

# BRIEF CONSIDERATIONS ON THE NEW EUROPEAN REGULATION IN TERMS OF PAYMENT SERVICES

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## **Abstract**

*Given that each Member State of the European Union had its own regulation in the matter of payments, the European Commission considered it necessary to adopt an uniform legislation in this regard.*

*Consequently was adopted Directive 2007/64/EC of the European Parliament and of the Council which regulated payment services in the EU and the EEA (European Economic Area).*

*In virtue of the obligation to transpose into the national law the provisions of this Directive, with effect from November 1, 2009 Romania adopted the Emergency Ordinance no. 113/2009 which regulated its own legislation on the provisions of Directive 2007/64/EC.*

*Given the experience gained so far, considering the technological opportunities in the matter of payments and the change in habits of payment of the EU citizens and not only, in conjunction with the development of electronic commerce and increasing facilities offered by the payment service providers in the field of payments via mobile terminals, it has been concluded that provisions of Directive 2007/64/EC are largely overcome by the technological evolution.*

*Wishing to maintain the regulations in the matter of payment services at the current technological level to guarantee the security of payment operations at the same time with the adaptation of the market of EU payments to the opportunities offered by the single market and simultaneously with supporting the EU economy growth, the European Commission has adopted a package of measures which include both a new directive relating to services of payment as well as a proposal for a regulation on inter-bank fees for card payments.*

*The purpose of the regulation is the transparency of bank information on payment services; creating a single legal framework at the EU and EEA level in the matter of payment services and the protection of payment service consumers.*

*The new regulation applies not only to payment transactions in the EU or EEA but also to payments made or received to/from outside through a payment service provider acting within the EU or EEA.*

*The objective of the study was a comparative analysis of current legislation of Directive 2007/64/EC, transposed into national law by Ordinance No. 113/2009 with subsequent amendments, with the provisions of the draft directive adopted by the 24.07.2013, who, on the date of entry into force will repeal Directive 2007/64/EC.*

*The research method used was a study comparing the current regulations and terms of the draft directive, using the rules for the interpretation of specific international trade law science and those common to all branches of law.*

**Keywords:** *payment services; payment transactions; payment institutions; framework contract;*

**JEL Classification:** *K33*

As it is known, by Directive 2007/63/EC, the EU has regulated unitary for the first time low-value payment services and Member States have transposed into national legislation the provisions of this European regulation.

In order to implement the Directive at the level of the Member States, the European Commission has continuously monitored procedures carried out in each of the states, collected and analyzed data of this process in order to improve the legislative framework.

Given the experience gained and considering the technological opportunities offered by the development of digital communications worldwide, taking into account that in matters of payments the EU citizens have substantially changed their habits, and also that an increasing proportion of citizens preferred electronic commerce, which contributed to its development, in conjunction with growing facilities provided by payment service providers in terms of payments through mobile terminals, the European Commission concluded that the provisions of Directive 2007/64/EC are largely outdated by the technological evolution.

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Accordingly, on July 24, 2013, the European Commission adopted a package of measures that include both a new draft Directive on payment services and a proposal for a regulation on inter-bank fees for card transactions.

Since the objective of this article refers to low-value payment services in the following we will address only those issues.

Consequently, according to the content of the draft Directive on payment services<sup>2</sup> we have identified a number of issues that have determined the European Commission to adopt this draft law.

Thus, in terms of the scope of this regulation was proposed to extend the scope both in terms of currencies that will fall under the regulation and also in terms of geography.

In other words, according to Article 1 paragraph 1 of the draft Directive, its provisions will apply not only to transactions in the EU or EEA but also payment transactions where only one of the payment service providers is located in the European Union (the so-called “transactions with one segment”).

More specifically the provisions of the Directive shall apply also to payment operations with EEA foreign element, in which only one of payment service providers acts in the European Economic Area.

However, under paragraph 2 of Article 1 of the Directive, its provisions shall apply to all currencies of low-value payments and not only to EU currencies as until now.

