

III

(Preparatory acts)

EUROPEAN CENTRAL BANK

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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)**

(2011/C 155/01)

Introduction and legal basis

On 28 January 2011, 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 establishing technical requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009 ⁽¹⁾ (hereinafter the 'proposed regulation').

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 regulation contains provisions affecting the basic task of the European System of Central Banks (ESCB) to promote the smooth operation of payment systems, as referred to in the fourth indent of Article 127(2) 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.

General observations

The ECB welcomes and supports the European Commission's proposal to impose end-dates for migration to the Single Euro Payments Area (SEPA) credit transfers and SEPA direct debits by means of a Union regulation. The ECB and the Eurosystem have repeatedly drawn attention to the need for ambitious but realistic end-dates to be set for migration to SEPA credit transfer and SEPA direct debit, in order to reap the full benefits of SEPA. Although the potential benefits of the SEPA project are substantial, the primarily market-driven approach currently used cannot be characterised as being entirely successful. The prevailing market uncertainty caused by the generally difficult economic climate, the disadvantages for first movers in a network business, and the duplicate costs of operating SEPA and legacy payment systems in parallel are reasons that have led many market players, especially on the supply side, to call for the establishment of an end-date for SEPA migration by means of legislation at the Union level. A Union act of general application, binding in its entirety and directly applicable in all Member States, is therefore considered essential for successful migration to SEPA, as the project would otherwise face a serious risk of failure.

Specific observations

The ECB has on several occasions pointed out the need for clear guidance regarding interchange fees for direct debits ⁽²⁾. Articles 6 and 7 of Regulation (EC) No 924/2009 of the European Parliament and of the

⁽¹⁾ COM(2010) 775 final.

⁽²⁾ See the Joint statement by the European Commission and the European Central Bank clarifying certain principles underlying a future SEPA direct debit (SDD) business model, March 2009, and the Single Euro Payments Area, seventh progress report, 'Beyond theory into practice', October 2010, page 17, both available on the ECB's website at <http://www.ecb.europa.eu>

Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001 ⁽¹⁾ introduced a temporary default interchange fee for cross-border direct debits, together with a temporary endorsement of national interchange fees for direct debits. Both of these Articles will no longer apply on 1 November 2012; in order to avoid a legal vacuum hampering migration to SEPA direct debit, it is important that a long-term solution for interchange fees for direct debits is established. Article 6 of the proposed regulation concerning interchange fees for direct debits contributes to achieving such legal certainty.

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

Done at Frankfurt am Main, 7 April 2011.

The President of the ECB
Jean-Claude TRICHET

⁽¹⁾ OJ L 266, 9.10.2009, p. 11.

