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Comments of the Zentraler Kreditausschuss (ZKA)* on the European Commission Proposal of 13 October 2008 for a Regulation of the European Parliament and of the Council on cross-border payments in the Community (COM [2008] 640)

** The ZKA 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-sector 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 around 2,300 banks.*

Table of contents

1	General observations	2
1.1	Continued interference with freedom of choice in pricing policy and discrimination of banks in countries with low payment charges	2
1.2	Expansion of the price parity requirement to direct debits sends a wrong signal	2
1.3	Thresholds for balance of payments reporting obligations.....	3
2	Specific remarks on individual articles of the Proposal.....	3
2.1	Article 1 – Subject matter and scope.....	3
2.2	Article 2 – Definitions	4
2.3	Article 3 – Charges for cross-border payments and corresponding national payments.....	5
2.4	Article 4 – Measures for facilitating the automation of payments.....	7
2.5	Article 5 – Balance of payments reporting obligations.....	8
2.6	Article 7 – Complaint procedures	8

1 General observations

The European Commission's Proposal for a Regulation of the European Parliament and of the Council on cross-border payments in the Community is designed to amend the current EU Regulation 2560/2001 on cross-border payments in euro as of 1 November 2009.

In the banking industry's view, the Proposal contains both positive and negative aspects.

1.1 Continued interference with freedom of choice in pricing policy and discrimination of banks in countries with low payment charges

The requirement set in EC Regulation 2560/2001 on cross-border payments in euro for banks to establish price parity between cross-border payments in the EU and national payments is a regulatory fallacy. This requirement constitutes interference with banks' freedom of choice in pricing policy. The present Proposal actually exacerbates the situation, as the price parity principle is to be expanded in future to also cover direct debits and possibly further payment instruments.

Experience so far shows that the price parity requirement in Article 3 of the Regulation has tended to cement rather than eliminate the different price levels in payment transactions across the EU. It thus prevents free European competition via prices. In Germany, where charges for national payments are comparatively low, euro cross-border transfers, for example, have to be offered at a price that does not cover the actual cost of such a payment. In countries with high charges, application of the price parity principle can, on the other hand, be offset better economically.

1.2 Expansion of the price parity requirement to direct debits sends a wrong signal

The 2001 Regulation is confined to card payments and credit transfers. Now direct debits are also to be covered by the price parity requirement because the European banking industry is planning to introduce, as of November 2009, the new SEPA direct debit scheme. This sends the banking industry a wrong signal, since it was not least because of the weight of expectation from European policymakers that it created this new pan-European direct debit scheme, investing considerable resources in the process. Submitting direct debits as well to a price parity requirement

- is unjustified because there is no market failure requiring regulatory action,
- reflects an unwarranted distrust of banks,
- undermines banks' motivation to offer the new SEPA direct debit scheme, and
- prevents pricing based on market principles.

Moreover, a SEPA direct debit is not comparable with any existing national direct debit instruments. To ensure EU-wide acceptance, it is much more complex, e.g. with regard to processing and the associated data retention, the time when payment is collected, the size of message formats and mandate management. This leads to higher operating costs for banks. Stipulating price parity between a national direct debit and a SEPA direct debit would therefore be a wrong approach.

If direct debits are nevertheless to be included, the price parity requirement must, however, be limited to the respective type of direct debit. For the SEPA direct debit, this would mean that its price should not be allowed to differ depending on whether payment is made nationally or within the EU. On the other hand, different pricing of SEPA direct debits and national direct debits should remain possible, as these types of direct debit differ considerably in terms of the processing workload involved.

1.3 Thresholds for balance of payments reporting obligations

The removal of reporting obligations (see Article 5, paragraph 2) is to be welcomed. These have always been incompatible with the idea of a payments area without barriers in the EU. It would only be logical – also in the light of the fact that the Payment Services Directive (PSD) does not set any limit on the value of payments – to completely dispense with such reporting thresholds in future.

2 Specific remarks on individual articles of the Proposal

2.1 Article 1 – Subject matter and scope

Compared with the Commission's draft of May 2008, it is to be welcomed that Article 1, in conjunction with Article 3, makes clear that the requirement to establish price parity between cross-border payments and national payments only covers transactions in the same currency. Article 1 should, however, continue to refer primarily to the euro, with the current opt-in rule

in Article 9 (2) of the Regulation being retained for other EU currencies. Only euro payments can be processed across borders just as efficiently and inexpensively as they are at national level. For other EU currencies, there is no comparable cross-border infrastructure. What is more, compliance with the price parity requirement would no longer be possible in every case where currency conversion is required.

