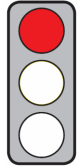


## MAIN ISSUES

**Objectives of the Regulation:** The proposed Regulation is to reduce the charges for cross-border payments and to improve payment transactions within the EU.

**Groups Affected:** Payment service providers, consumers, companies.

**Pros:** –



**Cons:** (1) The EU has no legislative competence to decree equal charges for domestic and cross-border payments.

(2) Effective competition among payment service providers is restrained, putting consumers and companies at a disadvantage.

(3) The proposal infringes the principle of proportionality.

## CONTENT

### Title

Proposal **COM(2008) 640**, dated 13. October 2008, for a **Regulation** of the European Parliament and of the Council **on cross-border payments in the Community**

### Abstract

#### ► Equal charges for payments within the EU

- For cross-border payments of amounts up to €50,000, payment service providers must not charge their customers higher fees than for “corresponding” domestic payments (Art. 3 Sec. 1 in conjunction with Art. 2 No. 1).
- Cross-border payments as stipulated by the Regulation include credit transfers, ATM (Automated Teller Machine) cash withdrawals, electronic money payments (including card payments), and direct debits, but not cheques. (Art. 2 No. 1)
- Payment service providers are mainly credit institutions, post office giro institutions and companies which are registered as electronic money institutions (“EMI”; Art. 2 No. 5 in conjunction with Art. 1 Sec. 1 of Directive 2007/64/EC).
- The “ultimate aim” pursued by the Commission is to “reduce the costs of cross border payments” (Statement of reasons for the Regulation, p. 6).

#### ► Processing of cross-border payments

- Payment service providers must inform customers of their International Bank Account Number (IBAN) and their Bank Identifier Code (BIC) (Art. 4 Sec. 1).
- Initiators of cross-border payments must submit the corresponding IBAN and BIC for the transaction to their payment service provider “upon request” (Art. 4 Sec. 2 and 3).
- Companies which accept cross-border payments must indicate their IBAN and BIC on their invoices (Art. 4 Sec. 4).

#### ► Abolition of balance of payments reporting obligations

- With regard to the reporting obligations for payment service providers in the individual Member States to report cross-border payments for statistical purposes, such obligations shall, from 1<sup>st</sup> January 2010, solely refer to amounts exceeding €50,000 (Art. 5 Sec. 1).
- Member States must completely abolish any reporting obligations for cross-border payments from 1. January 2012 (Art. 5 Sec. 2).

#### ► Complaint and redress procedures

- Member States are to set up “adequate and effective” out-of-court complaint and redress procedures for the settlement of disputes between payment service users and payment service providers regarding the rights and obligations arising under this Regulation (Art. 8 Sec. 1).
- In addition, Member States must enable payment service users and “other interested parties” to submit complaints to the competent authorities with regard to alleged infringements of the proposed Regulation (Art. 7 Sec. 1).

#### ► Application to other currencies

- The Regulation takes immediate effect for payments made in euros solely (Art. 1 Sec. 2).
- Member States which have not introduced the euro as their currency can choose whether they wish to apply this Regulation to their currency (Art. 11 Sec. 1).

## Changes Compared to the Status quo

- ▶ The proposed Regulation is to replace Regulation (EC) No 2560/2001.
- ▶ Currently, the principle of equality of charges for cross-border and domestic payments applies to credit transfers, cheques, ATM cash withdrawals and card payments, but excludes direct debit payments. According to the draft Regulation, direct debits shall be subject to the principle in future whilst cheques are to be excluded from it.
- ▶ To date, initiators of cross-border payments have been required to indicate the corresponding IBAN and BIC for the transaction to their payment service provider. In future, this is to be necessary "upon request" only.
- ▶ To date, payment service users who did not indicate the corresponding IBAN and BIC have been required to bear any costs incurred by this. This regulation is no longer valid.
- ▶ To date, Member States could oblige payment service providers to report cross-border payments exceeding €12,500. Such obligations will no longer be valid from 1. January 2012.
- ▶ To date, out-of-court complaint and redress procedures for the settlement of disputes between payment service providers and their customers have not been regulated by EU law.

## Statement on Subsidiarity

The Commission believes that the intended reduction of charges for cross-border payments can only be achieved at EU level.

## Political Background

In order to promote a single payment services market in the EU, in late 2001 the European Parliament and the Council passed the Regulation (EC) No 2560/2001 on cross-border payments in euros. The Regulation stipulates that charges for cross-border payments may not be higher than for domestic payments. Directive 2007/64/EC, which Member States are to transpose into national law by 1. November 2009, set up a harmonised legal framework for payment services in the EU. It is to facilitate access to the market for new providers by means of providing harmonised access conditions and supervisory regulations.