Also, in accordance with Article 3, have been clarified and updated derogations from the scope provided by Directive 2007/64/EC on the activities of payment or payment related that does not fall under its regulation.

Thus, under the provisions of Article 3 letter b) was amended the original derogatory provision related to “traders” in the sense that it will only apply to traders acting on behalf of the payer or of the payee, and not to those who act for the payer and for the payee.

This provision was determined by the fact that under the rule of the current regulations (Directive 2007/64/EC) the derogation has been used to exclude payment transactions handled by electronic trading platform in the name of the seller (who is the payee) and that of the buyer (which is the payer) or this was not the purpose of the derogation.

However, regarding the derogation concerning “limited payment networks” governed by Article 3 letter k), it has been applied more and more to large networks, involving high payment volumes and extensive range of products and services, which is contrary to the original purpose of the derogation, as large volumes of payments remained outside the regulatory framework and created a competitive disadvantage for the participants of the regulated market.

Regarding the derogation on digital content or of telecommunications governed by Article 3 letter l), it was redefined by restriction, meaning that it will only apply to auxiliary payment services offered by providers of electronic communications networks or services, such as telecoms operators.

Consequently, the derogation will cover digital content supplied by third party, until reaching the limits laid down in the Directive. It was argued that this new approach of digital content or of telecommunications should ensure a fair competition field for payment service providers and ensure more effective protection of consumers of payment services.

However, the new draft Directive has removed the letter a) of former Article 3 which provided the exclusion from the scope of the Directive ATM services offered by independent operators.

The reason that justifies this measure was the fact that the initial derogation led to the creation of networks of ATMs charging larger fees from consumers for the cash withdrawal.

More specifically, based on the original derogation, banks have terminated contracts with payment service providers in order to be able to charge higher fees directly from consumers or it was not the purpose of the derogation.

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<sup>2</sup> We do specify that the draft directive on the repeal of Directive 2007/64/EC has been adopted by the European Commission on 24 July 2013 and was forwarded to the European Parliament and the Council on 25 July 2013. At the time of writing this article, the draft directive on the role of the European Parliament and of the Council in the run-up to the approval procedure;

Regarding the *authorization of the payment institutions*, the new Directive stipulated in Article 6 a minimum amount of the initial capital differentiated on three criteria according to work performed.

Thus, if the payment institution provides only the money remittance service, its *capital* cannot, in any time, be less than 20.000 EUR. But if the payment institution provides services based on the access to payment accounts provided by a payment service provider other than the payment service provider that offers account services in the form of services to initiate payments or information services on the accounts, its capital shall not be less than 50.000 EUR.

However, if the payment institution provides placement services for cash in a payment account or services allowing cash withdrawals from a payment account, or execute payment transactions, including transfers of funds in an payment account opened at the payment service provider of the user or at another payment service provider, consisting either in making direct debits or in executing payment transactions through a payment card or a similar device or execute credit transfers, including standing orders or issue payment instruments or execute payment transactions where the funds are covered by a credit line granted to the payment service user, consisting of the execution of direct debits, execution of payment transactions through a payment card or a similar device, or running credit transfers, including standing orders, social capital cannot be less than 125.000 EUR.

Regarding the payment institution's own funds, the new regulation stipulated in Article 7 that they cannot be lower to the social capital, determined in accordance with the work for which they were authorized.

According to Article 9, the new regulation imposed to payment institutions providing any payment services and simultaneously providing operational and closely related auxiliary services in the strict sense of the word, such as ensuring the execution of payment transactions, exchange services, safekeeping activities, as well as data storage and processing or the operation of payment systems or business activities other than the provision of payment services, according to the applicable EU and national laws, the obligation to protect the funds received from payment service users.

