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France to ban fixed-rate card commissions

The French Finance Minister Michel Sapin announced on 2 June proposed measures relating to payments including a ban on the fixed-rate part of the inter-bank commissions that banks charge to process card payments; the variable part of the commissions will remain.

"There is a true 'pro-business' policy behind the measures: the government wants to encourage growth within the payments industry," said Bruno Fatier, Partner at Rosenblatt.

The fixed-rate part of the commissions currently apply regardless of the amount involved in the transaction; the ban may therefore lead to French retailers removing their minimum card spend. The measures will not be put forward until autumn, but Fatier believes "the likelihood that the prohibition will be adopted is far from being low, all the more so given that banks do not seem to carry much lobbying weight within the French government." In response to the fixed-rate prohibition, "Banks may seek to raise other fees and costs paid by merchants or consumers (e.g. card subscriptions and ongoing fees) to make up for the loss of revenues," adds Fatier.

Security of internet payments in EU could be jeopardised

The UK, Slovakia and Estonia have said that they are unable to comply with the European Banking Authority's ('EBA') final guidelines on the security of internet payments which come into force on 1 August, due to a conflict with their legal frameworks, according to a 21 May EBA press release.

The UK's Financial Conduct Authority stated that it 'does not have the power without legislative change to make binding rules requiring all payment service providers [...] to comply with the EBA Guidelines,' but that it remains 'fully supportive' of the EBA's objectives and will incorporate the requirements set out in the guidelines in its supervisory framework.

The EBA's guidelines aim to harmonise the regulatory and supervisory practices applicable to internet payments and set minimum security requirements for payment services providers ('PSPs'). The guidelines are an interim measure until the revised Payment Services Directive ('PSD2') comes into force. Maximilian Riege, Partner at Hambach & Hambach, thinks that the aim of the EBA's guidelines could be jeopardised if the national authorities take very different approaches on if or how to implement the guidelines.

"On the one hand, PSPs in countries with less strict regulations might have a competitive advantage with regard to those PSPs located in more strictly regulated markets," adds Riege. "On the other PSPs that offer their products cross-border could face the challenge of complying with different or even contradicting regulations."

Germany's federal financial supervisory authority, BaFin, published a circular on 5 May, which transposes the EBA's guidelines and defines the minimum requirements for online payment services. BaFin's circular came into effect on 5 May and companies have six months to comply.

In addition to the three Member States that are unable to comply, Cyprus and Sweden have also indicated that they will only be able to partially comply with the guidelines. "The unacceptable provisions are related to 'strong customer authentication,'" explains Dr. Carsten Lösing, Partner at White & Case LLP. "It seems that the level of customer protection will be different between countries that apply the guidelines and those that do not. Thus the EU landscape may differ with respect to local enforcement of this requirement. It is unclear how BaFin will react to PSPs offering cross-border payment services into Germany that do not comply with these requirements."

Final compromise text of PSD2 fails to provide complete clarity

The EU Council of Ministers published on 2 June a final compromise text of the proposed revised Payment Services Directive ('PSD2').

There are a few changes since the last draft was released in December 2014, among them that "Payment initiation providers and account information service providers will be expected to hold either professional indemnity insurance or a comparable guarantee to cover their liabilities," explains John Worthy, Partner at Fieldfisher.

Concerns still remain about certain aspects of the text, including regarding security. Dr. Michael Salmony, Executive Adviser at Equens SE, asks "Is it possible to set up a secure and useable system under the given conditions? The text is not always technology neutral and may preclude modern authentication and security methods." Regarding the limited network exemption, which currently excludes payment services based on instruments that are used within a limited network of service providers or for a limited range of goods or services, "The Directive still does not offer a clear definition of what 'limited' means," said Worthy. "The scope is now narrower, so there must now be a 'direct agreement between retailers or retail chains' or 'a very limited range of goods or services.' However, this leaves businesses unclear about what they have to do in practice to stay within the exemption."

The text is now subject to a plenary vote at the European Parliament, before Council approval is needed for formal adoption.

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