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AK Position Paper

Opinion on the Directive proposal on payment services in the internal market

About us

The Federal Chamber of Labour is by law representing the interests of about 3.4 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Rudi Kaske
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Werner Muhm
Director

The AK position in detail

Unfortunately, it has to be said from the point of view of Austrian consumer protection that the Commission has **only** provided for **insignificant improvements and amendments**. For example, the proposed expansion of the scope to so-called “one-leg transactions” and the application of Title III on payment services within the EU - independent of the currency - are of course to be welcomed. The Austrian Federal Chamber of Labour (AK) also welcomes the regulation of interbank charges for debit and credit cards.

However, the intention is also to introduce **a number of serious changes for the worse**, which directly affect consumers and which make payments more expensive resp. less trustworthy, **in particular by changing resp. cancelling electoral rights of Member States**, provided for by Directive 2007/64/EC.

The proposed restriction of both electoral rights in respect of charges for certain payment instruments and limitation of liability in case of misuse has to be rejected from a consumer's point of view:

The Austrian legislator has exercised the existing electoral rights in a consumer-friendly manner. The now **planned uniform mandatory regulations** lead to a significant deterioration of the legal position for consumers and to uncertainty and **will not strengthen the trust of consumers in a harmonised payment market**, as improvements due to the PSD have only come into force 4 years ago in Austria and were only gradually realised by consumers.

There are currently a number of pending court cases in Austria to enforce the consumer-friendly aspects of the der PSD Regulation in practice.

Hence, particular criticism has to be reserved for the fact that **no orientation on best-practice models** in the Member States is taking place but that by changes to the electoral rights a **return to uniform and little consumer-friendly regulations** is intended, as

- pursuant to new Art 55.3 and 4, Member States shall no longer be able to prohibit **additional charges for using certain payment instruments**, which would turn the legal position for these charges in Austria by 180 degrees and many payment transactions would become more expensive, and
- pursuant to new Art 61 Abs 1, **the payer can be obliged** to bear **losses due to the non-authorised use** of a payment instrument up to an amount of EUR 50. Until now, an option allowed Member States to provide for a fault-based liability of up to EUR 150, which Austria made use of. The proposed amendment means that in future consumers will have to pay excess of EUR 50 each time a loss due to misuse occurs as it can be assumed that all banks will include this provision in their framework agreements to be able to pass on part of the damage to consumers.

With regard to direct debit the option of reimbursing an amount, which has

already been collected without stating any reasons shall remain:

Consumers should have an **unconditional right to reimbursement for payments, which are initiated by the payee**. This serves as a compensation for the advantages payees have in case of authorised direct debit orders, at the same time protecting consumers against fraud, for example if ordered goods do not materialise. The reimbursement right shall give consumers full control of their direct debit payments, which at the same time strengthens trust in payment transactions.

It is therefore incomprehensible and must be **strictly rejected that the unconditional right to reimbursement in respect of direct debit shall be abolished** (Art 67.1). This prevents the unconditional reimbursement, which had been made possible by Art 62 PSD old, which is part of Austrian consumer contracts; in doing so a popular payment method has lost its basis of trust. This change makes payments by direct debit significantly more attractive for trades and far less appealing to consumers.

In our opinion, the proposed restriction for unconditional reimbursement in the event that the payer has received services or consumed the goods is also **impractical, as it remains open how these requirements are supposed to be checked**.

The payer bank has no means of checking either payee or claims and the payee bank must not conduct any prior checks - it is only liable if no mandate for collection exists. Due to the existing unrestricted right to cancel the consumer can also prevent that he will have to assume the role of plaintiff in case of dispute.

Exclusion of prima facie evidence, which results in unfair liability of the consumer in respect of non-authorised payment transactions:

In several Member States (among them Austria and Germany) case-law **applies prima facie evidence**, which in the absence of direct evidence for breach of duty of care by the consumer results in the fact that the consumer **is accused of gross negligence, which cannot be proven**. In doing so, the **burden of proof rule of Art 64**, which imposes the burden of proof for authentication on the payment service provider, **is practically undermined**, because limited joint liability for only **slight negligence is no longer looked at and gross negligence is assumed**.

If, for example payments are made by using personal identification and if misuse by a third party cannot be proven, the court assumes that the consumer has written his PIN on his card making its misuse possible. It is practically impossible for the consumer to contest this allegation and to prove the opposite, by refuting this fact. This would only be possible if the consumer could prove possible misuse, which is not attributable to him, by a third party.

In model case proceedings led by the Chamber of Labour Vienna, the consumer, who had suffered losses after his bank card had been stolen, was able to credibly assure that he had not written his PIN on the stolen bank card, as he knew it by heart. He had used this card with the same PIN for decades. Hence, probability suggested that the consumer did in fact know the code by heart. During the proceedings, the defendant bank also conceded the consumer's credibility. In spite of this, due to prima facie evidence, the court decided against the consumer who was left with his losses.

As the outcome of applying prima facie evidence is that consumers have to bear a risk, which is beyond their control, we are in favour of excluding prima facie evidence in such constellations. On the one hand, payment service providers are closer to the evidence; on the other hand they operate payment systems including safety conditions, when in fact it would be their responsibility to prevent misuse by up-to-date technical measures and to make payment systems more secure.

Clarification in respect of excluding mobile payment services from the scope is required:

In our opinion, the necessary **revised version** (in Art 3 lit k) mentioned in Recital 13 of excluding payment services when buying digital goods, which are offered by providers of electronic communication networks resp. services, **does not bring the desired clarity.** Only **amount limits** are laid down; **however the term ancillary service is not defined. This will result in problems of demarcation also in future.**

Recital 13 explicitly mentions **micro payments** and SMS services. However, **in practice** - as experiences made by the AK consumer advice bureau show - this may be **higher amounts than the EUR 200 suggested in the exemption clause,** in particular in case of online games. Technical progress in the last years has resulted in the fact that such products can also be paid by way of Web billing resp. WAP billing.

Apart from that, the proposed exemption clause suggests that it is up to **communication providers to decide whether an issue is subject to PSD regulation or not;** in can provide a service

under its own name or outsource it to a subsidiary (payment service provider), which is unsatisfactory.

The wording does not make it clear what shall apply **if ancillary services according to the revised version exceed the amount limits.** Are these cases **subject to the PSD or shall Telecom law** apply. If this fulfils PSD facts, the provider needs a licence for payment services; for the common business to offer these services and ancillary service to communication services would be obsolete.

No deterioration for consumers in case of misuse of mobile phone payment services:

In Austria, a permanent Supreme Court ruling exists, according to which the telephone subscriber in the event of the **misuse of value-added services does not have to assume any liability.** In cases, where misuse has taken place, which is based on an ancillary service of a mobile phone provider and where the amount limits of Art 3 were exceeded, it has to be possible **to maintain this very high level of consumer protection.**

We would therefore ask you to consider the issues outlined by us, which are key concerns of consumers in respect of payment transactions.

Should you have any further questions
please do not hesitate to contact

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