In order to lower the costs resulting from Regulation (EC) No 2560/2001, the European and national associations of the banking industry formed the European Payments Council (EPC) in mid-2002. Their aim was to develop the necessary procedures for a Single Euro Payments Area (SEPA). As a result, specific SEPA payment schemes were created. A SEPA direct debit is to be available from 1<sup>st</sup> November 2009. This enables direct debit payments across borders for the first time.

To date, SEPA products have almost exclusively been used for cross-border payments, but they could also be used for domestic payments. The European Central Bank, the Commission and members of the banking industry have been pushing for processing all payments within SEPA payment schemes. Despite such ongoing developments towards a single payment services market, the Commission intends to extend the principle of equality of charges to direct debit payments.

## Status of Legislation

13.10.08 Adoption by Commission  
 Open Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union and entry into force

## Options for Influencing the Political Process

Leading Directorate General:	DG Internal Market and Services
Committees of the European Parliament:	Economic and Monetary Affairs (in charge), rapporteur: Magarita Starkevičiūtė (ALDE); Internal Market and Consumer protection; Legal Affairs
Committees of the German Bundestag:	Finance (in charge); Economics and Technology; Food, Agriculture and Consumer Protection; Legal Affairs
Decision Mode in the Council:	Qualified majority (rejection at 91 of 345 votes; Germany: 29 votes)

## Formalities

Legal basis:	Art. 95 Sec. 1 TEC (Internal Market)
Form of legislative competence:	Competing legislative authority
Legislative procedure:	Art. 251 TEC (Codecision)

## ASSESSMENT

### Economic Impact

#### Ordoliberal Assessment

**The Commission is concerned that competition will become distorted if the charges for cross-border and domestic direct debit payments vary**, while credit transfers and card payments remain subject to the principle of equality of charges. It believes that the banks could use their fee structures to make companies process their payments primarily using direct debit while charging cross-border direct debit payments at a very high rate [SEC(2008) 2598, p. 11]. However, **this scenario is not very likely** since companies in competitive markets are forced to offer their products as cheaply as possible.

The Commission reveals that it also intends to use the principle of equality of charges to prevent banks from making seemingly excessive profits, and to lower user fees. It refers to the fact that payment services cause 35% of all costs, some 25% of revenues but only 9% of the profits of banks. Due to this “imbalance” the banks could charge higher fees for cross-border payment services without any regulatory intervention [SEC(2008) 2598, p. 10]. However, this argument is equally insufficient to justify the proposed market intervention. **As long as increased costs are incurred** for cross-border payments, **higher charges are justified**. If, however, costs are the same, higher fees cannot be maintained for longer periods since competitors would undercut them. For the same reason it is unlikely that a SEPA payment would be charged differently according to destination.

The Commission claims that the Regulation (EC) No 2560/2001 to be replaced has led to a decrease in charges for cross-border credit transfers and card payments. It further states that, no “substantial increase” in charges for domestic payments as compensation for potential losses from the more expensive international business has resulted from this [COM(2008) 64, p. 8]. However, this is not a valid argument since it can be assumed that the charges for domestic payment services would have decreased due to technological progress without the Regulation. Equally, the possibility that banks have covertly implemented price increases by lowering the number of free transactions per month cannot be ruled out.

**Inexpensive charges for payment services cannot be achieved on a long-term basis through interventions into the pricing of service providers.** This can only be achieved if the legal framework is set in such a way that the largest possible amount of competition is created, which allows customers to choose their preferred offer. **The competitive pressure among service providers will then lower the charges to a sustainable and cost-covering level.**

**Therefore, the principle of equality of charges** for domestic and cross-border payments **should be abolished completely, instead of extending it to direct debit payments.** The Commission is also assessing this option, but considers it a risk for the single European payments market, which is still in the process of being established [SEC(2008) 2598, p. 8]. This assessment is not comprehensible since an efficient payments market merely needs an adequate regulatory framework for payment services in addition to standardised procedures and norms to process payments. Directive 2007/64/EC set up an adequate regulatory framework for payment services. In addition, the banking industry has developed standardised procedures and norms to manage cross-border payments as part of the SEPA process. There is no need for any further intervention into the market process as proposed in the draft Regulation at hand.

