

# ZENTRALER KREDITAUSSCHUSS

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**ZKA comments on the "Proposal for a Regulation of the European Parliament and of the Council on information on the payer accompanying transfers of funds" (COM (2005) 343 final) of 25 November 2005  
- English translation of the German comments of 20 January 2006**

On 26 July 2005, the Commission of the European Communities presented a proposal for a Regulation on information on the payer accompanying transfers of funds. ZKA has already submitted its corresponding detailed comments on 27 September 2005. On 25 November 2005, the Council submitted its amended Proposal for a Regulation which has now been formally adopted by the ECOFIN Council on 6 December 2005. Although a number of our comments have already been incorporated into said Council document, we still feel the need to specifically point out various individual aspects which, in our view, might endanger smooth implementation of the Regulation:

We generally welcome the existing plans to transpose into Community law Special Recommendation VII of the Financial Action Task Force on Money Laundering along with its corresponding Interpretative Note so as to ensure uniform implementation across the European Union.

Here, however, allow us to point out that changes in the banking industry's existing IT systems usually require 12 to 18 months implementation time. This lead time shall and must be taken into account when defining implementing deadlines for a Regulation which, after all, will take immediate effect after its adoption and which will require profound changes in the technical architecture of banking systems.

Having said that, especially Article 8 and 9 of the Proposal for a Regulation give rise to serious concerns over potential dangers for the overall effectiveness of cross-border transfers:

### **Article 8 – Detection of lack of presence of information on the payer**

Art. 8 of the Council document imposes upon the payee's payment service provider the obligation to have effective procedures in place so as to detect a lack of presence of information during transfers of funds. Here, we feel an essential need to point out that – due to technical constraints – examinations can and must only be limited to verifying that mandatory data fields have been filled with information. Yet, any plausibility check as to the content of such information is virtually impossible. Neither man nor machine can possibly determine whether, for instance, the address of a payer located in a third country speaking a foreign language has been entered correctly and whether such information is complete. We therefore suggest the following language for Art. 8:

*„The payment service provider of the payee is required to detect that fields within the messaging or payment and settlement system used to effect the transfer in respect of the information on the payer have been filled in accordance with the characters or inputs admissible within the conventions of that messaging or payment and settlement system. This shall apply to:*

- (1) transfers of funds where the payment service provider of the payer is situated in the Community and the European Economic Area, in which case the information specified under Article 6 is required;*
- (2) transfers of funds where the payment service provider of the payer is situated outside the Community and the European Economic Area, in which case, complete information on the payer as referred to in Article 4, or, where applicable, the information specified under Article 13, paragraph 2 is required and*
- (3) batch file transfers where the payment service provider of the payer is situated outside the Community and the European Economic Area, in which case complete information on the payer as referred to in Article 4 is required only in the batchfile, not in the individual transfers bundled therein.”*

## **Article 9 – Transfers of funds lacking information on the payer**

In practice, implementation of Art. 9 would have particularly serious repercussions. Article 9 stipulates that, in the event of incompleteness of the payer data for incoming transfers, the bank of the payee would either have to return the transfer or it would have to request the complete data (Art. 9, paragraph 1). Should the payment service provider deliver incomplete data sets on several instances, then each and any payments received from such payment service provider shall be rejected or the business relations with it shall be terminated (paragraph 2).

This provision turns a blind eye to idiosyncrasies in international payment practices and it also fails to take account of the scope for discretion offered under FATF Special Recommendation VII and the accompanying Interpretative Note; in effect, this will virtually lead to a standstill of cross-border payments to certain countries:

- Under No 4, the Interpretative Note of FATF Special Recommendation VII to be implemented by the present Proposal for a Regulation envisages a *de-minimis* threshold of EUR/USD1,000. Below this threshold, payer countries shall not be obligated to identify the payer of the transfer and do not have to forward such data along with the transfer. This means that transfers of up to EUR/USD1,000 from countries using the threshold regime will generally be deemed ‘incomplete’. Any query filed with the payer bank would be to no avail since there has been a (legitimate) failure to record the complete set of information. Pursuant to Art. 9 paragraph 1 of the Proposal for a Regulation, these transfers would thus always have to be returned.
- In the final analysis, after repeated entries of such (legitimately) incomplete transfers, Art. 9 paragraph 2 of the Proposal for a Regulation stipulates that no payments at all shall be accepted from countries which use the *de-minimis* threshold rule (including, e.g. the US). Payment transactions with these countries would thus have to be discontinued within the foreseeable future. Such a consequence would appear neither in the interest of EU citizens nor of consumers. In a day and age of increasingly integrated markets, this is not acceptable with a view to international trade and commerce, either.

