Cooley

May 19, 2015

Background

"*Payment cards are the most frequently used electronic payment instrument for retail purchases. However, integration of the [European] Union [(**EU**)] payment card market is far from complete as many payment solutions cannot develop beyond their national borders and new pan-[EU] players are prevented from entering the market.*".[1] The Regulation of the European Parliament and of the Council on Interchange Fees for Card-Based Payment Transactions (the **Regulation**) is intended to address each of these issues.

The final text of the Regulation was adopted by the European Parliament at first reading in a plenary session on 10 March 2015 and adopted by the European Council on 20 April 2015. The Regulation was published in the Official Journal of the EU on 19 May 2015. The Regulation will come into force 20 days after publication in the Official Journal on 8 June 2015 and will have direct effect in Member States.[2]

First things first: scope and definitions

The Regulation applies to card-based payment transactions carried out within the EU, where the payer's and the payee's payment services providers (PSPs) are both in the EU. However, it doesn't apply to commercial card transactions, or cash withdrawals at ATMs.[3]For these purposes: [4]

"***acquirer***" means	"***a payment service provider contracting with a payee to accept and process card-based payment transactions, which result in a transfer of funds to the payee***"
"***card-based payment transaction***" means	"*a service based on a payment card scheme's infrastructure and business rules to make a payment transaction by means of any card, telecommunication, digital or IT device or software if this results in a debit or a credit card transaction. Card-based payment transactions exclude transactions based on other kinds of payment services*"
"***interchange fee***" means	"*a fee paid for each transaction directly or indirectly (i.e. through a third party) between the issuer and the acquirer involved in a card-based payment transaction. The net compensation or other agreed remuneration is considered to be part of the interchange fee*"
"***issuer***" means	"*a payment service provider contracting to provide a payer with a payment instrument to initiate and process the payer's card-based payment transactions*"

"***net compensation***" means	"*the total net amount of payments, rebates or incentives received by an issuer from the payment card scheme, the acquirer or any other intermediary in relation to card-based payment transactions or related activities*"
"***payment service provider***" means	"*natural or legal persons authorised to provide the payment services listed in [the First Payment Services Directive][5] or recognised as an electronic money issuer in accordance with [Second Electronic Money Directive][6]. A [PSP] can be an issuer or an acquirer or both*"
"***processing***" means	"*the performance of payment transaction processing services in terms of the actions required for the handling of a payment instruction between the acquirer and the issuer*"

Restrictions on interchange fees

The following fee caps will take effect from 9 December 2015:[7]

Transaction type	PSPs shall not
For cross border debit card transactions	offer or request a per transaction interchange fee of more than 0.2% of the value of the transaction
For domestic debit card transactions	offer or request a per transaction interchange fee of more than 0.2% of the value of the transaction. Member States may allow a PSP to apply a per transaction interchange fee of no more than 5 eurocents (or corresponding value for Member States whose currency is not the Euro), in combination with a maximum 0.2% of the value of the relevant transaction, provided that the sum of interchange fees of the payment card scheme does not exceed 0.2% of the annual transaction value of the domestic debit card transactions within each payment card scheme. Until 9 December 2020, Member States may also allow PSPs to apply a weighted average interchange fee of no more than the equivalent of 0.2% of the annual average transaction value of all domestic debit card transactions within each payment card scheme. The Member States may define a lower weighted average interchange fee cap applicable to all domestic debit card transactions
For cross border credit card transactions	*"offer or request a per transaction interchange fee of more than **0.3%** of the value of the transaction"*

For domestic credit card transactions	*"offer or request a per transaction interchange fee of more than **0.3%** of the value of the transaction." Member states may also "define a lower per transaction fee cap."*

For these purposes, *"any agreed remuneration, including net compensation, which has the equivalent object or effect as an interchange fee, received by an issuer from the payment card scheme, acquirer, or any other intermediary, in relation to payment transactions or related activities shall be treated as part of the interchange fee."*

Other provisions

The Regulation has a number of other provisions designed to encourage competition and enhance consumer protection. The Regulation will:

- (From 9 December 2015), [9] prohibit (i) intra-EU territorial restrictions; (ii) requirements or obligations to obtain country specific licences or authorisations to operate on a cross-border basis; and (iii) (in either case) rules with an equivalent effect in licensing agreements or payment card scheme rules;
- (From 9 June 2016),[10] require that payment card schemes and processing entities:
  - Are separated in accounting and organisational terms;
  - Do not:
    - Present bundled prices for payment card scheme and processing activities;
    - Cross-subsidise these activities;
    - Discriminate between (i) their subsidiaries or shareholders, on the one hand; and (ii) users of these schemes, and other contractual partners, on the other; or
    - Make the provision of any service they offer conditional on the acceptance of any other service they offer;
  - (From 9 June 2016),[11] payment card schemes and processing entities are prohibited from including in their scheme rules and licensing agreements, any provisions that *"hinder or prevent an issuer from co-badging different payment brands on a card based payment service".*
  - (From 12 months after it comes into force),[12] require processing entities within the EU to ensure that their systems are interoperable with the systems of other processing entities by meeting the standards developed by international or European standardisation bodies;
  - (From 9 June 2016), require acquirers to:
    - Offer and charge payees merchant service charges that are individually specified for different categories and different brands of payment cards with different interchange levels (unless merchants make a written request for blended merchant service charges); and
    - Include in their agreements with payees individually specified information on the amount of the merchant services charges, interchange fees and scheme fees applicable to each category and brand of payment cards, unless the payee subsequently makes a different request in writing".
  - (From 9 December 2015),[13] require the payee's PSP to provide the payee with:
    - *"The reference enabling the payee to identify the card-based payment transaction";*
    - "The amount of the payment transaction in the currency in which the payee's payment account is credited"; and
    - The amount of any charges for the card-based payment transaction, with the merchant service charge and the amount of the interchange fees appearing separately;
    - (in each case), at least once a month, in a form that allows the payee to store and reproduce the information unchanged.
  - (From 9 June 2016),[14] prohibit application of the 'Honour all Cards' rule which *"obliges payees accepting a card-based payment instrument issued by one issuer also to accept other card-based payment instruments issued within the framework of the same payment card scheme".* The prohibition will not apply to *"consumer card-based payment instruments of the same brand and the same category of prepaid card, debit card or credit card subject to interchange fees".* What this means is that a merchant accepting debit cards for example, will not be obliged to accept credit cards,

but would be obliged to accept debit cards of the same brand, which are subject to the same regulated interchange fee. The aim is to enable *"merchants to limit the choice of payment cards they offer to low(er) cost payment cards only", which "benefit[s] consumers through reduced merchants' costs", and to "protect…the consumer's ability to use the payment cards [of the same brand and category] as often as possible ."*

- (From 8 June 2015),[15] prohibit *"any rule in licensing agreements, in scheme rules…and in agreements…between card acquirers and payees preventing payees from steering consumers to the use of any payment instrument preferred by the payee".* Payees will also be forbidden from *"treating card-based payment instruments of a given payment card scheme more or less favourably than others".*

Final Thoughts

The Regulation should be read alongside, and interpreted with, the proposed second Payment Services Directive (**PSD2**) (for further information, read our Client Alert here). The legislative proposals for PSD2 were published at the same time as the European Commission adopted proposals for the Regulation. PSD2 will ban surcharges[16] for card-based payment transactions, which the Commission argues will no longer be justified after interchange fees are capped by the Regulation because merchants' costs for card-based transactions will reduce. These changes are intended by the European institutions to form part of a cohesive legislative whole that will enhance consumer protection, lower prices and fees, and ensure the continued development of the internal market in respect of payment services over time.

This client alert is correct as at 19 May 2015.

NOTES

1. See recital 8 to the Regulation.
2. The Regulation gives the European Banking Authority (EBA) the power, after consulting an advisory panel, to develop draft regulatory technical standards, which establish the requirements to be complied with by payment card schemes and processing entities to ensure they operate separately. The EBA is required to submit its drafts to the European Commission within 6 months of the Regulation coming into force, for possible adoption by the Commission. 'Level 3' Guidance may also be developed by the EBA; and the competent authorities of the EEA's Member States may develop guidance of their own.
3. See article 1 of the Regulation.
4. See article 2 of the Regulation.
5. "First Payment Services Directive" is a reference to the Directive 2007/64/EU of the European Parliament and of the Council on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC. The European Institutions are developing a second Payment Services Directive that will repeal and replace the First, when it comes into force (currently expected 2017). Our Client Alert on the proposed Second Payment Services Directive is available here.
6. "Second Electronic Money Directive" is a reference to the Directive 2009/110/EC of the European Parliament and of the Council on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC.
7. See Articles 3, 4 and 5 of the Regulation.
8. See Article 6 of the Regulation.
9. See Article 7(1) of the Regulation.
10. See Article 7(4) of the Regulation.
11. See Article 9 of the Regulation.
12. See Article 8 of the Regulation
13. See Article 12 of the Regulation
14. See Article 10 and Recital 37 of the Regulation.
15. See Article 11 of the Regulation
16. Additional charges that merchants sometimes charge customers for card payments.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do

not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.