

III

(Preparatory acts)

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 19 November 2013

on a 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

(CON/2013/77)

(2014/C 51/02)

Introduction and legal basis

On 24 September 2013, the European Central Bank (ECB) received a request from the Council for an opinion on a proposal for a directive on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features ⁽¹⁾ (hereinafter the 'proposed directive').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union, since the proposed directive contains provisions affecting the European System of Central Banks' tasks to promote the smooth operation of payment systems and to contribute to the smooth conduct of policies relating to the stability of the financial system, as referred to in the fourth indent of Article 127(2) and Article 127(5) of the Treaty. 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.

1. Purpose and content of the proposed directive

The proposed directive establishes a common Union framework for the protection of consumer rights related to access and use of payment accounts. This framework will comprise rules on all of the following: (a) the transparency and comparability of fees charged to consumers in connection with their payment accounts in the Union ⁽²⁾; (b) services for switching payment accounts provided by payment service providers to consumers ⁽³⁾; (c) the right of consumers legally resident in the Union to open and use a payment account with basic features in the Union irrespective of their nationality or Member State of residence ⁽⁴⁾; (d) related matters such as designation and duties of competent authorities and sanctions in the event of non-compliance by payment service providers ⁽⁵⁾.

2. General observations

The ECB strongly supports the proposed directive. Previously in other instances, the ECB has supported the imposition of specific transparency requirements for financial transactions, accompanied by effective monitoring of compliance with those requirements, to make it easier to compare different products and services and therefore to improve competition among financial actors ⁽⁶⁾. The ECB has also promoted setting

⁽¹⁾ COM(2013) 266 final.

⁽²⁾ See Chapter II of the proposed directive.

⁽³⁾ See Chapter III of the proposed directive.

⁽⁴⁾ See Chapter IV of the proposed directive.

⁽⁵⁾ See Chapters V and VI of the proposed directive.

⁽⁶⁾ See paragraph 2.4 of Opinion CON/2007/29, paragraph 1.1 of Opinion CON/2012/103 and paragraph 3 of the general observations in Opinion CON/2012/10. All ECB opinions are published on the ECB website at: <http://www.ecb.europa.eu>

standards as a means of facilitating the execution of cross-border payments⁽¹⁾. Finally, the proposed directive should give consumers easier access to payment accounts and contribute to the creation of a Union-wide payment area, a goal that the ECB has consistently supported⁽²⁾.

3. *Specific observations*

3.1. *Defined terms*

The terms defined in the proposed directive⁽³⁾ should be aligned with those of Directive 2007/64/EC of the European Parliament and of the Council (hereinafter the 'Payment Services Directive' (PSD)) and Regulation (EU) No 260/2012 of the European Parliament and of the Council⁽⁴⁾ (hereinafter the 'SEPA Regulation'), unless there are objective reasons for departing from such defined terms. This concerns in particular the definitions of the terms 'durable medium' and 'direct debit'. The use of standardised terminology based on existing Union legislation for payment services will improve consistency and facilitate the understanding of Union legal acts. In the interests of clarity and consistency, it also appears sensible to define 'switching' simply in terms of the services provided under Article 10 of the proposed directive⁽⁵⁾.

3.2. *List of covered services and powers of the authorities to obtain information*

The list of basic payment services covered by the proposed directive should reflect payment services accounting for at least 80 % of the most representative payment services subject to a fee at national level. However, more far-reaching conditions, mandating a certain number of services on such a list, may prove excessive. Moreover, it should be clarified that the competent authorities are entitled to obtain information from payment service providers on the profitability of individual services provided in connection with payment accounts for the purpose of compiling the list of the most representative payment services⁽⁶⁾. Specific reporting obligations may need to be established for this purpose, which should at the same time ensure the right of payment service providers to protect business secrets from their competitors⁽⁷⁾.