ANNEX

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
Amendment 1	
First sentence of recital 2 of the proposed regulation	
The success of SEPA is very important economically, monetarily as well as politically.'	The success of SEPA is very important economically, monetarily as well as politically.'
<i>Explanation</i>	
<i>SEPA is important economically and politically but does not play a role in monetary policy; therefore the word 'monetarily' should be deleted.</i>	
Amendment 2	
Third and new fourth sentence of recital 6 of the proposed regulation	
'Money remittance, internally processed payments, large-value payment transactions between payment service providers and payments via mobile phone should not fall under the scope of those rules since these payment services are not comparable to credit transfers and direct debits.'	'Money remittance, internally processed payments, large-value payment transactions between payment service providers and payments via mobile phone should not fall under the scope of those rules since these payment services are not comparable to credit transfers and direct debits as defined in this Regulation. Payment transactions processed and settled through large value payment systems should also not fall under the scope of this Regulation. '
<i>Explanation</i>	
<i>The ECB suggests to add 'as defined in this Regulation' to clarify the message that money remittance, internally processed payments, etc., are not credit transfers and direct debits in the sense of the proposed regulation. As for the explanation of the new fourth sentence suggested by the ECB see Amendment 5.</i>	
Amendment 3	
Second sentence of recital 9 of the proposed regulation	
'In order to create an integrated market for electronic payments systems in euros, it is essential that the processing of credit transfers and direct debits are not hindered by technical obstacles and are carried out under a scheme whose basic rules are adhered to by a majority of payment services providers from a majority of Member States and be the same both for cross-border and for purely national credit transfer and direct debit transactions.'	'In order to create an integrated market for electronic payments systems in euros, it is essential that the processing of credit transfers and direct debits are not hindered by technical obstacles, and are carried out under a scheme whose basic rules are adhered to by a majority of payment services providers from a majority of Member States whose currency is the euro , and be are the same both for cross-border and for purely national credit transfer and direct debit transactions.'
<i>Explanation</i>	
<i>Interoperability is essential to ensure that payments can be processed efficiently across the Union. The dual requirements, i.e. that the rules apply on a national and cross-border basis and the required majority participation, in recital 9 and Article 4(1) of the proposed regulation, are important measures to ensure that payment schemes become pan-European. However, taking into account the development of new payment services, adherence by payment service providers in Member States whose currency is not the euro might not be considered a priority, considering the low number of euro transactions in some of these Member States. It is therefore suggested to limit the condition in Article 4(1)(b) (see Amendment 14) and accordingly recital 9 to a majority of payment service providers in a majority of Member States whose currency is the euro. This should on the one hand, avoid insurmountable impediments at the launch of the innovative credit transfer and direct debit services and, on the other hand, ensure a pan-European character.</i>	

Text proposed by the Commission	Amendments proposed by the ECB (1)
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Amendment 4

First sentence of recital 16 of the proposed regulation

<p>'In some Member States, there are certain legacy payment instruments which are credit transfers or direct debits but which have very specific functionalities, often due to historical or legal reasons.'</p>	<p>'In some Member States, there are certain legacy payment instruments which are classified as credit transfers or direct debits but which have very specific functionalities, often due to historical or legal reasons.'</p>
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Explanation

This suggestion is aimed at clarifying that certain legacy payment instruments are classified as credit transfers or direct debits irrespective of their very specific functions.

Amendment 5

Article 1(2)(b) of the proposed regulation

<p>2. This Regulation shall not apply to the following: [...] (b) payment transactions processed and settled through large value payment systems for which both the original initiator and the final recipient of the payment is a payment service provider'</p>	<p>2. This Regulation shall not apply to the following: [...] (b) payment transactions processed and settled through large value payment systems for which both the original initiator and the final recipient of the payment is a payment service provider'</p>
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Explanation

Payments made through large value payment systems have never been within the scope of SEPA and should therefore be excluded from the scope of the proposed regulation. In this respect, the proposed regulation should clearly focus on bulk retail payments as an inclusion of large value payment systems would require a separate more complex Union act due to very different service levels. Considering the complexity of large value payment systems, the technical challenges the banking industry would face for such a migration, and that retail payments settled within large-value payment systems constitute less than 1 % of the total number of retail payments in the euro area, the ECB does not see any need for such a Union act.

However, in their role under the fourth indent of Article 3.1 and Article 22 of the Statute of the ESCB as operators of the component systems of the Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2), the ECB and the national central banks (NCBs) currently consider the introduction of ISO20022 XML standards in TARGET2 is an issue of strategic importance.

Amendment 6

Article 1(2)(c) of the proposed regulation

<p>2. 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 banc account number (IBAN)'</p>	<p>2. This Regulation shall not apply to the following: [...] (c) payment card 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 banc account number (IBAN)'</p>
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Explanation

The ECB agrees that card payments and cash withdrawals should be exempt from the proposed regulation; however 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. In addition card payments are not covered by the Commission's impact assessment accompanying the proposed regulation and it follows that they fall outside the scope of the proposed regulation. Accordingly, the ECB suggests deleting the reference to the use of BBAN and IBAN to avoid an interpretation of card payments as being included de facto in the proposed regulation, which is contrary to the intention underlying this provision.

