HDE
Handelsverband Deutschland

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HDE position on legislative package to regulate payment systems (MIF and PSD II)

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I. Introduction

The German Retail Federation – HDE welcomes the legislative package to regulate payment systems which was published on 24 July 2013. A reform of the framework conditions is urgently needed in order to help European consumers take advantage of the opportunities offered by the Single Euro Payments Area and rapid technological developments. The proposed legislation will help Europe's payments market to embrace innovation, in doing so benefitting businesses and consumers and allowing innovative European companies to become trailblazers in developing new payment models.

II. The main challenges for the retail sector

The adoption of the regulation on interchange fees and the revision of the payment services directive in the Single Market must take absolute priority ahead of the parliamentary elections in 2013. Moreover, the regulations have to come into effect as soon as possible because this is crucial for the further development and for creating robust framework conditions. If possible, the MIF regulation should be separated from the legislative package and separately should be treated with high priority. Based on the nature of the regulation as immediately effective legislation and the concrete content on dealing with interchange fees, the regulation can stand alone and be adopted separately.

III. Suggestions for improvement for the regulation on interchange fees (MIF regulation)

With the suggested improvements, the MIF regulation would be streamlined. Significant implementation measures could be omitted and deadlines could be shortened. The most important points are as follows:

1. Extending the scope:
    a. By including all cards of a four party system, the necessity to differentiate the card type of a system is eliminated.
    b. Differentiating between card-based payments and other types of payments is not necessary. Designing the regulation in a technology neural manner results in a simplification by extending it to include all payments except for bank transfers and debiting.
    c. By including three party systems, evasion strategies would be eliminated and the regulation would be simplified.
2. Generally banning interchange fees:
    a. A general ban on interchange fees would definitely lead to simplification and clarification. At least for debit payments this option should be used.
3. Committing issuers to provide freely readable IBAN codes on all payment instruments: This measure would promote competition by offering an alternative processing method via debiting (basic payment services, see explanation on point IV (PSDII)).

Proposal for improvement in detail:

Article 1 (Scope)

Not limiting scope to ‚card-based transactions'
Article 1 paragraph 1 uses the term ‚Payment cards transactions'. In order to highlight the technical neutrality of the regulation, a term should be used which highlights this fact. However, the definition of the card-based payment transaction should at least clarify that a physical card is not necessary in order to process a card payment. Therefore, we recommend that the term is redefined in a technologically neutral way and is extended to apply to all types of payment services in order to also cover payments on the internet.
Proposal: Generally all payment transactions - which are not a bank transfer or debiting in the sense of article 2 of the regulation (EU) 260/2012 - should be covered by the regulation.

Not limiting territoriality
Article 1 paragraph stipulates that the regulation applies to payment card transactions which are processed within the European Union and for which the payment service provider of the payer as well as the payment service provider of the payee are located within the EU. This would mean that payments which are being processed by a payment service provider located outside of the EU and that cards which have been issued in non-European countries - e.g. used by tourists - would not be covered by the regulation.
Proposal: The scope of the regulation should cover all transactions which are processed within the region of the European Union.

No exceptions for commercial cards
All cards of four party systems - especially commercial cards - should be included in the scope. There are neither economic nor technical reasons for treating these types of cards any differently. In many cases it is impossible for retailers to identify them. An obligatory labelling of the cards in question would result in significant effort for card issuers and would require long transitional periods to replace the cards. Therefore, including all types of cards in the scope would be preferable. This would also prevent evasion strategies of the affected business models to the card types which are currently excluded in the proposal.
Proposal: Deleting of section 3 a)

No exception for three party systems
Three party systems should be included in the scope. Mechanisms need to be determined in order to apply the cap of the maximum fixed fee to consumer and commercial cards of three party systems. Should three party systems be excluded, there would be the risk of card issuers changing to a business model which does not fall within the scope of the regulation.
Proposal: Deleting of section 3 c)

Article 3 (Level of interchange fees)

Caps on fixed maximum fees as compromise to a general ban on interchange fees
The proposal would set caps on interchange fees at 0.2 % for debit and 0.3 % for credit cards. These figures have been taken from the commitment proposals given by the schemes

themselves in the context of the competition cases. Hence, they are not based on proven cost data and do not reflect the current best practice of debit scheme in certain countries some of which have significantly lower or no fees at all. Moreover, the fees are calculated 'ad valorem' irrespective of the technical processing cost of each transaction. Hence, the current proposal is a compromise solution. Accordingly, we are proposing the following improvements:

Proposal for debit payments:

A MIF-free electronic debit card application should be available to all citizens by generally eliminating interchange fees for debit cards. This is an economically practical solution which is established and proven in several member states. This proposal also in line with the principle that all citizens should have access to a basic electronic debit facility 'free of charge or for a reasonable fee' contained in the proposed directive on access to basic bank accounts[1]. Further, this option is supported by the European Commission's own Impact Assessment published with the proposal, which states:

> *"….banning interchange fees for debit cards, whether or not credit cards interchange fees are capped, appears to be the most beneficial to all stakeholders."*[2]

As an alternative, any fee should be set as a maximum fixed cap in line with the best practice at national level (with provision for a proportionate fee for micro-payments).

