

# The European Payments Regulations Landscape – where are we headed?

In a time when one regulatory initiative has been completed and another one makes its appearance, the payments industry - faced with such a plethora of legislative measures - is trying to live up to the challenge. This client briefing discusses the key European regulatory initiatives and provides a summary of their purpose and projected timetable. It appears that the themes of supporting market integration, enhancing competition, fostering innovation and improving transparency feature in almost every initiative; revealing that the European Commission (the “**Commission**”) does have a sense of direction.

## In what direction?

The publication of the Green Paper on Card, Internet and Mobile Payments (COM (2011) 941) (the “**Green Paper**”) in January 2012 provided a clear indication of the Commission’s policy priorities in the growing market of mobile payments (“**m-payments**”) and electronic payments (“**e-payments**”). Aimed at promoting security, transparency, choice, competition and innovation, the Commission has been looking at various practices and developments, including multilateral interchange fees (“**MIFs**”), cross-border acquiring, co-badging, access to information on the availability of funds and to settlement systems, payment security, price transparency, interoperability between service providers and governance issues.

The Green Paper also notes that despite the fact that the banking/card sector and mobile network operators have initiated discussions on cooperation and standardization, tangible results have yet to be achieved and several important gaps remain; standardization work in the context of m-payments should ensure full interoperability between m-payment solutions. Unlike m-payments, the

Commission notes that the lack of common standards is less of an issue for e-payments. In its Feedback Statement, the Commission explains that certain actors are of the view that standards should emerge as a result of market forces rather than through regulatory intervention. In contrast, some other respondents, in particular retailers and terminal manufacturers, have enunciated a request for the establishment of common standards, as a means of fostering investment in new payment channels. A key area where respondents have identified a need for standard-setting is that of online banking security. It should be noted that any standardization exercise requires significant stakeholder involvement; and – as if this is not complicated in itself - one needs to further consider the potential competition implications that such an effort may trigger. Another significant aspect of the Green Paper relates to the question of whether non-bank actors should be allowed access to bank account information in order to check whether such accounts contain adequate funds. The Commission is of the view that access should be opened up to more actors, in order to minimise barriers to entry, subject to certain safeguards.

With all these issues remaining open, the industry is waiting for the Commission’s next move – it is expected that next steps will be announced in the coming months, with a view to adopting the relevant proposals in due course, probably by the first quarter of 2013.

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As noted in the Green Paper, the e-commerce market has been growing incrementally in recent years. Accordingly,



the Commission’s proposal for a Regulation on electronic identification and trusted services for electronic transactions in the internal market (COM (2012) 238/2) was adopted on 4 June 2012. This is aimed at providing a legal framework for electronic signatures, electronic seals, time stamping, electronic document acceptability, electronic delivery and website authentication and is based on the objectives identified by the Legislation Team (eIDAS) Task Force set up by the Commission. This Regulation builds on the current eSignature Directive (Directive 1999/93/EC), which despite having brought a degree of harmonization to practices across Europe, has not managed to procure the requisite conversion of Member States’ legal frameworks. The proposal permits mobile phone signatures, mandates higher accountability and requires mutual recognition between various national e-identity systems. It is expected that this will give rise to controversy from a privacy and data protection perspective and will be scrutinized by the European Parliament and the Council of the European Union; the process will probably take between one and two years.

## Heading for a revision – the PSD and e-money

Most actors in the payment services industry will be excused for feeling that as soon as they began grappling with the



maze of the Payment Services Directive (Directive 2007/64/EC) (the “**PSD**”), ‘PSD2’ appeared. Article 87 of the PSD requires the Commission to present a report on the implementation and impact of the PSD, together with proposals for its revision, by 1 November 2012. Based on a call for tender to conduct a study on the application of the PSD and Regulation (EC) 924/2009 issued by the Commission in 2011, it seems likely that the Commission will address the following items:

- The question of whether to extend the scope of the PSD to payment transactions where at least the payer’s payment service provider (“**PSP**”) is acting from within the community (so-called ‘one leg’ transactions).
- The question of how to achieve greater consistency in respect of the treatment of the ‘negative scope’ exemptions of the PSD across different Member States and how to improve the operation of the passporting regime.
- The application and functioning of the liability regime in relation to unauthorised payment transactions.

- The treatment of different categories of payment actors, including Electronic Money Institutions<sup>1</sup> and the prospect of updating the Payment Institution (“**PI**”) definition to encompass such actors.
- The Commission is contemplating amending the current prudential requirements for PIs, in particular with regards to their ‘own funds’ requirements and safeguarding requirements (so-called ‘ringfencing’).