#### Impact on Efficiency and Individual Freedom of Choice

**The prescribed equality of charges** obstructs competition by preventing institutions which could specialise in cross-border payments from entering the market. Unlike established banks, such payment service providers would not be in a position to subsidise their services with funds from their other business fields. This prevents institutions from entering the market and **results** in the long run **in less choice for customers**. This means that the draft Regulation is contrary to the goal of the Directive on Payment Services 2007/64/EC, which is to facilitate access to the market for new providers.

However, the medium-term obligation for Member States to remove their reporting obligations for payment service providers is to be welcomed. Information on payment transactions for statistical purposes can be obtained more easily and efficiently, and with the same quality of data, using representative company surveys. Most Member States therefore do not impose reporting obligations on payment service providers.

#### Impact on Growth and Employment

Insignificant.

#### Impact on Europe as a Business Location

Insignificant.

### Legal Assessment

#### Legal Competence

**Art. 95 Sec. 1 of the EC Treaty does not provide any legislative authority for the introduction of a principle of equality of charges for cross-border and domestic payments.** The article was created with the objective of harmonising Member State regulations in order to establish an EU-wide internal market. However, there are no national regulations which determine charges for cross-border payments. Preventive

legislative harmonisation is admissible in cases where such regulations do not exist in Member States, but where it seems likely that differing regulations will emerge. In the present case this would mean that the legislative or administrative regulations of Member States prescribing or creating differing prices for cross-border or domestic payments would have to be impending. This is clearly not the case. There is thus no need for any preventive adaptation of the law.

With regard to reporting obligations for payment services providers, the situation is different. Only some Member States have been using such reporting instruments to obtain information about payment operations, which is relevant for balance of payments statistics. For the same purpose, other Member States rely on information obtained from companies directly. The increased expense incurred by payment service providers who are subject to the reporting obligation creates competitive disadvantages in the internal market, and therefore justifies the prohibition of such obligations according to Art. 95 Sec. 1 of the EC Treaty.

#### Subsidiarity

Due to the lack of legislative authority of the EU, the issue of subsidiarity is not relevant in this context.

#### Proportionality

The **extension of the principle of equality of charges** to domestic and cross-border payments **infringes the principle of proportionality**.

With the draft Regulation, the Commission intends to create an adequate legal framework for a modern and efficient payment system within the EU. As a further goal, it states the completion of the internal market for payment services through effective competition and the equal treatment of cross-border and domestic payments. The “ultimate aim”, however, is “to reduce the costs of cross-border payments” (statement of reasons for the draft Regulation, p. 6).

It may be the case that the stipulation of equal charges will lead to reduced prices for cross-border payments. However, this does not justify the proposed massive intervention into the pricing of payment service providers. The Payment Services Directive and the voluntary SEPA initiative of the banking industry allow for an efficient payment system and low prices on a long-term basis reached by competition among payment service providers. This renders any additional interventions unnecessary.

#### Compatibility with EU Law

Unproblematic.

#### Compatibility with German Law

The draft of the Payment Services Directive (PSD) of 22. November 2008 stipulates in Art. 28 that customers and interested parties, as well as consumer protection associations may lodge complaints against payment service providers with the Federal Financial Supervisory Authority (BaFin).

The German Central Bank and the banking associations have out-of-court arbitration offices pursuant to Art. 14 of the Law on Injunctions (UKlaG). The arbitration office procedure rules (SchlichtVerfVO), which have to date been only applicable to credit transfers, are to be extended to all payment transactions according to a draft bill dated 5. November 2008. Art. 6a (SchlichtVerfVO) stipulates EU-wide cooperation. National procedures meet the requirements of the complaint and out-of-court arbitration procedures stipulated in Articles 7-9 of the draft Regulation.

According to Art. 69 of the Foreign Trade and Payments Ordinance (AWV) the obligation of payment service providers to report payments for security and interest businesses in excess of €12,500 would have to be removed. The other stipulations of the draft do not require any further adaptation of German law.

### Alternative Policy Options

**Any EU Regulation governing the charges for cross-border payments should be prevented in its entirety.** The Regulation (EC) No 2560/2001 on cross-border payments should be annulled.

### Possible Future EU Options

Not foreseeable.

### Conclusion

The Regulation should not be passed since it would mean continuing with the already misguided approach of the earlier Regulation (EC) No 2560/2001. The EU has no legislative authority to stipulate equal charges for domestic and cross-border payments. In addition, the proposed Regulation obstructs effective competition among payment service providers and would put consumers and companies at a disadvantage.