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
Amendment 7	
Article 1(4) of the proposed regulation (new)	
No current text.	‘4. This Regulation shall not apply to the European Central Bank and the national central banks when acting in their capacity as monetary authorities or other public authorities.’
<i>Explanation</i>	
<i>Activities performed by the ECB or a national central bank in accordance with the fourth indent of Article 127(2) of the Treaty, and Article 3 of the Statute of the ESCB, should be excluded from the scope of the proposed regulation with a view to central bank independence (see Article 130 of the Treaty). In this respect, the ECB suggests that the same exemption as contained under Article 1(1)(e) of 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 ⁽²⁾ is inserted in the proposed regulation.</i>	
Amendment 8	
Article 2 of the proposed regulation (new definition)	
No current text.	‘“payment card” means a device that allows the payer (i) to perform payment transactions, either at a card accepting device or remotely, including by mail, telephone or through the Internet; or (ii) to access cash at an automatic teller machine’
<i>Explanation</i>	
<i>The ECB understands that the aim of Article 1(2)(c) of the proposed regulation is to exclude traditional card transactions from its scope of application while including transactions in which a payment card is used primarily to identify the payer when they initiate a direct debit or credit transfer transaction. Since a majority of card payments are finally settled either via a credit transfer or a direct debit transaction, the current drafting could be interpreted as including also card transactions in general. To ensure legal certainty, the ECB suggests introducing a definition of payment card and redrafting Article 7(2) of the proposed regulation, waiving direct debit transactions initiated by a card at a point of sale (see Amendment 17). In addition, Article 1(2)(c) of the proposed regulation exempts from the scope of application payment transactions through a payment card without defining the latter.</i>	
Amendment 9	
Article 2 of the proposed regulation (new definition)	
No current text.	‘“large-value payment systems” means payment systems whose main purpose is to process, clear and/or settle single payment transactions of high priority and primarily of a large amount’
<i>Explanation</i>	
<i>The suggested new Article 1(2)(b) of the proposed regulation (see Amendment 5) contains the term ‘large-value payment systems’, which should be defined.</i>	
Amendment 10	
Article 2 of the proposed regulation (new definition)	
No current text.	‘“retail payment systems” means payment systems whose main purpose is to process, clear and/or settle payment transactions, which are bundled together for transmission and are primarily of a small amount and low priority’.

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

Article 4(2) of the proposed regulation introduces the concept of interoperability between payment systems, which should only apply to retail payment systems (see Amendment 15). In view thereof, the term 'retail payment systems' should be defined.

Amendment 11

Article 2(1) of the proposed regulation

'(1) "credit transfer" means a payment service for crediting a payee's payment account, where a payment transaction or a series of payment transactions is initiated by the payer on the basis of the consent given to his payment service provider'	'(1) "credit transfer" means a payment service for crediting a payee's payment account, where a payment transaction or a series of payment transactions is initiated by the payer based on an instruction on the basis of the consent given to his payment service provider'
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Explanation

Since a credit transfer requires concrete action, which is more than mere consent on the part of the payer, its definition should be made more specific.

Amendment 12

Article 2(2) of the proposed regulation

'(2) "direct debit" means a payment service for debiting a payer's payment account, where a payment transaction is initiated by the payee on the basis of the payer's consent'	'(2) "direct debit" means a payment service for debiting a payer's payment account, where a payment transaction is initiated by the payee on the basis of the payer's consent given to the payee, to the payee's payment service provider or to the payer's own payment service provider '
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Explanation

In order to ensure consistency with other relevant secondary Union acts and for reasons of legal certainty, it is suggested to align the definition of 'direct debit' contained in the proposed regulation with the definition contained in Article 2(14) of Regulation (EC) No 924/2009 and in Article 4(28) of Directive 2007/64/EC.