The publication of the Commission’s proposal for PSD2 was projected for November 2012, with a view to taking the dossier forward in the first half of 2013; it has been suggested that the PSD2 proposals will be published in April 2013, although it should be noted that this has not been officially confirmed.

### Plain sailing to security and transparency?

On 11 April 2012, the Commission adopted its Report on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the “**AML Directive**”). In a Feedback Statement published in July 2012 the proposed alignment of the

relevant provisions to the revised Financial Action Task Force (“**FATF**”) standards and their risk based approach were welcomed. Some contributors expressed their preference for a consultation of interested parties affected by Regulation (EC) No 1781/2006 on information on the payer accompanying transfers of funds that came into force in January 2007, which lays down the rules pursuant to which PSPs have to send information on the payer throughout the payment chain, aiming to ensure the traceability of funds. Two areas that have sparked debate relate to the provisions on beneficiary information and on national arrangements with respect to third countries. The Commission is currently working on a legislative proposal to revise the AML Directive, which is scheduled for adoption before the end of 2012.

The Commission has also been working on the terrorist financing tracking system (“**TFTS**”). On 13 July 2011 the Commission published a communication entitled “a European terrorist finance tracking system: available options” (COM (2011) 429 final) which examined the scope for establishing the TFTS in the European Union and set out the different options for establishing such a system. A European TFTS would contribute to the fight against terrorism and its financing within the European Union and would limit the amount of personal data transferred to third countries. The system should, in the Commission’s view, be subject to European data protection principles and legislation. A follow up review is expected to be carried out during 2012.

In addition to security, transparency has also been on the Commission’s agenda. Accordingly, the Commission tabled the European Market Infrastructure Regulation (Regulation (EU) No. 648/2012) (“**EMIR**”), which introduced various reporting obligations and information requirements on OTC derivative contracts entered into by European financial and non-financial

<sup>1</sup> This links into the e-Money Directive (2009/110/EC), that should have been transposed by Member States by 30 April 2011. The Commission is looking at whether other issues in respect of electronic money can be addressed in the PSD2 context.

firms. EMIR also contains provisions on capital requirements, organizational rules and conduct of business standards for CCPs. It mandates clearing for certain standardized contracts and exchange of collateral as a risk mitigation technique and includes provisions aimed at reducing operational risk. Unlike its US counterpart, EMIR does not exempt FX derivatives from its scope, leaving such products exposed to margin requirements. Moreover, there is a risk that different collateralization requirements for FX derivatives in the two jurisdictions could result in regulatory arbitrage. EMIR came into force on 16 August 2012 but prior to its rules being fully implemented, the European Supervisory Authorities have to develop the relevant technical standards; with most of these nearly completed, it is expected that the new standards will be fully adopted by the Commission by the end of 2012.

Moreover, on 28 September 2011, the Commission unveiled a proposal for the implementation of a financial transaction tax ("**FTT**") (COM (2011) 594 final) as of January 2014, to be levied on all securities and derivatives transactions executed in the European Union. The proposal captures a broad range of products, including FX derivatives, and provides for the imposition of a 0.1 percent tax on share and bond trades and a 0.01 percent tax on other transactions. The Commission's reasoning for this proposal is that "through the FTT, the financial sector will properly participate in the cost of rebuilding Europe's economies and bolstering public finances...without posing undue risk to EU competitiveness". The Commission envisages that the tax will assist in preventing fragmentation in the internal market for financial services and in creating appropriate disincentives for transactions that do not enhance the efficiency of financial markets. On 23 May 2012 the European Parliament publicly supported the proposal, but some Member States (most notably the UK) have expressed reservations. France and Germany have recently launched a new bid to resurrect the proposal and there

are indications that some Member States will proceed with the FTT using the enhanced cooperation procedure.

### Through the governance canal

In February 2012, the European legislator adopted Regulation (EU) No 260/2012 (the "**SEPA Regulation**") which defines 1 February 2014 as the deadline in the euro area for compliance with certain of its core provisions. Recital 5 of the SEPA Regulation states: "The Commission should...review the governance arrangements of the whole Single European Payments Area ("**SEPA**") project before the end of 2012 and where necessary make a proposal. This review should examine, *inter alia*, the composition of the European Payments Council (the "**EPC**"), the interaction between the EPC and an overarching governance structure, such as the SEPA Council, and the role of this overarching structure." The SEPA Council, which brings together representatives from both the demand and supply sides of the payments market, including the EPC, was established by the Commission and the European Central Bank (the "**ECB**") in June 2010. Its aim is to promote the realisation of an integrated euro retail payments market by ensuring proper stakeholder involvement at a high level and by fostering consensus on the next steps towards the full realisation of SEPA.

