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Die Deutsche Kreditwirtschaft

Creating space for innovation in payments

Position paper on the review of the European Payment Services Directive

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The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent approximately 1,700 banks.

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Position paper on the review of the Payment Services Directive

Creating space for innovation in payments – this should be the overarching goal of the revision of the Second European Payment Services Directive[1] (PSD2). From the perspective of the German Banking Industry Committee, this can be achieved by focusing on the following guiding principles.

The market for payment services needs regulatory stability

PSD2 set the objective of promoting competition in the payments market. The key to achieving this, lawmakers believed, was to open the customer interface of banks to new third-party providers: this would encourage the development of new digital offerings for payment service users and enable the use of payment data.

Whether these underlying assumptions and their legal implementation have led to sensible results is open to question, in the view of the German Banking Industry Committee (GBIC). The one-sided obligation on account servicing institutions has given privileged treatment to certain business models and set undesirable incentives. At the same time, a fair distribution of the associated costs was prevented, so this privileged treatment has been to the detriment of banks and savings banks as well as their customers.

However, the technical infrastructures and roles established under PSD2 can be used for cooperation between account servicing institutions and other payment service providers. The initiatives at national and European level to this end are mostly still in their infancy. They nevertheless offer huge potential because economically viable and customer-friendly payment services can only be developed according to market-based principles. Lawmakers should therefore recognise the opportunities that a stable regulatory environment in the coming years can offer. The call for further one-sided obligations on account servicing institutions may sound tempting but meeting such obligations would stifle the ability of all market participants to be truly innovative.

GBIC calls on lawmakers to reflect on the successes of the first European Payment Services Directive[2] (PSD1) when reviewing PSD2: this means honing the harmonised legal framework for payment services with the needs of consumers, businesses and payment service providers in mind. It also means adjusting some of the requirements introduced by PSD2. Placing a further one-sided regulatory burden on banks while favouring certain individual business models will do nothing to foster competition or strengthen European sovereignty in the digital sphere.

Promote innovation instead of prescribing it

Banks and other payment service providers have created an efficient, secure and customer-friendly European market for payment services. There is naturally a need to further develop the services on offer to reflect advances in digitisation and the associated changes in customer demands, and this process will benefit from legislation that promotes innovation rather than

[1] Directive (EU) 2015/2366 (hereinafter PSD2)

[2] Directive 20107/64/EC (hereinafter PSD1)

steering it in a particular direction. To what extent PSD2 has succeeded in doing so is – as illustrated by the mandatory opening of the customer interface described above – a moot point at least.

Future legislation on payments, especially a revised Payment Services Directive, should take a different approach. Additional legal requirements aimed at promoting individual business models or products will set the wrong incentives, tie up much-needed resources and undermine the actual goal – namely to encourage offers that create added value for as many payment service users as possible while enabling freedom of choice and an equitable allocation of costs. We also have concerns in this context about political ideas at European level which seek to interfere with product design and pricing freedom in order to position SEPA Instant Credit Transfers as the "new normal" irrespective of actual customer demand or the associated costs involved.

Legislation governing payments should instead set a product-agnostic framework that offers civil law and regulatory certainty, without bias, for a variety of payment solutions. The review of PSD2 should take account of this, which, given the payment services covered, is more likely to succeed by stabilising and refining the current rules than by substantially expanding them.[3,4]

Adjust rules on interaction with third-party providers

We welcome the fact that PSD2 has created a framework that increases legal certainty for all concerned when using third-party providers. We nevertheless see room for improvement at least with respect to refund and liability rules and the procedure for ensuring a coherent interpretation of rules by competent authorities.

With the aim of affording particular protection to consumers, account servicing payment service providers have to make refunds without delay if the customer reports an unauthorised payment – even if the payment was initiated through a payment initiation service provider.[5] It is true that the third-party service provider co-owns the burden of proof that the payment was authorised correctly. Nevertheless, the period within which the account servicing payment service provider has to refund the payment should be extended to take appropriate account of the greater complexity of coordination between service providers where an element of doubt is involved. It would also be worth considering a mechanism whereby the payment initiation service provider is initially responsible for refunding the payment in order to set stronger incentives to jointly clarify the matter and reduce the one-sided risk borne by the account servicing institution. In addition, it would be desirable to establish a standardised framework for the joint resolution of customer complaints.