Proposal for credit card transactions:

The proposed capped fees for credit cards transactions should be lowered proportionally to the reduced fees for debit transactions. As a general ban of interchange fees does not seem enforceable, we recommend a restriction of the fees to 0.2 % of the sales amount.

Article 4 (Implementation for domestic transactions)

The current proposal would implement cross-border caps within 2 months of adoption of the regulation (article 3) and national caps within 2 years. Yet the greatest burden of MIFs is felt at national level. We propose that the caps should come into force earlier at a national level. Moreover, the replacement of the existing cards with 'identifiable' cards would not be necessary, if all types of cards would be included in the scope. Hence, implementation periods could be reduced.

Proposal: Shortening the transitional period from two years to six months after the regulation comes into force.

Article 5 (Ban on circumvention)

Article 5 aims to prevent circumvention by stipulating that any net compensation received by an issuing bank be treated as an interchange fee. This would not however prevent card schemes from increasing fees charged to acquirers (licensing, authorisation etc.) which would then be passed on to retailers and therefore consumers. The regulation should be tightened to prevent such fee increases.

Proposal: Clarification that the acquirer should only be charged the fixed maximum amount as stipulated in the regulation.

[1] Proposed Directive COM(2013) 266, Chapter IV

[2] Commission Impact Assessment SWD(2013) 288 final, p 193.

Article 8 (Co-badging)

Paragraphs 18 and 19 stipulate that at the point of sales the payer decides which brand to use when the payment machine can offer a choice. It should be clarified at this point that payment machines are configured to the specifications of the retailers which depend on the particular environmental conditions. For example, for the required check-out processing speed it might be necessary for the retailer to have certain default settings. Retailers should be able to determine if and how they present the choice of brand to their customers should one card contain more than one brand. Paragraph 19 should be amended so that payees can authorize the limitation of the choice or rather that they can commission this with their service provider.

Proposal: Changes to paragraph 18: 'When it a choice between different brands of a payment instrument should be possible when using a payment machine, the choice should be coordinated between payer and payee.'

Changes to paragraph 19: Addition to the sentence: *'(…), unless the payee determines this.'*

Article 10 (Honour All Cards Rule) / Card identification

Generally article 10 could be deleted, should the scope be changed to include all payment instruments of a provider (deleting article 1 paragraph 3a).

Should however certain cards or payment instruments be excluded from the scope, the optical and electronic identification is necessary. The design of payment instruments should significantly differ from regular instruments, especially the brand/logo should be changed.

The proposed rule for commercial cards and additional fees is based upon the assumption that retailers know whether they are dealing with a consumer or a business card or rather a card of a three party system and where the card was issued. In fact, currently this is not technically possible in many cases. The necessary information for the identification of a cards are contained in the so-called BIN numbers and product type codes which are exclusively known to card system operators and banks. Retailers – especially in online or telephone trade – do not have this information at their disposal. Therefore, they cannot determine how many or if additional fees have to be allocated (see proposal PSD II, article 55 paragraph 3 and 4). Retail outlets exist in a great variety of formats and the majority of card terminals in the EU cannot determine the correct amount of the additional fee even though commercial cards are marked. Card identification is not absolutely necessary if all card types of a brand are being included in the scope of this regulation.

IV. Proposal for improvement for the directive on payment services in the internal market (PSD II)

HDE welcomes the proposed directive. However, we have a few comments which we will detail below. These comments are not conclusive in their nature; we reserve the right to make further proposals after an in in-depth assessment.

Electronically readable IBAN

(Amendment article 58)

In order to give retailers the opportunity to process card-based payments via the SEPA direct debit scheme, the customer account number (International Bank Account Number, IBAN) should be electronically readable on all account related payment instruments (especially credit and debit cards) and should be recognizable for terminals through the primary account number (PAN).

Justification: This obligation of the issuers to make their payment instrument electronically readable results in a variety of opportunity for competition in the payment market. A basic payment service could be established which is based on debiting. With the help of IBAN, a point of sale payment system could be created on the basis of direct debiting which could be processed independently of the underlying (card) payment system. This means that an EU-wide alternative is available which payer and payee can agree upon.