Although paragraph 3 does make clear that interbank payments for own account are excluded, further clarification to the effect that the price parity requirement under Article 3 only applies to the relationship between service provider and user should be incorporated in order to facilitate application of the Regulation in practice.

2.2 Article 2 – Definitions

2.2.1 *General*

The definitions should generally correspond as closely as possible to those used in Article 4 of the PSD. A definition of the term “payment” has not yet been included – it may also mean “payment transaction” (see, for example, the use of the term “payment” in Article 1 or Article 3). Further definition of the term “payment” is therefore required. It should also be made clear that only cashless electronic transactions continue to be covered, as only these can be processed cost-efficiently like comparable automated national payments.

2.2.2 *Article 2 (1) – “Cross-border payments”*

The term “cross-border payments” is vital for identifying which types of payment are covered by the Regulation. Compared with Regulation 2560/2001, the approach now adopted is much more abstract, which may lead to unnecessary interpretation problems. Like in the PSD, there should be an exhaustive list of the categories and types of payment that are covered and those that are excluded. With regard to the description of the categories and types of payment covered by the Regulation, the approach adopted in the definition in Article 2 (1), whereby only “electronic payment transactions” would be covered, is to be welcomed. Consequently, only credit transfers, direct debits and card payments would fall under the Regulation, whilst cheques and bills of exchange, for example, would be excluded.

2.2.3 Article 2 (2) – “Payment instrument”

As already discussed in connection with implementation of the PSD, the term “payment instrument” is misleading. It would be better to use the term “payment authentication instrument”. To improve understanding of the Regulation in practice, it would be advisable to drop the misleading term “payment instrument” currently used. Under present use of this term in banking practice, it would cover credit transfers, direct debits and card payments, for example. However, what is meant is not the transaction as such but the instrument or scheme provided to the payer which allows the payer’s service provider to authenticate the payment order. Such an authentication instrument can, for example, be an online banking PIN, plus online banking TAN, or a payment card. Furthermore, it is questionable whether this term is actually of any relevance for the further provisions of the Regulation or whether it can be dropped.

2.2.4 Article 1 (9) – “Charges”

Unlike in the currently applicable version of the Regulation, the term “charges” also covers any charges “indirectly” linked to a payment. Such an extension of its scope is unclear, as it could also cover, for example, charges – permissible under the PSD – for returning payments or account-keeping fees that have to be separated from payments. This would be inappropriate in both cases. Such an extension of the scope of this definition is not covered by the declared thrust of the Regulation either. It is explained (see Section 5 “Detailed explanation of the Proposal”) that, apart from the three main changes, the substance of the Regulation is to remain much the same. Consequently, the definition of charges contained in the currently applicable Regulation should be retained.

2.3 Article 3 – Charges for cross-border payments and corresponding national payments

The expansion of the price parity requirement to direct debits in Article 3 following the introduction of the new abstract term “cross-border payments” in Article 2 (1) is inappropriate for the reasons outlined in sections 1.1 and 1.2. above. As regards the wording of Article 3, may we also point out the following:

- *Payment currency as point of departure for price parity*

Unlike the existing legal situation, there is no explicit reference in this Article to the “same currency” equivalence criterion – meaning that only payments in the same currency are to

be treated identically. Although such reference is already contained in Article 1, it should be included in Article 3 as well to make the directly applicable Regulation easier to understand for legal practitioners. In addition, this would also make clearer that the point of departure for price parity is in every case the currency of the payment order. Price parity should be geared neither to the possibly differing account currency of the payment service user nor to the possibly differing interbank settlement currency. Unlike Article 4 of Regulation 2560/2001, there is no mention of the fact that, where the order currency and the account currency differ, additional fees may well be charged for conversion without any breach of the price parity rule.

- *Differentiation according to types of payment*

Article 3 (1) correctly restricts the price parity requirement to “corresponding” national payments. This is highly important so that a distinction can be made not only between the categories of payment (credit transfers, direct debits, card transactions), but also between the types of payment within these individual categories. For example, a distinction must be made in the “card transactions” category between debit cards and credit cards, as these types have different characteristics (debit card payments are usually charged immediately to an account, whilst – depending on the underlying terms and conditions – credit card payments are debited periodically on an agreed date). In the “direct debits” category, a distinction must be made at present between the types SEPA basic direct debit, the SEPA corporate direct debit and the German direct debit *Einzugsermächtigungslastschrift/ Abbuchungsauftragslastschrift*). Thus, while a cross-border and a national SEPA basic direct debit are comparable and therefore also have to be priced identically, there is no such equivalence between the cross-border SEPA basic direct debit and the German *Einzugsermächtigungslastschrift*. To make this clear, the “type of payment” should be included as an equivalence/defining criterion in recital 6.