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[3] Article 75 of PSD2 on payment transactions where the transaction amount is not known in advance is a case in point: the regulated mechanism may also be attractive to ASPSP's services beyond card payments (see e.g. the initiative SEPA Payment Account Access (SPAA) Scheme) and could therefore be designed in a "product-agnostic" way.

[4] The third-party service "confirmation on the availability of funds" pursuant to Article 65 of PSD2 has no market relevance: the requirements should be deleted.

[5] Article 73 of PSD2

Both the European Banking Authority (EBA) and national competent authorities have an important role to play in interpreting issues regarding the account access via third-party providers. Both account servicing service providers and third-party providers need to have greater legal certainty and a balance has to be struck between harmonised requirements and room for national specificities. The status quo does not achieve this. The level of detail in interpretations by the EBA varies widely, as does the frequency with which they are issued. This significantly reduces planning certainty for market players and national supervisors and increases the risk of fragmented implementation instead of reducing it. What is more, there is a growing danger of supervisors' interpretations undermining principles of the directive which are not least intended to protect users of payment services.[6] We need predictability and supervisory processes that deliver stability for both market participants and their customers.

Maintain the focus on consumer needs

The Payment Services Directive has promoted the further harmonisation of legal and security requirements geared primarily towards consumers. It has become apparent, however, that applying these rules to services for corporate clients often flies in the face of market needs. This goes above all for strong customer authentication (SCA) requirements, which were developed for card payments and online banking and which, due to their narrow principles and technical specifications, are difficult to apply to modern remote communication protocols for corporate clients or M2M payments. Yet it also applies to other provisions, such as relating to transparency and information requirements or the opening of the customer interface of payment accounts, which have been established with the needs of consumers in mind. Acknowledging both their higher degree of professionalism and specific product needs which are more often than not different from consumers', a greater room to manoeuvre for corporate clients offerings seems adequate. A revision of the Payment Services Directive should hone the directive's scope and allow for a higher degree of freedom with regard to non-consumers: Here, switching from an opt-out to an opt-in regime for account-holding institutions could be adequate.

When it comes to consumers, the SCA requirements and the liability regime have demonstrably succeeded in achieving further European harmonisation and reducing fraud. The high level of protection that already existed in Germany has been strengthened, even if this required considerable time and effort on the part of institutions and customers. We recommend retaining the current rules for consumer payment services. It is important that account servicing institutions retain decision-making authority for security aspects and that no obligation is introduced to waive strong customer authentication for the benefit of third-party services. This is the only way to preserve the principle of risk management by the account servicing payment service provider, supplemented by stringent liability provisions where strong customer authentication is waived. Otherwise, fraud prevention and the protection of the payment service user could become significantly less effective.

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[6] The recent proposal by the European Banking Authority to amend Commission Delegated Regulation (EU) 2018/389 [on] regulatory technical standards for strong customer authentication and common and secure open standards of communication runs counter to the requirements of lawmakers for the treatment of personalised security credentials.

It is also clear in this context that effective fraud prevention must be complemented by measures beyond payment law: the principle that an unauthorised payment is the starting point for refund and liability requirements is appropriate but not a suitable means of dealing with problems with the underlying transaction or damage as a result of social engineering. This requires the provision of even better customer information and financial education, which should be considered a task for the banking industry and society as a whole, as well as even more effective law enforcement. In contrast to this, measures proposed at European level such as a requirement for the payer to be able to verify the name of the payee would not serve a useful purpose: In addition to high implementation costs and a significant reduction in the speed of payments, this would raise sensitive data protection questions and, last but not least, would only be able to address a small proportion of fraudulent actions and scenarios.