Against this backdrop, we urgently request that the credit transfer Regulation be synchronised with FATF Special Recommendation VII. At least for payments received,

the *de-minimis* threshold of EUR/USD1,000 contained under No 4 of the Interpretative Note on FATF Special Recommendation VII needs to be adequately reflected by Art. 9 of the EU Regulation. Especially the provisions on the action that needs to be taken upon identification of incomplete payments should not exceed the scope of action laid down under FATF Special Recommendation VII.

We therefore suggest the following language for Art. 9:

- „1. If the payment service provider of the payee situated within the Community and the European Economic Area becomes aware that information on the payer required under this Regulation is missing or incomplete when receiving transfers of funds over an amount of 1000 EUR/USD, it shall either reject the transfer or ask for complete information on the payer. In all cases, the payment service provider of the payee shall comply with any applicable law or administrative provisions relating to money laundering and terrorist financing, in particular, Regulations (EC) No 2580/2001 and (EC) No 881/2002 and Directive 2005/60/EC, as well as national implementing measures. This should be notwithstanding the contractual arrangement and contract law that governs such business relationship.*
- 2. Where a payment service provider systematically fails to supply the required information on the payer, the payment service provider of the payee situated within the Community and the European Economic Area should consider restricting or even terminating its business relationship with these financial institutions.*

*The payment service provider of the payee situated within the Community and the European Economic Area shall report that fact to the authorities responsible for combating money laundering or terrorist financing.”*

Beyond this, we feel the need for further comments on the following provisions contained in the Proposal for a Regulation:

#### **Article 1 – Subject matter / Article 2 - Scope**

Pursuant to Art. 1 and Art. 2, the Regulation’s scope shall include "transfers of funds". In our understanding, however, collection processes by direct debit and cheques are not meant to be covered hereby. In order to clarify this, we propose to consistently replace

"transfers of funds" by "wire transfers". This would also be in line with the *ratio legis*, the subject matter and the language contained in FATF Special Recommendation VII.

## **Article 6 – Transfers of funds within the Community**

Since it has to be assumed that the Regulation will also be adopted in States that belong to the European Economic Area, namely Liechtenstein, Iceland and Norway, this privileged treatment should also apply to payments to and from these States. This would also be in line with the regulatory scope of EU Regulation 2560/2001 which, following a decision by the joint EEA-Committee, shall similarly apply to cross-border payments from all states of the European Economic Area. We therefore suggest the following amendment for the heading as well as the first paragraph of Art. 6:

*„Transfers of funds within the Community and the European Economic Area*

*By way of derogation from Article 5(1), transfers of funds, where both the payment service provider of the payer and the payment service provider of the payee are situated in the Community and the European Economic Area, shall only be required to be accompanied by the account number of the payer or a unique identifier allowing the transaction to be traced back to the payer.”*

In order to adequately reflect the different holiday and banking day arrangements within different Member States, we feel it would be helpful to change the specification of the deadline under Art. 6 paragraph 2 from "working days" into "banking business days". Furthermore, we feel that the banking days of that state should be applicable where the payment service provider of the payer is based. This way, for instance, also Christmas Eve could be taken into account. Although in Germany, the 24<sup>th</sup> of December is not a national holiday, it still is a day where banks are closed. We therefore propose the following amendment for Art. 6 paragraph 2:

*„However, if so requested by the payment service provider of the payee, the payment service provider of the payer shall make available to the payment service provider of the payee, complete information on the payer, within three banking business days of receiving that request; this period refers to the banking business days observed in the country in which the payment service provider of the payer is situated.”*

### **Article 13 – Technical limitations**

Just as payee's banks, intermediate banks have no means for verify the completeness or plausibility of payer data (cf. our earlier comments on Art. 8). Hence, also in this regard, the Regulation should not exceed the provisions contained in FATF Special Recommendation VII. We therefore suggest that Art. 13 No 2 be deleted without any replacement thus effectively limiting the duties of intermediate payment service providers to forwarding and keeping the received data sets.