At the same time, protecting the funds received from users or through another payment service provider to execute payment transactions must be ensured by one of two methods:

- a) either appealing to not mixing the funds meant for payment transactions with the funds of any individual or legal person other than the payment service user on whose behalf the funds are held, and if they are still held by the payment institution and are still not sent to the payee nor transferred to another payment service provider before the end of the working day following the day on which they were received, they must be deposited in a separate account in a credit institution or invested in safe, liquid and low risk assets, as defined by the competent authorities of the home Member State. At the same time, the funds destined for payment operations must be exempted, in accordance with the national law and in the interest of payment service users, from the traceability from the satisfaction of claims of other creditors of the payment institution, including in the event of its insolvency;
- b) or, funds must be covered by an insurance policy or other comparable guarantee from an insurance company or a credit institution, which do not belong to the same group as the payment institution is part of, for an amount equivalent to that which would have been segregated in the absence of an insurance policy or any other comparable guarantee, payable when the payment institution could not meet its financial obligations.

In the same vein we argue that requirements to protect payment institutions authorized funds have been optimized in order to reduce the possibilities of Member States to limit the safeguarding requirements and mitigate their protection methods in order to ensure a fair competitive environment and improving legal certainty.

However, the new regulation stipulated in Article 12 the right of the competent authorities which authorize the operation of payment institutions to be able to deny this authorization if any of the following situations is incident:

- a) payment institution does not use the authorization within 12 months, or expressly gives up on it, or cease operations for a period exceeding six months, if the Member State does not provide that in such situations the authorization loses its validity;
- b) authorization has been obtained based on false information or by any other unlawful means;
- c) payment institution no longer fulfils the conditions to obtain the authorization or has not informed the competent authority on important changes in this respect;
- d) payment institution would be a threat to the stability of the payment system and of the confidence in it, if continuing to provide payment services;
- e) falls within one of the cases where the national law provides the withdrawal of an authorization.

At the same time, according to Article 14 of the draft Directive was established to create an European electronic access point on the portal of the European Banking Authority to allow the interconnection of national public registers at the EU level in order to increase transparency of authorized and recorded payment institutions.

Also, the provisions of former Article 27 relating to the possibility of using a simplified regime for authorizing the so-called “small payment institutions” are to be extended in order to include a larger number of such institutions, on the grounds that a number of Member States faced with negative experiences such as insolvency of payment service providers whose activities exceed the current threshold for the derogation regime.

The purpose of this regulation is to achieve a balance and avoid unnecessary regulations for small institutions, and also to ensure a high level of protection of payment service users.

At the same time, in Article 27, the enactment has provided two cumulative conditions under which Member States may resort to use the simplified system of authorizing small payment institutions, namely in the situation in which:

- a) the total value average for the twelve months preceding the payment transactions executed by the person concerned, including any agent for which has full liability, does not exceed 1 million EUR per month, according to its business plan;
- b) none of the individuals responsible for the management or operation of the business has been convicted for offenses relating to money laundering or terrorism financing or to any other financial crimes.

In terms of access to payment systems, Article 29 has optimized the regulation on the access to such systems and clarified the conditions required for indirect access to payment institutions to payment systems provided for in Directive 98/26/EC on settlement, similarly with access means of smaller credit institutions.

Regarding the possibility of providing payment services by any individual or legal entity that has not been authorized as a payment services provider, the draft Directive has provided in Article 30 that Member States are required to prohibit individual and legal entities which are not payment service providers nor are explicitly excluded from the scope of this Directive to provide payment services.

As per the obligation to inform payment service users by the providers of such services, for low value payment instruments, the draft Directive has provided a number of derogations.

Thus, Article 35 paragraph 1 stated that if payment instruments which, according to the framework contract, concern only individual payment transactions not exceeding 30 EUR or that have a spending limit of 150 EUR or store funds that never exceed 150 EUR:

- a) payment service provider may provide the payer only with information on the main characteristics of the payment service, including how payment instrument can be used, the responsibility, fees charged and other important information needed to make an informed decision, and also mentioning the place where any other information is made available in an accessible way;

- b) however, it may be agreed that the payment service provider is not required to propose changes to the terms of the framework contract within the meaning of Article 44 paragraph (1);
- c) or it may be agreed that, after the execution of a payment transaction, *either* the payment service provider shall provide or make available to the user only a reference enabling it to identify the payment transaction, the amount of the payment transaction and any fees charged and/or, in case of multiple payment transactions of the same type to the same payee, information on total amount and charges for those payment transactions, *either* the payment service provider is not required to provide or make available information above, if the payment instrument is used anonymously or if the payment service provider does not have the technical capacity to provide them. However, the payment service provider is obliged to give the payer the possibility to verify the amount of funds deposited.

