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Hogan Lovells Global Payments Newsletter

February 2017

Hogan Lovells

Welcome to the Hogan Lovells Global Payments Newsletter. In this monthly publication we provide an overview of the most recent payments, regulatory and market developments from major jurisdictions around the world as well as sharing interesting reports and surveys on issues affecting the market.

For our latest news and commentary on payments innovation, follow us on Twitter @HLPayments.	*For more information on our Payment Services team please click the link here.*	*For more Financial Institutions resources please click the link here.*

Key Developments

Key developments of interest over the last month include:

HM Treasury consults on PSD2 implementation: the stated aim of the consultation, which was published on 2 February 2017, is to reduce the burden of PSD2 implementation on businesses, where possible. Appendix B to the consultation paper contains draft Payment Services Regulations 2017.

European Commission revises draft RTS on separation of payment card schemes and processing entities under IFR: in a letter to the EBA, the Commission has proposed amendments to provisions in sections 3 (organisation) and 4 (decision-making process) of the draft RTS. The EBA has also published a revised version of the RTS containing the Commission's amendments.

'Providing' a durable medium in online banking: the CJEU has adopted the same reasoning as the previous AG's opinion in the *BAWAG* case, which concerned whether a notice of variation under the PSD sent to a secure online banking mailbox was "provided" in a "durable medium".

Regulatory Developments

Global

Europe: 'Providing' a durable medium in online banking

On 25 January 2017, the CJEU handed down its judgment in the *BAWAG* durable medium case.

The CJEU decision in *Content Services* had created uncertainty over whether online banking can be used to "provide" prescribed information. The recent Advocate General (AG) opinion in the *BAWAG* case distinguished *Content Services* and took a more pragmatic approach. The CJEU's judgment in *BAWAG* adopted the same reasoning as in the AG opinion.

The Court examined whether a notice of variation under the PSD sent to a secure online banking mailbox was "provided" in a "durable medium".

It concluded that for information to be provided in a durable medium two conditions must be met:

- To satisfy the requirement for information to be in a 'durable medium', the website must allow the "user to store information addressed to him personally in such a way that he may access it and reproduce it unchanged for an adequate period, without any unilateral modification of its content by that service provider or by another professional being possible". It appears that this covers both information stored on websites that cannot be changed by the provider (for example a website maintained by a third party) and information accessible on or through the provider's website which can be printed or downloaded and saved (for example in pdf format). In both cases, if the information is only available for a limited period, the user should be told and the period should be 'adequate'.
- To 'provide' information, the service provider must actively alert the customer to the existence of the information on, or accessible on or through, the website to draw the attention of the customer to the existence and availability of the information. Where the information is simply posted to online banking without any form of alert, then it has only been "made available".

See the judgment here.

See the AG Opinion here.

See further information here.

United Kingdom: HM Treasury consults on PSD2 implementation

On 2 February 2017, HM Treasury published a consultation paper on implementation of PSD2.

Appendix B to the consultation paper contains a draft version of the Payment Services Regulations 2017, the statutory instrument that the Government will use to make the legislative changes required to implement PSD2 in the UK.

The consultation paper:

- Explains the scope of PSD2;
- Explains the key provisions that have changed from PSD;
- Presents the Government's proposed approach to implementation; and
- Consults on options for implementation (where discretion for member states exists).

The Government's stated aim is to reduce the burden of PSD2 implementation on business where possible. It therefore aims to finalise and lay the final version of the implementing regulations before Parliament in early 2017, to provide industry with as much time as possible to adjust to any changes required.

The consultation paper closes to responses on 16 March 2017.

See the consultation paper here.

See the draft Payment Services Regulations 2017 here.

See Hogan Lovells' webinar here.

United Kingdom: FCA expected to consult on Handbook changes to implement PSD2 in early Q2 2017

On 2 February 2017, the FCA updated its webpage on PSD2 to include a new "timeline" section.

The FCA indicated that:

- HM Treasury will consult on implementing regulations, which will update the Payment Services Regulations 2009 (**PSRs**), in Q1 of 2017. The consultation was published on 2 February 2017 (see above item).
- The FCA expects to consult on the necessary changes to its guidance and Handbook rules early in Q2 of 2017.
- Some of the regulatory technical standards (**RTS**) and guidelines under PSD2 that are being developed by the EBA will come into force after January 2018. These include RTS on strong customer authentication, which are expected to come into force in autumn 2018. The EBA indicated in November 2016 that it was likely that it would submit the final RTS on strong customer authentication a month or so later than the 13 January 2017 deadline set out in PSD2, due to the need to assess a large number of consultation responses with limited resources.

Member states must transpose PSD2 into national law by 13 January 2018.

See the webpage here.