In a meeting on 25 June 2012, SEPA Council members exchanged views on options regarding the institutional aspects of the revised SEPA governance structure. Considerations aimed at establishing a cooperative model, under the auspices of the SEPA Council, with a clear mandate and possibly a yearly reporting mechanism towards the relevant European institutions, seem to be prevailing in the ongoing debate. Fitting the role of the SEPA Council within the current European infrastructure and institutional map will certainly be a challenging task. The outcome of the ongoing review process and the proposal of the Commission and the ECB for a revised SEPA governance structure,

expected to be finalised by the end of 2012, will be monitored with interest by all market participants.

The SEPA Regulation also redefines the process governing the evolution of the SEPA Credit Transfer and SEPA Direct Debit Schemes. Accordingly, the schemes will have to comply with the technical requirements detailed in Article 5 and in the Annex to the SEPA Regulation. The SEPA Regulation empowers the Commission to amend the technical requirements set out in the Annex to the Regulation through delegated acts. Delegated acts are a new addition to the EU decision-making landscape. They were introduced by the Lisbon Treaty, which came into force in December 2009 and more specifically by Article 290 of the Treaty on the Functioning of the European Union ("**TFEU**"). Whereas European legislation is adopted by the EU legislator, Article 290 TFEU allows the Council of the European Union and the European Parliament to delegate the power to adopt non-legislative acts to the European Commission (as executive body). By amending the technical requirements for credit transfers and/or direct debits the Commission can *de facto* take over the role of scheme manager.

The European Regulation on Cross Border Payments (Regulation (EC) No. 924/2009) introduced certain provisions aimed at promoting financial integration in a SEPA environment, building on the foundations laid by its predecessor (Regulation (EC) No. 2560/2011). Specifically, the Regulation ensures that banks cannot impose different charges for domestic and cross-border payments or ATM withdrawals within the European Union and imposes price parity requirements on direct debits. The rules on the reachability obligation in respect of cross-border direct debit collections and MIFs are also clarified, in line with the SEPA Regulation.

Amid the critiques levied against the two-year old European Banking Authority (the "**EBA**") and in light of the SEPA governance review, one cannot help but

wonder whether the institutional map of European payments industry bodies is about to change - again. It remains to be seen whether the Liikanen Group Report, published on 2 October 2012 will undermine the EBA's role in European banking regulation. The report, which was completed following a public consultation earlier this year, was prepared by an expert group tasked with determining whether, in addition to ongoing regulatory reforms, structural reforms of EU banks would strengthen financial stability and improve efficiency and consumer protection. The Commission's proposals are envisaging a leading role for the ECB in the new supervisory system and may result in the EBA losing control over the Eurozone countries' banking sectors. The Commission plans on putting the new system in place in 2013.

### **A basic payment account for everyone?**

"Having a bank account should be made a legal right for the 10 percent of European Union citizens who currently do not have one" proclaimed the Economic and Monetary Affairs Committee in May 2012, calling on the Commission to table appropriate legislation by January 2013. On 18 July 2011, the Commission published a Recommendation (2011/442/EU) with the aim of enabling consumers to open and use a basic payment account with a set of essential payment services, free of charge or at a reasonable charge, regardless of their place of residence in the European Union. The Commission also published a follow-up report on 22 August 2012 (SWD (2012) 249 final), providing a factual overview and assessment of the current measures in Member States; this focuses on the right to open and use an account, the features of such account and any associated charges. In light of the fragmentation revealed, and noting that to date eleven Member States have no relevant measures in force, the Commission "is assessing the measures taken at national level and may propose

any necessary action or measure in order to ensure that the objectives of the Recommendation are met in full throughout the Union".

### **Coming full circle - the consumer aspect**

The protection of consumers holds clearly a prominent position in the Commission's agenda, as enunciated in the Green Paper. The Directive on Consumer Rights (Directive 2011/83/EC) published on 22 November 2011, is aimed at achieving a real business-to-consumer internal market, striking the balance between consumer protection and enterprise competitiveness. The Directive will be transposed by 13 December 2013 and the rules will be applied in all Member States by 13 June 2014. The proposal is aimed at eliminating hidden charges and costs on the internet, as well as surcharges for the use of credit cards and at increasing price transparency by forcing traders to fully disclose the total costs of products. Moreover, the Directive will ban pre-ticked boxes on websites and will enhance consumer protection in respect of digital products. Customers will be given a 14 day period during which they will be able to withdraw from a contract and will get better refund rights. This will facilitate cross-border trading via the codification of a single set of core rules for distance contracts and off-premises contracts, creating a level playing field and reducing transaction costs for cross-border traders.