3.3. *Right to open a payment account with basic features — limitation in terms of currency of account*

The proposed directive introduces a right for consumers legally resident in the Union to open and use a payment account with basic features in any Member State⁽⁸⁾. However, the wording of Article 15 of the proposed directive might be understood to imply that payment service providers may be required on request to open a payment account with basic features denominated in any Member State currency. Given that the implementation of such a broad requirement may not be economically viable, it suffices to limit this right to open and use a payment account to payment accounts in the currency of the Member State where the payment service provider is located⁽⁹⁾.

3.4. *Cross-border cooperation*

Finally, the proposed obligation on the competent national authorities within a Member State to cooperate to ensure effective compliance with the proposed directive⁽¹⁰⁾ should be expanded to include an obligation on competent authorities from different Member States to cooperate on a cross-border basis. This is to ensure that national implementation measures and practices do not diverge to an extent that jeopardises the proposed directive's aim to approximate laws and measures to bring about a single market in payment account services within the Union⁽¹¹⁾.

⁽¹⁾ See paragraph 11 of Opinion CON/2001/34.

⁽²⁾ See Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market (OJ L 319, 5.12.2007, p. 1).

⁽³⁾ See Article 2 of the proposed directive.

⁽⁴⁾ Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro (OJ L 94, 30.3.2012, p. 22).

⁽⁵⁾ See proposed amendments 1 to 3. See also paragraph 3.3 of Opinion CON/2013/32.

⁽⁶⁾ See points (4) and (5) of Article 3(2) of the proposed directive.

⁽⁷⁾ See proposed amendment 4.

⁽⁸⁾ See Article 15 of the proposed directive.

⁽⁹⁾ See proposed amendment 5.

⁽¹⁰⁾ See Article 20(2) of the proposed directive.

⁽¹¹⁾ See proposed amendment 6.

Where the ECB recommends that the proposed directive is amended, specific drafting proposals are set out in the Annex accompanied by explanatory text to this effect.

Done at Frankfurt am Main, 19 November 2013.

The President of the ECB

Mario DRAGHI

ANNEX

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
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Amendment 1

Article 2(l)

'(l) "durable medium" means any instrument which enables the consumer or the payment services provider to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.'	'(l) "durable medium" means any instrument which enables the consumer or the payment services provider to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.'
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Explanation

This definition should be aligned with that in Article 4(25) of the PSD, which does not refer to the payment service provider. According to that definition, 'durable medium' refers only to instruments available to the payment service user, i.e. the consumer in the present case.

Amendment 2

Article 2(m)

'(m) "switching" means, upon a consumer's request, transferring from one payment service provider to another the information about all or some standing orders for credit transfers, recurring direct debits and recurring incoming credit transfers executed on a payment account, with or without transferring the positive account balance from one payment account to the other or closing the former account.'	'(m) "switching" means, the service provided under Article 10 of this Directive upon a consumer's request, transferring from one payment service provider to another the information about all or some standing orders for credit transfers, recurring direct debits and recurring incoming credit transfers executed on a payment account, with or without transferring the positive account balance from one payment account to the other or closing the former account.
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Explanation

The proposed definition of 'switching' suggests that the payment account itself is being moved, which would not be correct. If this definition is necessary, it should only contain a simple reference to Article 10, rather than a condensed description.

Amendment 3

Article 2(n)

'(n) "direct debit" means a payment service debiting a payer's payment account, where a payment transaction is initiated by the payee with the payer's consent.'	'(n) "direct debit" means a national or cross-border payment service for debiting a payer's payment account, where a payment transaction is initiated by the payee with on the basis of the payer's consent.'
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Explanation

This term should be aligned with the definitions of 'direct debit' in the PSD and the SEPA Regulation, which refer to this form of payment arrangement covering either a national or cross-border payment service for debiting a payer's payment account.

Text proposed by the Commission

Amendments proposed by the ECB (1)

Amendment 4

Article 3

'Article 3

List of the most representative payment services subject to a fee at national level and standardised terminology

1. Member States shall ensure that the competent authorities referred to in Article 20, determine a provisional list of at least 20 payment services accounting for at least 80 % of the most representative payment services subject to a fee at national level. The list shall contain terms and definitions for each of the services identified.