Europe: ECB consults on revision of Regulation on oversight requirements for systemically important payment systems

On 3 January 2017, the European Central Bank (**ECB**) published a consultation paper on the revision of the Regulation on oversight requirements for systemically important payment systems (**SIPS**) (also referred to as the **SIPS Regulation**).

The SIPS Regulation aims to ensure the efficient management and smooth operation of SIPS in the euro area.

The related press release states that, under the SIPS Regulation, the general application of the Regulation must be reviewed every two years and amended if needed.

Among other things, the revised version sets clearer requirements on liquidity risk mitigation and new requirements on cyber resilience, and assigns additional powers to the competent authorities.

As part of the revision, the ECB has also published a consultation paper on its decision relating to the methodology used to calculate sanctions that can be imposed in cases of non-compliance with the SIPS Regulation.

See the press release here.

See the Regulation here.

See the decision here.

Europe: ECB market consultation on TIPS user requirements

On 10 January 2017, the ECB published a consultation document (dated 9 January 2017) setting out the user requirements for a TARGET Instant Payments Settlement (**TIPS**) service.

In the consultation, the ECB explained that TIPS is a service for the settlement of instant payments and will offer instant settlement services to its participants when an originator instructs the transfer of funds to a beneficiary.

The primary aim of the service is to offer the settlement of instant payments in euro, although it could also support settlement in non-euro central bank money.

TIPS will support participants' compliance with the Single Euro Payments Area instant credit transfer scheme, which the European Payments Council has launched for instant euro payments. It will follow the participation criteria of TARGET2.

Participants that are eligible to open TARGET2 accounts will also be eligible to open TIPS accounts, even if they do not have TARGET2 accounts.

The consultation closes on 24 February 2017 and the ECB will decide in June 2017 whether to develop the service. If it does decide to proceed, it expects that TIPS will be operational in November 2018.

See the consultation here.

Europe: European Commission revises draft RTS on separation of payment card schemes and processing entities under IFR

On 19 January 2017, the EBA published a letter from Olivier Guersent, Director-General, DG FISMA, and Johannes Laitenberger, Director-General DG Competition, relating to the EBA's draft regulatory technical standards (**RTS**) concerning the separation of payment card schemes and payment processing entities under the Interchange Fee Regulation (**IFR**).

The EBA had submitted the draft RTS to the Commission in July 2016.

The Commission proposes to amend provisions in sections 3 (organisation) and 4 (decision-making process) of the draft RTS. The EBA has also published a revised version of the RTS containing the Commission's amendments.

In the letter, the Commission sets out its specific concerns on the drafting of the following Articles of the RTS:

- Article 9 (Independence of senior management);
- Article 10 (Independence of staff);
- Article 11 (Remuneration);
- Article 15 (Code of conduct); and
- Article 16 (Independence of the management bodies).

The EBA published their opinion on the Commission's proposal on 16 February 2017. In this opinion, the EBA agreed with three of the Commission's six proposed amendments (in modified form), but disagreed with the other three, since they appeared to assume that card schemes and processing entities are, or should be treated as if they were, legally and structurally separated.

The opinion explained that, since the IFR does not require structural or legal separation, the Commission's proposals might result in disproportionate, difficult, or ambiguous application of the RTS for those payment card schemes and processing entities that are not legally separated, or that are organised in separate undertakings within the same group.

The EBA noted that they believed that the cumulative effect of the Commission's proposals would significantly affect the ability of small undertakings to compete.

See the letter here.

See the revised version of the RTS here.

See the EBA's opinion here.

Europe: SEPA guide for adherence to SEPA schemes published

On 19 January 2017, the European Payments Council (**EPC**) published a guide for adherence to the Single Euro Payments Area (**SEPA**) Credit Transfer Scheme (**SCT Scheme**), the SEPA Instant Credit Transfer Scheme (**SCT Inst Scheme**), the SEPA Core Direct Debit Scheme (**SDD Core Scheme**) and the SEPA Business to Business Direct Debit Scheme (**SDD B2B Scheme**) (collectively, the **SEPA Schemes**).

The guide provides detailed instructions for payment service providers (**PSPs**) who want to adhere to the SEPA Schemes.

The guide:

- Specifies the documents that must be submitted as part of the adherence process for each type of applicant.
- Provides guidance on completing the adherence documentation.
- Specifies the roles of the different entities involved in the adherence process.
- Sets out the timetable for the adherence process.

Annexes A to D to the guide set out template versions of the documents required to accompany the adherence application: adherence agreements, schedules to the adherence agreements and a range of pro-forma legal opinions. These templates have been published separately on the EPC documents webpage.

The guide replaces the three previous adherence guides published by the EPC (EPC125-07, EPC103-08 and EPC329-08). These guides related to the SCT Scheme, the SDD Core Scheme and the SDD B2B Scheme.