Amendment 13

Article 2(7) of the proposed regulation

'(7) "payment scheme" means a set of rules, practices and standards for making payments between the scheme participants, and which is separated from any infrastructure or payment system that supports its operation across and within Member States'	'(7) "payment scheme" means a common set of rules, practices and standards agreed for making payments between the scheme participants, and which is separated from any infrastructure or payment system that supports its operation across and within Member States service providers for the execution of payment transactions '
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Explanation

To ensure consistency with other relevant secondary Union legislation and for reasons of legal certainty, the definition of 'payment scheme' contained in the proposed regulation should be aligned with the definition of 'direct debit scheme' contained in Article 2(15) of Regulation (EC) No 924/2009, taking into account the common elements of a scheme contained in the two definitions.

Amendment 14

Article 4(1) of the proposed regulation

'1. Payment service providers shall carry out credit transfers and direct debits under a payment scheme which complies with the following conditions:	'1. Payment service providers shall carry out credit transfers and direct debits under a payment scheme which complies with the following conditions:
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Text proposed by the Commission	Amendments proposed by the ECB (1)
<p>(a) its rules are the same for national and cross-border credit transfer and direct debit transactions across and within Member States</p> <p>(b) the participants in the scheme represent a majority of payment service providers within a majority of Member States.'</p>	<p>(a) its rules are the same for national and cross-border credit transfer and direct debit transactions across and within Member States</p> <p>(b) the participants in the scheme represent a majority of payment service providers within a majority of the Member States whose currency is the euro.'</p>

Explanation

See explanation to Amendment 3.

Amendment 15

Article 4(2) of the proposed regulation

<p>'2. Payment systems and, where applicable, payment schemes shall be technically interoperable through the use of standards developed by international or European standardisation bodies.'</p>	<p>'2. Retail Payment systems and, where applicable, payment schemes shall be technically interoperable through the use of standards developed by international or European standardisation bodies.'</p>
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Explanation

Article 4(2) of the proposed regulation requires technical interoperability of payment systems and payment schemes (where applicable) without defining concretely what is meant by such technical interoperability. Ideally, more precise drafting addressing the implications of the term would be warranted. In the absence of this, the ECB suggests deleting the reference to payment schemes as technical interoperability between such schemes is not regarded as operationally feasible. More importantly, retail payment systems and large-value payment systems are very different in nature from a processing, clearing, and settlement perspective, despite the fact that both types of systems can be used to process retail payment transactions. Generally speaking, retail payment systems make use of large-value payment systems for settlement of their balances. It should be made clear that interoperability can only be expected among payment systems of the same type. Demanding interoperability between retail payment systems and large-value payment systems would not only raise question of proportionality, since retail payments processed via large-value payment systems like TARGET2 and EURO1 constitute less than 1 % of the total number of retail payments in the euro area, but could also have unintended side effects from a risk and stability perspective.

Amendment 16

Article 5(1) and (2) of the proposed regulation

<p>'1. By [insert concrete date 12 months after entry into force of this Regulation] at the latest, credit transfers shall be carried out in accordance with the technical requirements set out in points 1 and 2 of the Annex.</p> <p>2. By [insert concrete date 24 months after entry into force of this Regulation] at the latest, direct debits shall be carried out in accordance with Article 6 and the technical requirements set out in points 1 and 3 of the Annex.'</p>	<p>'1. By 31 January 2013 [insert concrete date 12 months after entry into force of this Regulation] at the latest, credit transfers shall be carried out in accordance with the technical requirements set out in points 1 and 2 of the Annex.</p> <p>2. By 31 January 2014 [insert concrete date 24 months after entry into force of this Regulation] at the latest, direct debits shall be carried out in accordance with Article 6 and the technical requirements set out in points 1 and 3 of the Annex.'</p>
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Explanation

The ECB agrees that the requirements for credit transfers and direct debits should enter into force within a rather short timeframe, especially considering that SEPA credit transfer was launched in January 2008 and SEPA direct debit in November 2009. Taking into consideration the payment industry's need for sufficiently long lead times, the ECB suggests setting concrete dates, which could preferably be at the end of January 2013 for credit transfers and the end of January 2014 for direct debits.

