



OPINION OF THE EUROPEAN CENTRAL BANK

of 30 November 2010

on the ratification or implementation of a Postal Payment Services Agreement

(CON/2010/85)

Introduction and legal basis

Nineteen Member States¹ agreed to sign the Postal Payment Services Agreement of 12 August 2008, as drawn up by the 24th Universal Postal Congress (hereinafter the 'Agreement'). Thus far, the European Central Bank (ECB) has not been consulted on any of the national draft legislative provisions ratifying or implementing the Agreement. Although some of the affected Member States have already ratified the Agreement, it still needs to be ratified by most of them.

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 (TFEU) and the second 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 Agreement deals with cross-border payment instruments.

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. It is addressed to the competent national authorities of the 19 Member States that agreed to sign the Agreement (hereinafter the 'relevant Member States'). The ECB anticipates that the draft legislative provisions ratifying the Agreement will be almost identical in the relevant Member States. For this reason, the ECB does not expect to be consulted on any draft legislative provisions that are addressed in this own-initiative opinion. The ECB reserves the right to make additional comments on specific national draft legislative provisions which go beyond the mere ratification of the Agreement, on which the ECB may be consulted separately.

1. Purpose of the Agreement

1.1 The Agreement obliges signatories to ensure, using best efforts, that at least one of the following four postal payment services is provided in their territories: money order in cash, outpayment money order, inpayment money order or postal transfer. The Agreement contains substantive rules which apply to paper-based postal money orders as well as to non paper-based postal payment orders, such as orders forwarded by electronic means or by any other technical means. These

¹ Belgium, Bulgaria, Czech Republic, Germany, Greece, Spain, France, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Malta, Austria, Poland, Portugal, Romania, Slovenia, Slovakia.

² OJ L 189, 3.7.1998, p. 42.

substantive rules address issues such as electronic data-interchange, the processing of postal payment orders, inquiries and the liability regime.

- 1.2 The Agreement is accompanied by regulations, as revised by the Postal Operations Council in 2008 and 2009, which set out how the Agreement is to be implemented.

2. General observations

- 2.1 The ECB notes that there is some overlap between the Agreement and Directive 2007/64/EC³ on key legal points, such as the liability of postal payment services providers or the moment of irrevocability of a postal payment order.
- 2.2 In this context, when signing the Acts adopted by the 24th Universal Postal Congress, including the Agreement, the relevant Member States made a Declaration stating that their countries will apply the Acts adopted by the Congress in accordance with their obligations pursuant to the Treaty establishing the European Community and the General Agreement on Tariffs and Trade (GATT) of the World Trade Organization. The wording of this Declaration is in line with the wording of Article 4.3 of the Treaty on European Union which states, *inter alia*, that, ‘The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.’ and that ‘Member States shall ... refrain from any measure which could jeopardise the attainment of the Union’s objectives’.
- 2.3 The ECB is of the view that the relevant Member States that have signed the Declaration are reaffirming their obligation to apply any provisions of the Agreement in accordance with their obligations under the Treaties. This would include obligations stemming from secondary legislation, such as Directive 2007/64/EC. Whilst the value of the Declaration is ultimately subject to review by the national courts, a Member State’s obligation to comply with the Treaties when entering into international obligations clearly derives from Article 351 TFEU. The Court of Justice of the European Union confirmed this in a judgement of 2009, ‘However, the second paragraph of Article 307 EC obliges the Member States to take all appropriate steps to eliminate incompatibilities with Community law which have been established in agreements concluded prior to their accession. Under that provision, the Member States are required, where appropriate, to assist each other to that end and, where appropriate, to adopt a common attitude.’⁴. Given that this obligation extends to international agreements concluded prior to a Member State’s accession to the Union, such an obligation would clearly extend to any international agreements, whether bilateral or multilateral, which were concluded following accession.

³ 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).

⁴ Case C-118/07 *Commission v Finland* [2009] ECR 10889, paragraph 28

3. Specific observations

Deletion of definition of 'postal money orders' in the Agreement

3.1 In the context of the reference in Directive 2007/64/EC⁵ to 'postal money orders' as defined by the Universal Postal Union, the ECB would like to point out that the 2008 version of the Agreement does not contain any definition of 'postal money orders', contrary to the previous version of the Agreement which was adopted in 2004 and which was in force at the time when Directive 2007/64/EC was adopted. The ECB draws attention to the fact that in order to address this issue and ensure legal certainty, national implementing measures should define 'postal money orders' instead of merely referring to 'postal money orders' as defined by the Universal Postal Union.

Incompatibilities between the Agreement and Directive 2007/64/EC

3.2 In particular, the ECB would like to draw attention to the incompatibilities between the Agreement and Directive 2007/64/EC that are set out below.

3.2.1 First, the definition of the moment of irrevocability of a payment order differs in the two legal instruments. The Agreement⁶ defines the moment of irrevocability of a payment order as the moment when the payee is paid or the payee's account is credited whereas, in Directive 2007/64/EC⁷, a payment order is irrevocable, once it has been received by the payer's payment services provider.

3.2.2 Second, under the Agreement⁸, inquiries are to be entertained within a period of six months from the day after that on which the postal payment order was accepted. The deadline and its point of departure are different in Directive 2007/64/EC which provides that notification of an unauthorised or incorrectly executed payment transaction must be made no later than 13 months after the debit date⁹.

3.2.3 Finally, the scope and the duration of liability differ. Under the Agreement¹⁰, the postal payment services provider is liable until the postal payment order has been duly paid or the payee's account credited. An exception to the liability of the payment services provider is provided for in case of delay in the execution of the services¹¹. This exception does not exist in Directive 2007/64/EC, which provides that the payee's payment service provider shall be liable to the payee for the correct execution of the payment transaction¹².

⁵ Article 3(g)(vii) of Directive 2007/64/EC contains this reference in the list concerning the negative scope of the Directive; paper-based postal money orders as defined by the Universal Postal Union are outside the scope of the Directive.

⁶ Article 2.27 and Article 6 of the Agreement.

⁷ Article 66 of Directive 2007/64/EC.

⁸ Article 19.1 of the Agreement.

⁹ Article 58 of Directive 2007/64/EC.

¹⁰ Article 20 of the Agreement.

¹¹ Article 22.1.1. of the Agreement.

¹² Article 75 of Directive 2007/64/EC.

3.2.4 The ECB considers it important that each relevant Member State ensures that the ratification of the Agreement does not jeopardise the application of the relevant national rules implementing Directive 2007/64/EC and takes appropriate measures in this respect, where necessary.

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

Done at Frankfurt am Main, 30 November 2010.

[signed]

The President of the ECB

Jean-Claude TRICHET