Future-proof rules on payment service contracts and information requirements

Lawmakers have set special rules to reflect the special nature of payment service contracts and the associated information obligations. This is appropriate in order to ensure transparency, legal certainty and at the same time flexibility for payment service users and banks when payment services are offered.

However, these rules, including those in related legislation, are now so numerous that their real suitability for consumers is called into question. The Payment Services Directive, the Regulation on cross-border payments in euros[7] and the Payment Accounts Directive[8] set different transparency obligations, some of which are inconsistent with one another or redundant, and define different time frames and reference points. We would recommend a complete overhaul of the information regime for payment services. The new system should, first, resolve contradictions and reduce the scale of information and, second, better reflect the methods of obtaining information offered by the digitalisation of customer channels. We believe this could be achieved by a two-tier model: basic information could be classed as "push" information, which would be actively communicated by the payment service provider. Other features or contractual terms would be considered "pull" information made available to users by the payment service provider on its website.

Furthermore, the relationship between the PSD and other European legislation (such as the Unfair Contract Terms Directive[9] and the General Data Protection Regulation) should be clarified to the effect that matters covered by the PSD are regulated exhaustively. This will avoid contradictory overlaps between EU legal norms. The PSD specifies a set of clear and practical conditions for changing payment service framework contracts, for example.[10] Yet

[7] Regulation (EU) 2021/1230

[8] Directive 2014/92/EU

[9] Directive 93/13/EEC

[10] Article 54 of PSD2

recent European case law has shown that these are completely invalidated by their cumulative application.[11] [12]

Take account of the complexity of third-country payments

Financial institutions worldwide are working on increasing the efficiency of cross-border payments. Projects such as the migration of all SWIFT messages to the ISO 20022 standard or the linking up of regional clearing systems can play an important role in this regard. It would be misguided, however, to assume that stricter European payment rules could support this objective: the heterogeneity and complexity of payments where a third country is involved remain far greater than for payments within the European internal market – the economic, technical and regulatory conditions are not comparable. The Payment Services Directive should therefore continue to focus on payments in euros within the European Economic Area and the flexibility necessary for handling foreign payments should be retained. European policymakers should use international forums to advocate further harmonisation of regulatory requirements and the promotion of market initiatives.

Counter growing complexity in a sensible way

The increasing linking of payment services with other digital services and functions offers numerous opportunities – but also goes hand in hand with greater complexity and interaction with other legal requirements. Finding a sensible form of interplay between payment law and other laws, some of which are still in the drafting phase, is becoming more and more challenging. Greater focus on the principle of "same services, same risks, same rules" could prove helpful here.

We believe that the foundations laid for opening the customer interface to payment accounts and the experience thus gained offer a valuable basis for developing a future Open Finance Framework: it is in the interest of all financial institutions to protect and utilize their investment in APIs and, where appropriate, allow them to be used for further applications beyond payments. This also goes for the security procedures and solutions established for strong customer authentication.

A major objective of PSD2 was to make payment data usable while protecting the rights of payment service users. To further strengthen payment service users' legal certainty and protection, the current requirements should be refined in a way that recognises the different spheres of responsibility of account servicing institutions and third-party providers (payment initiation services and account information services) and makes it clear that specific payment law rules take precedence over the general requirements of the GDPR.

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[11] CJEU C-287/19 – DenizBank https://curia.europa.eu/juris/liste.jsf?language=en&jur=C%2CT%2CF&num=C-287%2F19

[12] Cf also the ruling (available in German only) of the Federal Court of Justice of 27 April 2021 (XI ZR 26/20): http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=118834&pos=0&anz=1

Finally, it is essential in light of further EU legislation and the new Eurosystem oversight framework[13] to avoid duplicate regulation in areas such as mobile wallets. The harmonisation recently achieved between the revised Regulation on payments statistics in the Eurosystem and the reporting of fraud data under PSD2 is an example of how important synergies can be achieved through cooperation between supervisors and by harmonised legislation. Given ever higher regulatory costs and their impact on the payment industry's ability to innovate and offer services to customers, this is an important aspect.

[13] Eurosystem oversight framework for electronic payment instruments, schemes and arrangements (PISA framework)