Also, the draft Directive has left to Member States or the competent authorities to reduce or double the amounts referred to in Article 35 paragraph (1), indicating that for the prepaid payment instruments, Member States may increase these amounts to 500 EUR.

Regarding the provision of payment services by authorized payment institutions, the new regulation provides as the previous Directive that such operations are carried out on the basis of framework contracts that are preceded by the communication of information regarding the payment service provider, the use of the payment service, fees incurred by the user, the security measures of payment instruments used, the framework contract changes and extrajudicial or judicial procedures for repair.

With respect to the amendment of the framework contract, the new regulation has maintained the current provisions, according to which, if the payment service user notified by the provider in relation to the amendment of certain provisions of the framework contract does not expressly communicate the refusal of the amendment proposition, it shall be presumed as tacit acceptance from him.

As far as we are concerned, we argue that the insertion of such a clause in the framework contract is detrimental to the payment service user.

We support it because, as it is known, any contract with credit and payment institutions represent a contract of adhesion whose terms cannot be negotiated but only simply accepted.

In the same vein we argue that on payment services, as in the case of any other services provided by credit and payment institutions, users overwhelmingly do not have legal training and shall not correctly understand the European Directive provisions nor the national legislation, reason for which payment service contracts will be unbalanced since their conclusion.

Therefore, we consider it necessary to amend the regulation contained in paragraph 6, letter a) of Article 45 of the draft Directive, in order to amend the framework contract only upon express acceptance of the payment service user and forbid the amendment of such contracts outside the express written agreement of the user.

We support this because payment service providers were given the opportunity to use the prior consent of the user to change the reference interest rate or the reference exchange rate.

Regarding the termination of the framework contract, the draft Directive as the current regulation has provided the opportunity for the abolition in the future of such payment service conventions, anytime, either by the user incurring penalties if such contract was concluded for a period exceeding 12 months or for an indefinite period and the termination was requested before the expiry of 12 months or so without incurring such penalties if dissolution was notified after reaching 12 months.

Nevertheless, the draft Directive gives Member States the option to grant by national regulations better conditions in the matter of termination of framework contracts for payment service users.

Regarding the fees applicable to payment service users, Article 55 in paragraphs 3) and 4) has provided harmonizing practices regarding overcharging, considering the provisions of Directive

2011/83 on consumer rights and the proposal of the Commission for Regulation (EU) XXX of the European Parliament and of the Council on interchange fees for payment card transactions.

The draft Directive has forbid overcharge and capped interchange fees in the draft regulation on interchange fees for credit card transactions.

As such, in the context of reducing the fees that a trader will pay to its bank, the card payment transactions overcharge with the amount of interchange fees is no longer justified. In this context, the regulation will contribute both to improved consumer experience in card payments within the EEA and to the increased use of cards for payments at the expense of cash.

Regarding low-value payment instruments or electronic money, the draft Directive provides a number of derogations only for individual payment transactions not exceeding 30 EUR or which have either a spending limit of 150 EUR, either store funds that do not exceed 150 EUR.

Thus, the first exception applies to the inapplicability of Directive regulations, regarding the obligations of the payment service user and the payment service provider strictly specified, and the payment service user's right of correcting a payment transaction, if the instrument payment does not allow blocking or preventing a further use.

The second derogation applies to regulations on the authentication and execution of payment transactions, on the provider liability for unauthorized payment transactions and also on those relating to payer liability for unauthorized payment transactions that does not apply if the payment instrument is used anonymously or if, for any other reasons related to the payment instrument, the payment service provider is not in a position to prove that a particular payment transaction has been authorized.