In parallel, the Commission has embarked on a review of certain aspects of the Consumer Credit Directive (Directive 2008/48/EC). On 14 November 2011 the Commission adopted the Directive on Credit Agreements (Directive 2011/90/EU) and in May 2012 it published a set of Guidelines in relation to costs and the Annual Percentage Rate of charge (SWD (2012) 128 final) which provide comprehensive explanations on how to delineate the total cost of credit.

Following a survey on attitudes to data protection, the Commission has also decided to update its privacy laws. Accordingly, in January 2012, the Commission published a communication (COM (2012) 9 final), which provides for the introduction of a single set of rules on data protection for the whole European Union. The Commission's proposals include a policy communication setting out the Commission's objectives and two legislative proposals: a Regulation setting out a general framework for data protection and a Directive on protecting personal data processed for the purposes of prevention, detection, investigation or prosecution of criminal offences and related judicial activities. The Commission is focusing on stronger enforcement, by introducing heavy sanctions and provisions shifting the burden of proof. Specifically, companies will have to become more accountable, by notifying their clients of any theft of personal data, by making clear rules on the re-use of data and by making transfers of such data to other providers less complicated. Moreover, the Commission is looking at giving clients the ability to have their personal data deleted in certain circumstances. The regulator is also seeking to enhance transparency and to ensure the applicability of the European rules when personal data is processed outside Europe, aiming to improve consumer trust. Many actors in the payment services industry will be greatly impacted by these measures; among those affected, some are concerned about the joint liability provisions, about the profiling regime (that could capture fraud monitoring and prevention activities, triggering express consent requirements) and about the need to introduce a lighter regime for 'anonymised' and 'pseudonymised' data. The Commission's proposals are being considered by the European Parliament and the Council of the European Union; the Regulation will be enforceable in all Member States two years after its adoption.

## What's New?

- The **Green Paper 'Towards an integrated European market for card, internet and mobile payments'** was published in January 2012. It is expected that the Commission will announce next steps in the coming months, with a view to adopting possible related legislative proposals probably by the first quarter of 2013.
- The **proposal for a Regulation on electronic identification and trusted services for electronic transactions in the internal market** was published in June 2012. The legislative process leading to the adoption of this Regulation will probably take between one and two years.
- The **Regulation (EU) No. 260/2012 establishing technical and business requirements for credit transfers and direct debits in euro** and amending Regulation (EC) No. 924/2009, that came into force on 30 March 2012, tasks the Commission to **review the SEPA governance arrangements** and to table a proposal by the end of 2012.
- The **provisions concerning multilateral interchange fees for direct debits of Regulation (EC) No. 924/2009 on cross-border payments in the Community are amended** in line with Regulation (EU) No. 260/2012 establishing technical and business requirements for credit transfers and direct debits in euro.
- The **Payment Services Directive is being reviewed** by the Commission. Article 87 of the PSD requires the Commission to present a report on the implementation and impact of the Directive, together with proposals for its revision by November 2012.
- The Commission is currently working on a legislative proposal, expected to be adopted by the Commission before the end of 2012, to **revise the Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing**.
- The **European Market Infrastructure Regulation** came into force on 16 August 2012. Prior to its rules being fully implemented, the European Supervisory Authorities had to develop the relevant technical standards. With the majority nearly completed, it is expected that the new standards will be fully adopted by the Commission by the end of 2012.
- In September 2011, the Commission **tabled its proposal for the implementation of a financial transaction tax** to be levied as of January 2014. In May 2012, the European Parliament publicly supported the proposal, but Member States have expressed diverging views.
- Following a public consultation in May 2012, a high level expert group **published its final report on reforming the structure of the EU banking sector (Liikanen Group Report)** in October 2012. The Commission plans on putting the new regime into place in 2013.
- The **Commission Staff Working Document: National Measures and Practices Regarding Access to Basic Payment Accounts** was published in August 2012. According to the Working Document, the Commission "is assessing the measures taken at national level and may propose any necessary action or measure in order to ensure that the objectives of the Recommendation are met in full throughout the Union."
- The **Directive on Consumer Rights will apply from June 2014** in all Member States. Further regulatory changes result from **the review of the Consumer Credit Directive** and the **adoption of the Directive on Credit Agreements**.
- The **Commission Communication: "Safeguarding Privacy in a Connected World – a European Data Protection Framework for the 21st Century"**, published in January 2012, envisages the introduction of a single set of rules on data protection for the whole of the European Union. Related proposals for legislative action are currently being considered by the European Parliament and the Council of the European Union.

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