- *Defining criteria*

The approach in Article 3 (2), according to which the payment service provider, when assessing the charges for a cross-border payment, identifies the corresponding domestic payment, is welcomed. This means that responsibility for product design remains with the provider. With regard to recital 6 in this connection, clarification as follows is required:

- The “degree of automation” criterion is appropriate, but should be supplemented by “complexness of processing” and “important procedure and processing criteria”. It should be made clear – like in Article 5 of Regulation 2560/2001 – that equivalence

presupposes “STP-capability” of the payment order, as only then can the payment be processed using an efficient, low-cost infrastructure. For credit transfers and direct debits, this means that users must use the IBAN and BIC so that these payments can be processed further on an automated basis. Otherwise the processing costs are so high that the price parity requirement would lead to results at odds with operating costs.

- The “legal and contractual basis” should also be included as an additional equivalence criterion, the reason being that this basis is highly important for the processing costs, since it leads to special obligations for the service provider (examination obligation, point at which payment is collected) and special rights on the part of the user (right to a refund, deferral of payment), for example.
- It should be made clear that purely national payment types are not covered by the price parity requirement. This would ensure that no inappropriate equivalence is established between the German *Einzugsermächtigungslastschrift* and the SEPA direct debit.
- The criteria contained in Article 3 (2) of the May 2008 draft version of the Regulation – “customer relationship” and “in general, the level of service provided to the customer” – should be retained, as they are relevant equivalence/defining criteria.

Clarification is also needed with regard to the wording “corresponding payments [...] within the Member State *from which the cross-border payment originates.*” It cannot be a question here of where the originating customer has his residence or current place of abode. What matters is the location of the branch of the payment service provider instructed to execute the payment transaction.

2.4 Article 4 – Measures for facilitating the automation of payments

2.4.1 General

Generally speaking, the arrangements to facilitate automated payments processing are to be welcomed, as technical banking requirements are thus taken into account. However, a connection needs to be made with the price parity requirement in Article 3, as only if payments are processed on an automated basis can the price parity requirement, which is still viewed critically, be implemented.

2.4.2 *Article 4 (1)*

It should be made clear that the obligation in paragraph 1 is fulfilled by indication of the IBAN and BIC in accordance with paragraph 2. Also, it is unclear whether this provision is not already covered by the PSD.

2.4.3 *Article 4 (3) and (4)*

Paragraph 3 stipulates – actually as a condition for the price parity requirement – that the payer must indicate the payee’s IBAN and BIC. In practice, however, the phrase “upon request” has repeatedly led to interpretation problems. Given that compliance with the price parity requirement is only possible if STP-capability exists, indication of the IBAN and BIC must be a condition for the price parity requirement. The qualification “upon request” should therefore be dropped. The same goes for paragraph 4. For the same reasons, the qualification “Where appropriate with regard to the nature of the payment transaction concerned” in paragraphs 3, 4 and 5 should also be dropped. What is more, the wording is unclear and would thus cause interpretation problems.

2.4.4 *Missing or incorrect information*

Unlike Article 5 (2) of Regulation 2560/2001, there is no mention of the fact that additional fees may well be charged if information is missing or incorrect. However, such mention is appropriate and should be retained.

2.5 *Article 5 – Balance of payments reporting obligations*

The removal of reporting obligations under paragraph 2 is to be welcomed. However, reporting obligations should be removed immediately and not only with effect from 1 January 2012, as they are no longer consistent with a single European market for payments. Paragraph 3 contradicts the first two paragraphs and should therefore be deleted. ECB statistics aside, the data in question should, if at all, be obtained directly from payers and payees.

2.6 *Article 7 – Complaint procedures*

An amendment of the present Article 7 of the Regulation is unnecessary, as in Germany at any rate there are no deficits with regard to monitoring and enforcement of compliance that require

additional rules. It is also questionable whether a directly applicable Regulation should interfere so heavily with national dispute-settlement and redress regimes.