



OPINION OF THE EUROPEAN CENTRAL BANK

of 30 January 2013

on credit transfer and direct debit transactions

(CON/2013/7)

Introduction and legal basis

On 17 January 2013, the European Central Bank (ECB) received a request from the Banca d'Italia for an opinion on a draft act of the Banca d'Italia on the application of 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 euro¹ (hereinafter the 'draft act').

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 and the fifth indent of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions², as the draft act relates to payment systems. 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 of the draft act

Regulation (EU) No 260/2012 laid down the end-dates for the migration of legacy credit transfers and direct debits to pan-European schemes. The Banca d'Italia was designated as the competent authority for Italy under Article 10(1) of the Regulation. It has prepared the draft act in order to further clarify the application of the Regulation in Italy, to exercise its right to grant waivers under Article 16(3) to (7) and to include in a single act all the relevant compliance requirements under the Regulation.

The draft act includes provisions regarding: (i) definitions; (ii) scope, including the specification of the national payment services that fall within and outside the scope of the Regulation; (iii) a special regime for the 'internal payments'; (iv) waivers; (v) interoperability; (vi) information obligations of payment service providers (PSPs) to their customers; (vii) the storage of direct debit mandates; (viii) the use of BIC codes, for which no waiver is envisaged, and the establishment of databases for such codes; (ix) optional additional services; and (x) the obligation for PSPs to prepare 'migration plans'.

¹ OJ L 94, 30.3.2012, p. 22.

² OJ L 189, 3.7.1998, p. 42.

2. Relationship between the draft act and Regulation (EU) No 260/2012

The draft act contains several provisions and definitions which to varying degrees duplicate or reword provisions in the Regulation. This type of application results in unnecessary duplication and could even create inconsistencies between national and Union law, which would be avoided by instead using references to the Regulation, wherever relevant. In this respect, according to consistent case-law of the European Court of Justice, ‘in accordance with the principle of the precedence of Community law, ... directly applicable measures of the [Union] institutions ... preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible [with such Union measures]’³. Moreover, the Italian Constitutional Court has also stated that regulations should not be reproduced, integrated or executed by national legislation which may differ from, or affect the entry into force of, Union measures, or partly derogate from, or repeal, the latter⁴. Therefore, the ECB recommends replacing in the draft act any definition of a term which has already been defined by the Regulation with a reference to the Regulation.

3. Scope of the draft act

- 3.1 Article 2(1) of the draft act explicitly lists payment services which fall within the scope of the Regulation while Article 2(5) states that services other than those referred to in the preceding paragraphs are not bound to migrate. This does not appear to be in line with the Regulation, pursuant to which all credit transfers and direct debits should migrate, unless explicitly excluded by the Regulation or by a waiver. Even though the list of payment services in Article 2(1) and (2) is not exclusive, it could still create confusion, and the ECB would therefore suggest deleting Article 2(1) and (2) and amending Article 2(5). The Italian payment services that must comply with the Regulation could be specified in an annex.
- 3.2 With reference to the negative scope, the draft act should specify sufficiently detailed and reasoned grounds for not applying the Regulation to certain transactions in Italy. Moreover, according to Article 1(3) of the Regulation, the Regulation nonetheless applies only to the underlying credit transfers or direct debts, where payment schemes are based on payment transactions by credit transfers or direct debits but have additional optional features or services. Furthermore, a review of services that fall outside the scope could also be considered after some years.

4. Internal payments

‘Internal payments’, as defined by Article 1(o) of the draft act, are specifically regulated by Article 3. The ECB understands that this Article is meant to clarify in which circumstances PSPs are not under an obligation to comply with the requirement specified by Article 5(1)(b) of the Regulation. However, such a clarification is not necessary, as under Article 5(1)(b) of the Regulation, where transactions are not

³ See e.g. Case 106/77 *Italian Minister of Finance v. Simmenthal S.p.A.* [1978] ECR 629, paragraph 17.

⁴ See Italian Constitutional Court Case 183/1973 *Frontini v Amministrazione delle Finanze*, p. 7.

transmitted via a retail payments system or to another PSP, such requirement does not apply. Moreover, the definition of ‘internal payments’ in Article 1(o) of the draft Act includes, in addition to transactions which are not transmitted to another PSP, also transactions which are transmitted to a PSP which belongs to the same banking group. This widens the range of cases in which the requirement under Article 5(1)(b) of the Regulation does not have to be complied with and, hence, inappropriately restricts the scope of the Regulation. In the light of the above and for the sake of legal certainty, the ECB recommends deleting Article 1(o) and Article 3, relating to internal payments, from the draft act.

5. Waivers

- 5.1 Article 4(1) of the draft act waives for ‘*RID finanziari*’ and ‘*RID a importo fisso*’ all the requirements under Article 6(2) of the Regulation until 1 February 2016. Under Article 16(3) of the Regulation, such waiver is only possible for credit transfer or direct debit transactions with a cumulative market share, based on the official payment statistics published annually by the ECB, of less than 10% of the total number of credit transfers or direct debit transactions. Both ‘*RID finanziari*’ and ‘*RID a importo fisso*’ are defined as ‘operational variants of the RID interbank procedure’, under Article 1(v) and (w) of the draft act. As a waiver under Article 16(3) of the Regulation may only be provided to credit transfer or direct debit transactions, the definitions of ‘*RID finanziari*’ and ‘*RID a importo fisso*’ should be amended.
- 5.2 Under Article 4(2) of the draft act a waiver is granted to payment service users that initiate or receive individual credit transfers or direct debits that are bundled together for transmission. In this respect, the ECB notes that under Article 16(5) of the Regulation ‘Member States may allow their competent authorities, ... to waive the specific requirement to use the message formats specified in point (1)(b) of the Annex set out in Article 5(1)(d) for PSUs which initiate or receive individual credit transfers or direct debits that are bundled together for transmission’. However, under Article 5(1)(d) of the Regulation, the compliance with the above-mentioned requirement is to be ensured by PSPs. Against this background, and for the sake of clarity, the ECB recommends that the waiver should not be addressed to payment service users.

6. Additional optional services

The ECB notes that Article 1(x) of the draft Act defines additional optional services as non-compulsory, whereas Article 9 seems to imply an obligation to provide such services. The ECB suggests clarifying in Article 9 that the provision of additional optional services is not compulsory for PSPs. The ECB notes that, according to recital 1 of the Regulation, ‘the creation of an integrated market for electronic payments in euro, with no distinction between national and cross-border payments is necessary for the proper functioning of the internal market’.

ECB-PUBLIC

This opinion will be published on the ECB's website.

Done at Frankfurt am Main, 30 January 2013.

[signed]

The President of the ECB

Mario DRAGHI