In a press release, the EPC announced that PSPs can apply for adherence to the SCT Inst Scheme, which is due to become effective in November 2017.

The EPC initiated the SCT Inst Scheme in November 2016.

See the guide here.

See the webpage here.

See the press release here.

United Kingdom: Minutes of Payment Services Stakeholder Liaison Group: December 2016

On 1 February 2017, the FCA published the minutes of the meeting of the Payment Services Stakeholder Liaison Group (PSSLG) that was held on 1 December 2016.

Items of interest in the minutes include:

- The provisional timing of the FCA's future consultation on rule and guidance changes relating to PSD2.
- The perceived major challenges for PSD2 implementation - in addition to timing difficulties, meeting participants mentioned (among other things) the alignment and interaction between the implementation of PSD2 and the Competition and Markets Authority's (**CMA**) Open Banking application programming interface (**API**), which also has a 2018 deadline.
- Participants also raised the issue of uncertainty around the protocols for interaction between account servicing payment service providers and third parties, and uncertainty about regulatory responsibilities relating to data and security and the new types of payment service (that is, Account Information Services and Payment Initiation Services).
- The meaning of "accessible online" (Articles 66 and 67 of PSD2) - following discussion, participants agreed to send the FCA examples of types of account access that were not straightforwardly "online".
- Communicating PSD2 changes to customers - some trade associations are considering how to raise consumer awareness, as is the Open Banking Implementation Entity (OBIE).
- Authorisation timelines under PSD2 - the FCA plans to be open for new PSD2 authorisations, including those of new AIS and PIS providers. By July 2018, all existing firms will need to be "re-authorised" to ensure that they are meeting all the new requirements of PSD2.
- Application of PSD2 to e-money firms - some participants thought that more clarity in this area would be helpful.

See the minutes here.

Switzerland: Consultation on amendments to FinTech regulations

On 1 February 2017, the Federal Council introduced a consultation concerning modifications to the Banking Ordinance and Banking Act.

The amendments propose a form of deregulation with three supplementary elements:

- The Banking Ordinance exception concerning the acceptance of funds for settlement purposes should apply explicitly for settlements within 60 days (currently, this exception only applies for settlements within seven days);
- An innovation area should be created, which would allow firms to try out a proposed

business model before they are required to obtain authorisation in the case of public funds over CHF 1 million; and

- Simplified authorisation and operating requirements for accounting, auditing and deposit protection for companies who do not operate in the lending business but accept public funds of up to a maximum of CHF 100 million.

The aims of the proposed amendments are to reduce barriers to market entry for FinTechs and increase the competitiveness of the Swiss financial centre.

The consultation is open until 8 May 2017.

See more information here.

Italy: Italian Government scrutinises implementation of PAD

The Italian Government is currently scrutinising a draft legislative decree concerning fees related to payment accounts, switching payment accounts, and access to payment accounts with basic features (the "**PAD Decree**"), which will implement the Payment Accounts Directive ("**PAD**") in Italy.

The PAD Decree will amend the Italian Consolidated Banking Act by inserting main provisions concerning payment accounts, payment accounts with basic features, payment account comparability and switching payment accounts.

The draft PAD Decree provides for a comprehensive implementation of PAD. The intention of the Italian Government is to gather together all the PAD Italian implementing rules in a single decree.

The draft PAD Decree stipulates that payment services providers will be able to transfer the existing basic payment accounts - currently opened and offered in accordance with local rules - into PAD payment accounts with basic features.

The Italian Government should approve the final PAD Decree by 16 March 2017.

France: Contactless payment limit to increase to €30

The contactless spending limit in France will increase to €30 at the end of 2017. The current limit is €20. From March to September 2017, contactless payment terminals will be reconfigured to accept payments up to the new limit. New cards will be sent out to customers from October 2017.

However, according to French bank card association Groupement des Cartes Bancaires, only around 40 per cent of customers will have new cards with the increased €30 limit by the end of 2018, because of the volume of cards required to be replaced and a lag on the expiry dates for some cards.

It is hoped that the spending limit increase will encourage more people to use their cards for day-to-day purposes.

See more information here (in French).

Payment Market Developments

Global

Africa: Mastercard delivers mobile platform to farmers in East Africa

On 17 January 2017, Mastercard launched a digital platform which connects agents, buyers, banks and smallholder farmers in East Africa. The platform, named 2KUZE, will enable farmers to buy, sell and receive payments for their produce through their phones.

2,000 small scale farmers in Nandi Hills, Kenya are currently using the platform and will work with agents to ensure the right buyers are reached for the best price.

See more information here.

Europe: EBA CLEARING starts testing for pan-European instant payment infrastructure platform

On 18 January 2017, EBA CLEARING announced the start of its testing phase for its pan-European instant payment infrastructure platform. The instant payment system, which is scheduled to go live in November 2017, will provide a real-time payment processing facility, and will be available around the clock on any day of the year.