A final category of derogations concern *both* the fact that the payment service provider is not obliged to notify the payment service user in relation to the refusal of a payment order, if the non-payment can be ascertained from the context *and also* the fact the payer may not revoke the payment after transmitting the payment order or after expressing its consent to execute the payment transaction to the payee.

Therewith, for national payment transactions, Member States or their competent authorities may reduce or double the amounts referred to in paragraph (1). They can increase them up to 500 EUR for prepaid payment instruments.

With regard to the authorization of payment transactions, the draft Directive has upheld in Article 57 the provisions of the current regulation, in the sense that it provided that a payment transaction is considered authorized by payer if it expressed its consent in connection with its performance either before or after its execution, if the payer and the payment service provider agreed in this way.

Regarding the expression of consent by the payer, the draft Directive states that it must be given in the form agreed between the payer and the payment service provider.

Or, as far as we are concerned, we maintain the view expressed previously that the enactment should provide expressly that the payer must express its consent regarding the payment before it is made also in writing, regardless if the support of the written form is the paper or digital format.

It is important to establish that the agreement for a payment comes from the payer and was prior to the initiation of the payment transaction.

In the same vein we argue that the regulation provided by Article 57 paragraph 1, final thesis of the draft Directive, according to which "*A payment transaction may be authorized by the payer either prior, either after its execution, if the payer and the payment service provider agreed so*" is contrary to some extent to the provision of Article 57 paragraph 2 final thesis, according to which "*In the absence of consent, a payment transaction is considered to be unauthorized*" and it is likely to create conflicts between the payer and the payment service provider.

We support this idea because in practice there is a possibility that based on Article 57 paragraph 1, final thesis, a service provider to make a payment without the consent of the payer, in the belief that the last will subsequently authorize the payment, ratification that will not be given for many reason.

Therefore, in order to avoid such situations, we believe that the payer should only express its consent prior to the initiation of the payment transaction and only in writing, to be able to verify in case of conflict, for which payment transactions the payer gave its agreement and when the agreement was expressed.

However, the means to authorize payment by the payer or the expression of consent for payment must be specified in the framework contract.

Regarding the payer's possibility to withdraw its consent to make a payment, the draft Directive provides such a possibility, with the condition to withdrawal of the consent will not intervene after the moment of irrevocability, as it was defined in Article 71.

According to Article 71 paragraph 1 of the draft Directive, it was held that the payment service user may not revoke a payment order after it has been received by its payment service provider.

In other words, once the payment order issued by the payment service user as payer to its provider, the payment becomes irrevocable because the payer may not revoke the payment order.

However, Article 71 paragraph 4 derogate from this provision under the terms of Article 69 paragraph 2, according to which if the payer and the payment service provider agreed that the execution of the payment order to be made in a given day, after a certain time period or the day in which the payer made funds available to the provider, the payment revocation may intervene before this date.

So, unless the framework contract contains such a provision, the payer may revoke the payment order because its moment of receipt is considered the date of payment agreed.

However, paragraph 5 of Article 71 stipulates the cancellation of a payment order to intervene also after the time limits specified, provided that such a possibility has been agreed between the payer and the payment service provider in the framework contract, mentioning that in the event of payment by direct debit the payee's agreement is required.

The novelty of the draft Directive is found in Articles 58 and 59 governing the access of a third-party payment service provider to information on the payer's payment account and the access of a third party issuer of payment instruments to information on the payer's payment account.

Under provisions of Article 58 of the project, the third-party payment service provider is assigned a series of obligations, namely to ensure that payment service provider's customized safety components are not accessible to other parties, to authenticate in an unambiguously manner to the payment service provider(s) of the account holder providing account services and not to store sensitive data on payments or payment service provider's customized safety components.

