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Comments of the Zentraler Kreditausschuss on the Working Document for the Preparation of an Impact Assessment on a Proposal for a Directive concerning a New Legal Framework for Payments in the Internal Market (issued by the European Commission's Internal Market Directorate-General on 17 February 2005 for discussion with PSMG and PSGEG)

We greatly welcome it that the European Commission has backed up its proposal for a Directive to create a New Legal Framework for payments in the Internal Market by drafting an impact study and presenting it for discussion as a working document. May we comment on the working document as follows:

1 General remarks

Approach

We believe that the impact study should contain, first and foremost, an assessment of the consequences of the proposed Directive for payment services in the Internal Market (legal framework). This means examining all of the planned provisions individually to ascertain whether, with the aim of improving payments in the Internal Market in mind, they are necessary, appropriate and reasonable. The present working document has a different focus, however. Its purpose is more to justify the proposed Directive in general than to describe and assess its actual impact. What is missing in particular is an assessment of the legal and economic implications of each individual provision of the proposed Directive. The draft study fails to identify any potentially negative consequences for customers and banks, predicting instead an entirely positive impact. The objections to the various drafts of the Directive raised by banks and Member States during the consultation process, e.g. the lack of a level playing field, have not been fully taken into account, nor have the conflicting goals of the proposed Directive – lower prices/more competition on the one hand and further obligations for providers/a higher level of consumer protection on the other hand – been highlighted. The draft study also overlooks the fact that many provisions of the proposed Directive also affect the relationship between providers, thus ignoring the

highly important issue of whether certain rules governing the relationship between users and providers do not – like in the Directive on Credit Transfers – require supporting rules for the relationship between providers (e.g. regulation of right of redress between providers in the case of strict liability in the user-provider relationship in order to achieve a liability regime based on fault).

Methodology

There are serious doubts as to whether the methodology applied in the draft study is suitable for analysing the impact of the proposed Directive systematically and stringently. For instance, uncommented texts, studies and figures from different sources are used as the basis for conclusions. In particular, the comparison between countries and between domestic and cross-border scenarios is questionable quality-wise. Countries with a low volume of payments are, for instance, portrayed as efficient without any further explanation. Moreover, the draft study ignores the fact that domestic payment sectors have developed differently and that different cultures continue to exist. This leads to incorrect generalisations, particularly as even third countries such as the US, Canada or Australia, which have a much different payment culture from that in Europe, are cited by way of comparison. Finally, it is not taken into account that 99 per cent of all payments are still national payments.

Account of the need for regulation in the banking sector

When outlining the need for regulation, the draft study ignores the fact that, although the banking industry basically supports the European Commission's plans to improve the legal framework, it did not actually call for the proposed Directive in its present form. The European banking industry's primary objective is creating a Single Euro Payment Area (SEPA), in which cross-border payments in euros in the European Union will be as efficient, safe and inexpensive as national payments in euros. This does require improving and expanding existing European payment rules. As regards the depth of regulation, however, priority should be given to self-regulation and observance of market principles. The Commission's regulatory approach unfortunately overshoots the mark. This is made particularly clear by the Commission's idea to go further than the actual regulatory objective by including even third countries and third-country currencies in the Directive.

Description of the status quo in the Internal Market payments sector

If what the study says about the status quo (see in particular the findings set out in Chapter IV.2) were accurate, all we would have in the European Union would be a completely underdeveloped payments sector. This assessment is incorrect, however – also from a user standpoint. Although, compared with domestic payments (99 %), the demand for cross-border payment services (0.5 %) is only a fraction of total demand (the remaining 0.5 % being accounted for by worldwide payments), banks offer highly efficient and – measured against the transaction volume – inexpensive payment services in the form of the standard EU credit transfer and card payment facilities. Despite the low demand, the European banking industry intends for political and strategic reasons to create the Single European Payment Area in the long term. It is therefore regrettable that the results of self-regulation achieved to date, such as the widespread introduction of IBAN and BIC, the Credeuro Convention (execution time of three banking days) and the Interbank Convention on Payments (crediting of the full transfer amount), are not taken fully into account in the study. Moreover, the study fails to properly acknowledge the positive impact of the EU Directive on Credit Transfers on the efficiency of cross-border payments.

Analysis of the supply and demand side

The study ignores the fact that the demand for cross-border payments is already covered by appropriate products and services offered by the banking industry (credit transfers, ATM withdrawals, POS [debit card, credit card]). The findings of the study presented in Chapter IV.2 do not accurately reflect the actual range of payment services on offer and the market failure implied as a result is puzzling and unfounded. It is no justification for regulatory intervention on the scale envisaged in the proposed Directive. In this context, the assessment of, for example, the need for regulation outlined in the grid entitled *Main impacts of the proposal* in Chapter VII.2 is also one-sided and incomplete. This line of reasoning could be used to justify any regulation and thus to more or less replace a market economy with a planned economy, as legislators could regulate everything better to the benefit of all concerned.

Impact on market prices

Bearing in mind that European legislators have no direct price-regulating powers, the study's central argument that the legal framework could help to generally lower prices for payment services is highly surprising. This effect, which is put forward as the justification for the proposed Directive, is not substantiated sufficiently in the study. For example, the

anticipated cost savings of 50 billion euros for corporate customers is not completely payments-related, as no allowance is made for the fact that electronic presentment and electronic payment are two separate processes and that only the latter is connected with payments.