Text proposed by the Commission	Amendments proposed by the ECB (1)
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Amendment 17

Article 7(2) of the proposed regulation

'2. Member States may allow their competent authorities to waive all or some of the requirements set out in paragraphs 1, 2 and 3 of Article 5 until [insert concrete date] 60 months after entry into force of this Regulation] for those payment transactions initiated through a payment card at the point of sale which result in direct debit from a payment account identified by BBAN or IBAN.'	'2. Member States may allow their competent authorities to waive all or some of the requirements set out in paragraphs 1, 2 and 3 of Article 5(1) to (3) until [insert concrete date] 60 months after entry into force of this Regulation] for those payment transactions initiated through a payment card at the point of sale which result in a direct debit transaction from a payment account identified by BBAN or IBAN.
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Explanation

See explanations to Amendment 8 and Amendment 20.

Amendment 18

Article 12(1) of the proposed regulation

'1. The powers to adopt the delegated acts referred to in Article 5(4) shall be conferred on the Commission for an indeterminate period of time. Where imperative grounds of urgency so require, Article 15 shall apply.'	'1. The powers to adopt the delegated acts referred to in Article 5(4) shall be conferred on the Commission for an indeterminate period of time. The Commission shall prepare draft delegated acts in close cooperation with the Eurosystem and where relevant, with the other members of the ESCB and in consultation with service providers and user representatives. Where imperative grounds of urgency so require, Article 15 shall apply.'
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Explanation

To avoid hampering the development of new and innovative payment instruments, it is of the utmost importance that the technical requirements set out in delegated acts can be amended in a smooth and efficient way. When exercising its delegated powers, the Commission should do so in close cooperation with the Eurosystem and where relevant, with the other members of the ESCB and also based on a consultation of the payments industry and other stakeholders, to ensure, inter alia, that amendments are scheduled taking into account the payment industry's business cycles.

Amendment 19

Point 1(d) of the Annex to the proposed regulation

'(d) The remittance data field shall allow for 140 characters. Payment schemes may allow for a higher number of characters, except if the device used to remit information has technical limitations related to the number of characters, in which case the technical limit of the device shall apply.'	'(d) The remittance data field shall allow for a minimum of 140 characters. Payment schemes may allow for a higher number of characters, except if the device used to remit information has technical limitations related to the number of characters, in which case the technical limit of the device shall apply.'
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Explanation

Payment schemes should not be restricted in the number of characters which can be provided, for which reason it is suggested to set 140 characters as a minimum.

Amendment 20

Point 3(f) of the Annex to the proposed regulation

'(f) Consent shall be given both to the payee and to the payment service provider of the payer (directly or indirectly via the payee) and the mandates, together with later modifications and/or cancellation, shall be stored by the payee or by a third party on behalf of the payee.'	'(f) Consent shall be given both to the payee and, directly or indirectly via the payee , to the payment service provider of the payer, (directly or indirectly via the payee) and the mandates, together with later modifications and/or cancellation, shall be stored by the payee or by a third party on behalf of the payee.'
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Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
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Explanation

The drafting in point 3(f) of the Annex to the proposed regulation could be incorrectly interpreted as meaning that existing mandates that do not explicitly address both the payee and the payment service provider of the payer are void and must be re-signed. This could be a very burdensome exercise considering the vast number of existing direct debit mandates. It should therefore be made clear, for the avoidance of any possible doubt, that consent to the payer's payment service provider may be given indirectly via the payee.

⁽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.

⁽²⁾ OJ L 319, 5.12.2007, p. 1.
