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1. **ATM business in the PSD**
2. **Access to payment schemes**
3. **Surcharging in the PSD**

1. ATM business in the PSD

The treatment of independent ATM operators is an important issue raised in the EU Commission website informing on the implementation of the PSD.

The PSD rules in Art. 3 (o) rules that the following services are exempted activities: “Services by providers to withdraw cash by means of automated teller machines acting on behalf of one or more card issuers, which are not party to the framework contract with the customer withdrawing money from a payment account where no other payment service is provided.”

The somewhat convoluted wording has never been easy to interpret but the Q&As of the European Commission provide an interpretation that seems clear enough.

“The intention is to exempt independent ATM service providers, e.g. typically ATMs in supermarkets, nightclubs, etc. All other ATM providers which are either the card issuer (that means, 'party to the framework contract with the customer withdrawing money from a payment account') or provide other services as listed in the annex, however, do fall under the PSD.” (Question 13.3)¹

Our comment:

The interpretation of the EU Commission as stated on its website seems straight forward. A stand alone ATM provider is exempted from the PSD. The German Ministry of Finance, however, views things differently. The Ministry of Finance sees the exemption as applying to those ATM service providers that act on behalf of card issuers.² According to this interpretation, an independent provider who provides ATM services to card holders and receives a fee from card holders (“surcharge”) would be within the scope of the PSD.

¹ Questions on the PSD and answers by the EU Commission can be found on the Commission website under: http://ec.europa.eu/internal_market/payments/docs/framework/transposition/faq-2008_07_23_en.pdf

² The proposed Payment Services Law §2(14) exempts: „die Bereitstellung von Bargeld über Bankautomaten für einen oder mehrere Kartenemittenten, ohne dass andere Zahlungsdienste erbracht werden.“ (“the provision of cash via automated machines for one or more card issuers, without providing other payment services”)

Thus, the Ministry of Finance is sticking with the traditional line of reasoning of German regulators who have always viewed the pay-out of cash as credit business. This interpretation is based on the fact that cash is paid out immediately, however the ATM owner is paid only the next day (assuming t+1 settlement). Therefore, an ATM transaction is seen as a short-term credit of the ATM owner to the card holder. Consequently, in the past, an ATM provider had to be a bank. Now, according to the formulation in the draft of the German payment services law, an ATM provider will have to be a payment institution. For Germany, this would still imply a lighter regulation than before. But it would not be in line with the PSD as interpreted by the EU Commission.

The UK Treasury seems to interpret the PSD in much the same fashion as the German Ministry of Finance. In the draft published in July, the corresponding paragraph refers to “providers ... acting on behalf of one or more card issuers”.³ The Dutch draft seems to use a very similar expression. Thus, for the moment, national regulators seem to be determined to keep part of the third party ATM business under the wings of the PSD.

2. Access to payment schemes

One question asked on the Q&A website touches the area of access to payment schemes: “How to apply Art. 28(2)(a) in the case where a four-party card scheme (subject to Art. 28(1)) would be using a payment system falling under Directive 98/26/EC⁴ as its core processor for clearing/settlement between participating payment service providers of that scheme? I.e. if certain PIs would not be granted access to the processing payment system (based on Art. 28(2)(a)), they would de facto not be able to participate in the card scheme, hence there would be discrimination in access to the latter.”⁵ In this question, there is a reference to Directive 98/26/EC known as “Settlement Finality Directive”. This directive sets rules for systemically important payment systems that have been designated by member states.

³ In the UK draft the corresponding paragraph reads as follows: “Services by providers to withdraw cash by means of automated teller machines acting on behalf of one or more card issuers, which are not party to the framework contract with the customer withdrawing money from a payment account where no other payment service is provided.” See HM Treasury: Implementation of the Payment Services Directive: a consultation on the draft legislation, July 2008. http://www.hm-treasury.gov.uk/documents/financial_services/payment_services/payment_servindex.cfm

⁴ DIRECTIVE 98/26/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 May 1998 on settlement finality in payment and securities settlement systems.

⁵ Questions 14, see footnote 1.

The EU Commission has answered as follows: *“In accordance with Article 28(2)(a), a four-party card scheme whose payment system would be designated under Directive 98/26/EC would be excluded from the requirements under Article 28(1).”*

Our comment:

The PSD is opening the payments playing field by a wide margin. One important element in this respect is Art. 28. This article rules that payment schemes may not discriminate against payment institutions. When asked about the biggest impact the PSD is likely to have banks point to the competition of non-banks in the payment area. Clearly, banks are worried and would be more than happy to restrict the competitive pressures of non-banks. The answer of the EU Commission quoted above seems to show a way how to restrict access in a manner complying with Art. 28. If you are a payment system and you want to keep payment institutions out, use a settlement system designated under Directive 98/26/EC for your settlement.

3. Surcharging in the PSD

In Art. 52 (3) it is stated: *“The payment service provider shall not prevent the payee from requesting from the payer a charge or from offering him a reduction for the use of a given payment instrument.”* However, the PSD allows member states to restrict surcharging.

The wording in Art. 52 (3) seems to refer to transactions at the POS. Thus, the focus would be on merchants wishing to surcharge for the use of particular payment products. However, the term “surcharging” is also common in the ATM business, though in a different meaning than in the POS business. Surcharging in the ATM business means that the ATM operator collects a fee from the cardholder instead of charging an interchange fee from the issuer in combination with a charge of the issuer to the cardholder. Since the PSD covers “payment transactions” one may question whether it is also intended to cover surcharging at ATMs with the clause quoted above.

Our comment:

In a number of countries, surcharging at the ATM has already been dealt with by the competent authorities. Thus, in the UK or in Holland, an ATM provider has to decide whether he wants to charge card issuers an interchange fee or charge card holders a surcharge fee.

But there may be no double charging. A clause allowing surcharge for ATM transactions generally would not change a lot in these countries. In other countries, the situation is different, however. In Germany, for instance, the ATM transaction is viewed as service of the card issuer for the card holder, performed by the ATM operator on behalf of the issuer. Thus, in the German legal interpretation, there is no commercial relationship between the cardholder and the ATM operator and accordingly a fee cannot be charged. The only applicable model is a fee payable by the card issuer to the ATM provider (MIF, bi-laterally or uni-laterally set fee) and a fee of the card holder to the issuer. If Art. 52 (3) of the PSD would apply to ATM transactions, as well, it would be interesting to see whether current German practise would have to be changed and how the commercial relationships need to be adjusted.

Should you have any questions or comments please contact

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