The study does not look either at the experience made with EU Regulation 2560/2001 in regard to price and cost structures. Although since this Regulation cross-border payments have been available for a few years now at the same prices as for national payments, the still varying domestic prices in the individual Member States mean that the Regulation cannot be seen as an incentive for payment service providers to reduce costs. The approach adopted in the Regulation has in fact reinforced the existing differences between national payment systems in the European Union.

The study also ignores the negative effects that over-regulation has on prices. If payment service providers were, for example, to be required to bear the much higher liability risks envisaged in Article 26 (3) and Article 32 (3) of the proposed Directive (version 5.0), this would affect their costs, which ultimately have to be borne by those using their services.

Comparison with the current legal situation

The study does not deal properly with the current legal situation following the EU Directive on Credit Transfers and EU Regulation 2560/2001, so that the change of approach in the proposed Directive (version 5.0), which ought actually to be highlighted and assessed in any appraisal of the legal consequences, remains hidden. This is illustrated particularly well by the following two examples:

Unlike the present EU Directive on Credit Transfers, the proposed Directive provides for – strict – liability on the part of the payer’s provider for receipt of the payment by the payee, whereas receipt of the payment by the payee’s provider has been sufficient up to now. This constitutes a complete break with the current liability rules for payments that have also been contained so far in the EU Directive on Credit Transfers, and with the separation of payment transactions and account management. Neither the reason nor the need for this change of approach are explained in the study.

Unlike the EU Directive on Credit Transfers and EU Regulation 2560/2001, the proposed Directive is not to be limited to the euro area, EU currencies or to a ceiling amount of 50,000 euros. The study neither provides any convincing reasons for this serious step nor explains the negative implications.

2 Detailed remarks (by way of example)

Although large parts of the study require commenting on, doing so would make the present response unreasonably long. Given that the Zentraler Kreditausschuss has already commented in detail on the Commission's communications and its five drafts of the Directive, our detailed remarks are therefore confined to a few points selected by way of example.

2.1 Chapter IV: Status quo

- The status quo is not correctly reported. There are already efficient credit transfer and card payment systems in place in the European Union. Recent developments in the field of credit transfers since mid-2003 are, for example, ignored.
- As regards the competitive situation, the study also contains errors, like on page 57 for example: German car-maker Volkswagen has not become a competitor for banks – it actually set up a bank with a full-fledged banking licence some years ago.

2.2 Chapter V: Five main objectives

We can basically support the five objectives described in Chapter V. At the same time, the planned Directive should facilitate, not obstruct, the provision and use of payment services. Opening up the market to new competitors must not lead to any discrimination of existing providers (level playing field). When pursuing the aim of protecting consumers, a balanced approach should be adopted that takes into account the actual interests of consumers without unfairly burdening providers.

2.3 Chapter VII: Impacts expected from the different options

- Opening up the market to new competitors must not lead to any distortion of competition due to differing prudential requirements for payment service providers (banks and non-banks). The risk assessment conducted for payment service providers without a banking licence does not justify the introduction of a new category of licence with lower prudential requirements. It is, for example, ignored that the fifth draft of the Directive does not stipulate any ceiling amount and that considerable risks may arise as a result. What is more, the effect of the new licensing regime on

banks is not examined, although it is conceivable that banks would spin off their payment services and only provide them in future under the third type of licence.

- Harmonised payment service information makes sense, although the requirements should be confined to what is essential (quality instead of quantity).
- The principle of strict liability is unreasonable, as a provider cannot control and assess all risks, particularly if these lie outside his sphere of influence. The intended full cover system, under which the user – if at all – bears only minor risks, has a “free-rider effect” and thus leads to higher economic costs that are at odds with the simultaneously pursued aim of lowering prices. The insurability argument advanced in the study ignores the fact that only limitable risks can actually be covered and that, ultimately, users have to bear any higher costs incurred on the provider side.
- The approach aimed at regulating all payment instruments uniformly is understandable. However, the study lacks an assessment of the impact that the new provisions of the legal framework would have on, for example, existing national direct debit schemes. Such an assessment is essential, as otherwise there is the danger that existing, smoothly functioning schemes may have to be abolished, without anything being put in their place. In Germany, for example, particularly efficient and customer-friendly direct debit schemes have evolved over a period of several decades. Abolishing these, e.g. the *Einzugsermächtigungslastschriftverfahren* and the *Abbuchungsauftragslastschriftverfahren*, would have fatal consequences. Unfortunately, the study does not address this problem.
- Also missing is an assessment of the consequences of extending the scope of the proposed Directive to cover third countries and third-country currencies. In particular, the reservations expressed by the banking industry about broader liability and risks are not acknowledged sufficiently.
- The passage on electronic payment instruments, e.g. on ATM systems, implies that such systems are inherently unsafe. The study concludes that the associated risks are regulated unfairly to the detriment of customers. This is wrong, as technical security reports have repeatedly demonstrated. It also fails to examine the consequences of any one-sided exemption from liability for customers, e.g. the resulting lack of incentive for them to handle electronic payment instruments carefully.

2.4 Chapter VIII: Results from stakeholder consultations

The concerns expressed by the banking industry and the Member States are not reported in full.