Proposal: Amending article 58 with a new paragraph 5 and changing the heading: *'Access to and use of payment account information by third party payment service provider and* ***payment service providers at POS****.*

> ***5. Issuer of debit cards have to guarantee that the account information (IBAN) of a payer is stored on the payment instrument in electronic form so that third party payment services at POS can use this information to initiate payments.'***

Payment Initiation and Account Information Services

(E.g. article 4 paragraphs 32 and 33, article 39, 40, 58, 59)

The addition of payment initiation and account information services is expressly welcomed. This opens up opportunities for competition on every level of the payment process.

It is our understanding that the Commission has the intention to introduce a fee for the passing on of information on account balances to third party payment providers. This should be highlighted.

Moreover, it should be prevented that the bank keeping an account should limit or prevent access of a payment initiation or account information service. Should the access to the account be dependent upon the agreement of the bank, there could be a risk that the goal of the payment services directive to create more competition cannot be reached any more.

Proposal: Clarification of the ban of fees for the provision of account information and the ban of refusal of account information to account information services.

An account information service should not be classified as a payment service as the information connected to the account details is not directly connected to a payment process. The obligations for the account information services therefore do not have to be rated equal to those of a payment institute. If an account information service is not connected to a payment service, a withholding of equity is not necessary for example.

Proposal: Changing the definition of account information service in article 4 paragraph 33: 'Account information service means a service where consolidated and user-friendly information is provided to a payment service user on one or several payment accounts held by the payment service user with one or several account servicing payment service providers'

An account information service does not have to be directly connected to a payment process according to article 4 paragraph 5 and be followed by a payment. Should the account holder give the service provider the permission to obtain certain account information – e.g. the availability of a certain payment amount – the service provider keeping the account has to provide this information according to article 59 paragraph 2 and 3, even if no payment process it connected to this.
Proposal: Deleting the words '(…) upon receipt of the payer's payment order.' from article 59 paragraph 2.

It is important from a retail perspective that in this context the rules for account information and payment initiation services are not limited to electronic information paths (online queries). Likewise, also classical card payments have to be included in order to increase competition between providers at POS. Hence, HDE calls for the amendment in PSD II in article 58 as described above (electronically readable IBAN).

Article 55 (Charges)
As the charges which have been set in the proposed MIF regulation represent a compromise, the payee should not be prohibited from passing on the related costs. This will encourage competition.

Often the costs of a payment process are not clear in detail at the time of processing the payment. For example, when a payee has to pay a surcharge for not reaching certain number of transactions the end of the accounting period, according to a narrow interpretation of article 55 paragraph 3 sentence 2, he is not allowed to pass on these costs in advance. In addition, especially in retail outlets it is hardly practicable to communicate the various payment methods with their differing costs – which are partly dependent on the sales amount - to the payer at the time of payment. Hence, a wording for sentence 2 should be found which allows for approximated values for the passing-on of charges.
Proposal: Deleting of article 55 paragraph 4. Amending paragraph 3 sentence 2: 'Any charges applied shall, however, not exceed the foreseen costs borne by the payee for the use the specific payment instrument.'

Article 87 (Authentication) in connection with article 66 (Liability for unauthorised payment transactions)
Currently we have no detailed knowledge on stronger customer authentication for electronic payment processes. The provisions for the EBA guidelines were supposed to define exceptions for this but are not available thus far. In particular it is not known which payment processes should be registered.
Proposal: Deleting article 87 and readdressing the issue when more details for the stronger authentication are available. Alternatively: Detailed list of the payment processes which should be registered with article 87.

Article 67 Paragraph 1 (revocation of direct debit)
According to article 67 paragraph 1 section 4, the eight week long right for revocation of the payer should be fixed by law, but this should only apply until the payer has received the ser-

vice or consumed the goods. From an HDE perspective, this approach is generally welcomed and corresponds with the understanding of commodity trading against payment.
Within this context, we recommend the reform of article 64 in the case of refund after the deadline defined in article 68.
Proposal: Should the deadline for unconditional return according to article 68 paragraph 1 be expired, but the notification of an unauthorized payment process still be possible according to article 63 paragraph 1, the payment service provider of the payer does not decide the legitimacy of the authorisation. Requirement for this is that the payee can provide documentation to prove that the underlying transaction with the agreement on the payment method was legal. In this case the documents are passed on to the payer who can decide on the further legal process. Should the payee not be able to provide the relevant documentation, the payment process is deemed unauthorised.

Explanation: The bank of the payer is generally not able to determine, whether the payer has authorized the payee to collect an amount. The payment service provider is hardly able to determine the authenticity of a signature based on a faxed copy of the mandate. Therefore, the payer should receive certain relevant documentation on the business process for assessment, after which he can take further measures in order to reverse an unauthorised payment transaction. The relevant process for this could be standardised. With this proposal the requirement for authorisation according to the standards of the payment service providers could alternatively be done via other legally protected contracts. This would create more competition as the final decision on authorisation processes of payment transactions would not be solely imposed upon the bank.