[...]

3. Member States shall notify to the Commission the provisional lists referred to in paragraph 1 within 6 months of the entry into force of this Directive.

4. The Commission shall be empowered to adopt delegated acts, in accordance with Article 24, concerning the setting out, on the basis of the provisional lists submitted pursuant to paragraph 3, of an EU standardised terminology for those payment services that are common to at least a majority of Member States. The EU standardised terminology will include common terms and definitions for the common services.

5. After the publication in the *Official Journal of the European Union* of the delegated acts referred to in paragraph 4, each Member State shall without delay integrate the EU standardised terminology adopted pursuant to paragraph 4 into the provisional list referred to in paragraph 1 and shall publish this list.'

'Article 3

List of the most representative payment services subject to a fee at national level and standardised terminology

1. Member States shall ensure that the competent authorities referred to in Article 20, determine a provisional list of ~~at least 20~~ payment services accounting for at least 80 % of the most representative payment services subject to a fee at national level. The list shall contain terms and definitions for each of the services identified.

[...]

3. The competent authorities shall be entitled to obtain from payment service providers the information necessary to determine indicators set out in points (1) to (5) of paragraph 2. In doing so, they shall ensure the protection of confidential business information.

34. Member States shall notify to the Commission the provisional lists referred to in paragraph 1 within six months of the entry into force of this Directive.

45. The Commission shall be empowered to adopt delegated acts, in accordance with Article 24, concerning the setting out, on the basis of the provisional lists submitted pursuant to paragraph ~~3~~ **4**, of an EU standardised terminology for those payment services that are common to at least a majority of Member States. The EU standardised terminology will include common terms and definitions for the common services.

56. After the publication in the *Official Journal of the European Union* of the delegated acts referred to in paragraph **45**, each Member State shall without delay integrate the EU standardised terminology adopted pursuant to paragraph **45** into the provisional list referred to in paragraph 1 and shall publish this list.'

Explanation

It should be clarified how the competent authorities may obtain data relevant to the compilation of the list of the most representative payment services, in particular in relation to the indicators mentioned in points (4) and (5) of Article 3(2). Since some categories of such data generally constitute confidential business information, appropriate safeguards for payment service providers need to be ensured.

Text proposed by the Commission

Amendments proposed by the ECB ⁽¹⁾**Amendment 5**

Article 15(1)

'1. Member States shall ensure that at least one payment service provider in their territory offers a payment account with basic features to consumers. Member States shall ensure that payment accounts with basic features are not only offered by payment service providers that provide the account solely with online banking facilities.'

'1. Member States shall ensure that at least one payment service provider **located** in their territory offers **to consumers** a payment account with basic features **in the currency of the Member State concerned** ~~to consumers~~. Member States shall ensure that payment accounts with basic features are not only offered by payment service providers that provide the account solely with online banking facilities.'

Explanation

Requiring payment service providers to open, if requested, a payment account in any Member State currency may not be economically viable for them. It is sufficient that this right of access comprises the right to open and use a payment account with basic features in the currency of the Member State in which the payment service provider is located.

Amendment 6

Article 20(2)

'2. The authorities referred to in paragraph 1 shall possess all the powers necessary for the performance of their duties. Where more than one competent authority is empowered to ensure and monitor effective compliance with this Directive, Member States shall ensure that those authorities collaborate closely so that they can discharge their respective duties effectively.'

'2. The authorities referred to in paragraph 1 shall possess all the powers necessary for the performance of their duties. Where more than one competent authority is empowered to ensure and monitor effective compliance with this Directive, Member States shall ensure that those authorities collaborate closely so that they can discharge their respective duties effectively. **Competent authorities shall cooperate with each other as provided for in Article 24 of Directive 2007/64/EC.**'

Explanation

In line with the objective of the proposed directive to enhance the single market, national competent authorities should also be required to cooperate on a cross-border basis within the Union as currently required under the PSD to ensure that divergences between the national transpositions of the proposed directive are mitigated.

⁽¹⁾ Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting text.