Regarding the liability of payment service providers and payers for unauthorized payment transactions covered by Articles 65 and 66, the proposed amendments aim to optimize and harmonize the rules on the liability for such operations, ensuring greater protection of the payment service users' legitimate interest.

In other words, if the payment service user denies having authorized a payment transaction executed or claims that the payment was not executed correctly, the burden of proof belongs to the payment service provider or the third-party payment service provider that must prove proper execution of obligations regarding payment.

However, except cases of fraud or severe negligence, the maximum amount that a payment service user may be required to pay in the event of unauthorized payment transactions will be reduced from the current value 150 EUR to only 50 EUR.

Relating to the reimbursement of payment transactions initiated by a payee or by it, governed by Article 67, the draft Directive clarifies the reimbursement right for direct debit transactions, aligning it with the basic rules of direct debits (*Core Direct Debit Rulebook*) of SEPA, provided that the goods or services paid for have not yet been consumed.

According to current regulations, for direct debits apply different reimbursement regimes, depending on whether or not to grant prior authorization for exceeding or not exceeding the expected value of the amount debited directly or, alternatively, for concluding or not an agreement on another right.

In other words, a payer who has previously authorized a payment transaction that was initiated by the payee, but that has already been executed, has the right to be reimbursed from the payment service provider, if two cumulative conditions are met, that the payment authorization has not specified the exact amount of the payment transaction at the time it was given, and the amount of the payment transaction exceeded the amount that the payer could reasonably expect, taking into account previous spending pattern, the conditions of the framework contract and relevant circumstances of the case.

Regarding the security measures covered by Article 85, the rules of the new regulation refers to authentication issues, thus brought into line with the proposal of the Commission of Directive of the European Parliament and of the Council on network and information security.

At the same time, the new regulation includes in Titles I to V and Annex I, Section 7, a number of new payment services and providers of such services, with access to payment accounts. These new market participants are not covered by the current Directive, to the extent that they do not have at any time the funds of the payer or payee.

The proposal of Directive includes this category of third-party service providers, particularly those offering payment services of initiation based on online banking services, within its scope.

The provision is intended to stimulate the emergence of new solutions in the field of electronic payments with low cost over the Internet while ensuring compliance with minimum safety standards, data protection and liability of providers of such services.

In the same vein we argue that to be entitled to provide payment initiation services, third-party providers are required to obtain authorization from the regulatory institutions in the field or to register and be supervised as payment institutions, regardless of whether they have access at any time to the payer's or payee's funds.

In respect of extrajudicial procedures of complaints and of resolution of litigations, referred to in Chapter 6, they update requirements in the matter of extrajudicial procedures of complaints and resolution, as well as the appropriate sanctions.

Also in Article 92 entitled "Sanctions" the draft Directive has provided the obligation of Member States to establish appropriate administrative measures and sanctions in case of violation of its provisions, while guaranteeing the proper implementation of these sanctions.

Finally the draft Directive imposes the European Banking Authority a series of actions meant to contribute to the consistent and coherent supervisory process under the Regulation no. 1093/2010. In other words, the European Banking Authority will issue draft regulatory technical standards in various fields, such as for example "passport procedure" for payment institutions operating in several Member States, or to ensure the establishment of adequate requirements in matters of security.

In conclusion, we are of the opinion that although the draft directive on payment services will meet users requirements, better services for payment, however, has not clarified a number of issues, of which the most important in our view, are those that relate to the manner of expressing the consent of the payer and the payment service provider and the time until which can be cancelled the payment order given the fact that any contract between a user of payment services and a provider of such services shall be contracts of adhesion, and negotiation of the terms thereof is virtually impossible.

Accordingly, we believe that in a situation in which the draft directive will be adopted by the European Parliament without having clarified these two problems, i.e. the expression of consent and the time within which such an order may be revoked by the initiator of passage of the law, we feel we feel that at the time of its transposition into national law should be clarified in this regulate, in order to facilitate proof of consent in connection with payment transactions and to ascertain, in particular, for which payment has expressed the consent payment service or user has revoked the order for payment.

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