully automated by payment service providers, should not be subject to any exemption threshold.
- 1.7. The ECB regards payments data as a potentially useful tool in particular to identify the reporting population to be surveyed, i.e. to set up and maintain a register of internationally active firms ⁽²⁾. This concerns information that is readily available to the banks and that can be supplied to b.o.p. compilers in a fully automated fashion at reasonable intervals, including, on the one hand, the mandatory fields of the SEPA message (including the International Bank Account Numbers (IBANs) of the payer and the payee) and, on the other hand, any other reference data that must be used and/or stored by banks (e.g. for anti-money laundering and counter-terrorist financing purposes), such as the address of the account holders. In turn, these data may be linked to the national statistical business register. This approach should be made possible at the discretion of each national b.o.p. compiler. As it meets the conditions listed in Article 5(3), this approach should not be subject to any reporting threshold.
- 1.8. In the future, in the context of SEPA, non-financial entities may choose to hold their bank account with a bank that is resident in another EU country. If and when this happens, the information as defined in Article 5(3) of the proposed regulation, which is based on the assumption that the banks and their account holders generally reside in the same country, may no longer provide a satisfactory

⁽¹⁾ In line with Article 1(3) of the proposed regulation, banks will still be required to report on their own cross-border financial and non-financial transactions.

⁽²⁾ In particular, this applies to small and medium-sized enterprises (SMEs) that receive payments from and/or send payments to non-resident bank accounts (i.e. bank accounts with a non-resident country code in it). This can serve as an indication that these SMEs are likely to be engaged in cross-border transactions. The (country code in the) IBAN in the SEPA message can be used as a proxy to identify these SMEs.

assessment of the reporting population. In such a context, and to assist the Commission, the ECB is willing to further assess the extent to which this phenomenon has developed. If it has become significant, the inclusion by the banks of the country of residence of the payer in the SEPA message should be reconsidered⁽¹⁾. This would allow an automatic and unambiguous identification of cross-border payments by the bank of the payee in all cases. This procedure should be applied without a threshold.

1.9. In order to further alleviate the reporting burden of both financial and non-financial agents, the ECB supports all initiatives that facilitate the exchange of information between b.o.p. compilers, for statistical purposes only. This may require the elimination of legal impediments to the exchange of information among EU statistical authorities, while maintaining the required confidentiality safeguards. To assist the Commission, the ECB would be ready to explore ways forward within this area.

1.10. Regarding the proposal to remove settlement-based national reporting requirements on payment service providers from 1 January 2012, as stated in Article 5(2) of the proposed regulation, the ECB highlights the need for an interim solution for Member States still relying on settlement-based reporting until a fully harmonised pan-European solution has emerged. Such an interim solution has been discussed within the Eurosystem, resulting in the following proposal by the ECB:

— one single field of the SEPA payment message should be used during this interim period for reporting in a fully harmonised way (including one code list and one methodology to apply this code list). Customers in Member States implementing this approach will be required to provide the information to fill in one, already existing, specific optional white field in the SEPA message (field 'Regulatory Reporting'). One common set of usage rules should be applied by banks in all these Member States, creating one additional optional service (AOS) community. The set of usage rules would only apply between the Member States which decide to implement this approach. The EPC should be informed and asked to help in co-ordinating the implementation of the AOS,

— banks and customers resident in Member States not implementing this approach will neither have to adopt the set of usage rules nor do they have to introduce, transmit or read the b.o.p. codes. Infrastructures providing payment services across Europe will only have to adopt the set of usage rules if they offer services to banks and customers resident in the Member States using this approach,

— the whole process requires the use of one harmonised code list about the economic nature of the underlying transactions, and one methodology to apply this code list. Such a code list is made available by the ECB. Once the coded information is introduced in the SEPA message, its treatment is fully automated by banks, without hampering the straight through processing of the payment.

Furthermore the ECB recommends to closely monitor the developments in the coming years, taking into account technical developments in SEPA and developments in statistical collection methods.

2. *Review clause — use of the Bank Identifier Code (BIC)*

2.1. According to Article 12(1) of the proposed regulation, the Commission must, by December 2012 at the latest, present to the European Parliament, the Council, the European Economic and Social Committee and the ECB a report on the use of IBAN and BIC in relation to the automation of payments, accompanied by an appropriate proposal. On the assumption that the aim of this provision is to facilitate and make more efficient the initiation of payments, the ECB would support the possible abolition of the need for retail customers to use the BIC if the use of IBAN only is technically possible, as this would ease the burden of providing two different identifiers.

⁽¹⁾ If this step were to be taken, the European Payments Council (EPC) would have to be requested to make mandatory the existing field on the country of residence of the payer, currently optional in the SEPA message (and possibly to agree on a codification).

- 2.2. IBAN was introduced as a mandatory requirement for equal charging under Regulation (EC) No 2560/2001 and has, in the ECB's view, proven to be a cornerstone for the standardisation of payments in the context of SEPA as it enhances straight through processing and facilitates the verification of account numbers. The ECB would therefore strongly recommend retaining the mandatory use of IBAN. The ECB further notes that the introduction of a similar standard format for securities accounts comparable with the regime for IBAN could enhance the conflicts of law regime for inter-mediated securities.

3. *Charges for cross-border payments and corresponding national payments*

Article 3(1) of the proposed regulation provides for the principle of equality of charges in respect of cross-border payments and corresponding domestic payments 'of the same value'. The only criterion for identifying the corresponding domestic payment in the proposed regulation is the reference to the value of such equivalent payments. In this respect, the ECB is concerned that the abovementioned provision might not provide payment service providers with adequate interpretation guidelines with regard to the notion of the corresponding domestic payments. Hence, the ECB proposes introducing a paragraph setting out the basic assessment criteria in order to ensure its uniform application within the Community, instead of allowing payment service providers a wide margin of discretion as regards its interpretation.

4. *Scope of application*

Regulation (EC) No 2560/2001 applies to 'institutions', and its Article 2(e) defines them as 'any natural or legal person which, by way of business, executes cross-border payments'. It follows that neither the ECB nor national central banks (NCBs) are covered by Regulation (EC) No 2560/2001. This situation is altered by Article 2(5) of the proposed regulation, which applies to payment service providers defined, *inter alia*, as 'any of the categories referred to in Article 1(1) of Directive 2007/64/EC ...' ⁽¹⁾ (hereinafter the 'PSD'). Article 1(1) of the PSD sets out categories of payment service providers, including the ECB and NCBs when not acting in their capacity as monetary authorities. It follows from the abovementioned provisions that the proposed regulation would apply to cross-border payments up to EUR 50 000 made by the ECB or NCBs when they are acting outside the scope of their capacity as monetary authorities and when such transactions are not made for their own account. The ECB welcomes the extended scope of the proposed regulation in this respect, which is in line with the principles of SEPA.

5. *Additional legal comments*

- 5.1. The ECB supports the proposed regulation's objective of complying with standards of good legislation and agrees with the introduction of the simplified definition framework. However, a certain overlap seems to exist between the notion of 'cross-border payments' and 'payment transaction' contained respectively in Article 2(1) and Article 2(7) of the proposed regulation.
- 5.2. The ECB is of the opinion that if a defined concept appears in more than one secondary Community legislation, the corresponding definition should, as far as possible, be identical in all such legislation to ensure legal certainty, especially in closely related legal acts. However, there are some divergences between the concept of 'payment instrument' as defined in Article 4(23) of the PSD and its equivalent in Article 2(2) of the proposed regulation. In the PSD, reference is made to 'payment order' whereas the definition in the proposed regulation refers to 'payment transaction'. This is unfortunate and could cause confusion, especially since both 'payment order' and 'payment transaction' are defined concepts in both the proposed regulation and the PSD. The ECB therefore suggests that these two legal acts be aligned with respect to the definition in question.
- 5.3. Since the proposed regulation does not contain any provision on transparency of charges corresponding to Article 4 of Regulation (EC) No 2560/2001, the ECB recommends considering whether a reference should be made in the proposed regulation to the relevant provisions in the PSD in respect of conditions and information requirements for payment services.

⁽¹⁾ Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ L 319, 5.12.2007, p. 1).

6. *Drafting proposals*

Where the above advice related to Article 2(1) and Article 3 of the proposed regulation would lead to changes in the proposed regulation, drafting proposals are set out in the Annex.

Done at Frankfurt am Main, 6 January 2009.

The President of the ECB

Jean-Claude TRICHET

ANNEX

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB
Amendment 1 Article 2(1) of the proposed regulation	
<p style="text-align: center;"><i>Article 2(1)</i></p> <p>'cross-border payments' means electronic payment transactions initiated by the payer or by or through a payee and carried out via a payment service provider or a branch thereof in one Member State, with a view to making an amount of money available to a payee via his payment service provider or a branch thereof in another Member State;</p>	<p style="text-align: center;"><i>Article 2(1)</i></p> <p>'cross-border payments' means electronic payment transactions initiated by the payer or by or through a payee and carried out via a payment service provider or a branch thereof in one Member State, with a view to making an amount of money available to a payee via his payment service provider or a branch thereof in another Member State;</p>
<i>Justification</i> — See paragraph 5.1 of the opinion	
Amendment 2 Insertion of Article 3(3) into the proposed regulation	
<p style="text-align: center;"><i>Article 3(3)</i></p> <p>No current text</p>	<p style="text-align: center;"><i>Article 3(3)</i></p> <p>The equivalence between cross-border payments and corresponding domestic payments shall be assessed on the basis of criteria such as the initiation channel, speed, degree of automation, customer relationship and the level of the service provided to the customer.</p>
<i>Justification</i> — See paragraph 3 of the opinion	