The platform can be used by account-servicing payment service providers from all over Europe, and will be in line with the ISO 20022 global messaging standards for real-time payments and fully compliant with the instant payment scheme of the EPC.

See more information here.

Global: Onfido's Machine Learning-based solution to bring financial services to the unbanked

Onfido uses proprietary technology to perform a Facial Similarity Check, which verifies a person's identity by comparing an identity document to a selfie. This technology, combined with a document check, will enable unbanked adults to access banking services without requiring in-person verification or an extensive credit history.

The Machine Learning technology can accurately identify documents that have been uploaded using basic technology like scanners and lower-res smartphone cameras, meaning financial services will be available to those in developing countries or those in areas with poor infrastructure.

See more information here.

Global: P20 transatlantic payments initiative to be created

The P20 is a transatlantic payments initiative formed by the UK and US governments, businesses and other leaders, and will serve as a forum for cybersecurity, innovation and regulatory and compliance frameworks, amongst other things.

The forum will see 20 of the payment industry's leaders, UK and US government officials and regulators meet once a year to promote the growth of the payments industry. This will be achieved through an improved regulatory framework, economic development and overall cooperation.

The inaugural meeting of the P20 will be held in Autumn 2017, when industry and policy challenges requiring attention over the next 10 years will be identified.

See more information here.

Africa: New payment system launched in Rwanda by Kenya Commercial Bank

The mVisa payment service will allow customers to make payments at merchant outlets and online, and has the potential to fast-track efforts to transform Rwanda into a cashless economy. The use of a mobile app and mobile POS terminal will allow Rwandan businesses, no matter what their size, to accept digital payments.

The payment system is expected to help reduce the cost of transactions and operations in Rwanda, and will increase access to services, as well as boosting financial inclusion in the country.

See more information here.

China: Trial run of digital bank acceptance exchange

According to media agency Caixin, China's central bank, the People's Bank of China (**PBOC**) is moving closer to becoming the first central bank in the world to research and test its own digital currency.

The trial run of transactions and settlements of bank acceptance bills using PBOC's own digital currency based on blockchain technology was completed in mid-December 2016.

In the future, PBOC is planning to set up a digital currency research institute to develop big-data systems, blockchain technology and cryptography.

See more information here.

Europe: Open Banking platform for PSD2 launched by Capgemini

On 8 February 2017, Capgemini announced the launch of their PSD2 Open Banking Solution.

The platform is designed around four key capabilities:

- An Open API programme on a central collaboration platform, which is designed to simplify PSD2 requirements and allow banks and payment service providers (**PSPs**) to share data more easily;
- Access to the FinTech ecosystem, an API sandbox and integrated developer portal, which will enable banks and PSPs to work with third party providers and developers to build solutions on open APIs;
- Using 'smart tokens' (combining public-key cryptography and tokenization) to give banks and PSPs the ability to issue and redeem payment authorisations; and
- Real-time, centralised monitoring of all platform components.

It is hoped that the platform will transform the ability of banks and PSPs to unlock new digital business models in light of PSD2.

See more information here.

Surveys and Reports

United Kingdom: 25 per cent of UK card payments are contactless

On 16 January 2017, the UK Cards Association published a press release which revealed that one in four card transactions in the UK are contactless, with debit cards accounting for 88 per cent of these contactless payments.

The press release revealed that contactless debit and credit cards accounted for 325 million purchases in November 2016, leading to a record £2.9 billion being spent using contactless technology in that month.

See the press release here.

United Kingdom: Half of UK consumers unlikely to use Open Banking

A poll of over 2,000 adults conducted by YouGov has shown that almost half of respondents would not use Open Banking when it becomes available.

The poll also found that consumers were concerned about data being shared: 63 per cent had concerns about security, and 60 per cent would not share personal data through Open Banking.

Nonetheless, the positives of Open Banking were recognised by respondents, with 50 per cent saying they would find the ability to access lenders offering better terms for financial products an important tool. 53 per cent of respondents said the ability to compare current account offerings from different banks would also be an important tool.

See more information here.

Global: 3 billion digital banking users expected by 2021

Research conducted by Juniper Research has revealed that digital banking users (those accessing retail banking services through smartphones, tablets, PCs and smartwatches) will increase by 53 per cent in the period from 2017 to 2021.

The research recommended that traditional banks should focus on providing a smoother digital experience to their customers if they are to remain market leaders, as consumers are increasingly opting to use banks offering the convenience of swift, multi-channel digital services. Juniper therefore predicted that traditional banks would acquire challengers such as tech-startups and digital-only banks in 2017.

See more information here.

Our Global Payments Team

Hogan Lovells' global payments practice is made up of financial services and technology lawyers working closely together as a single team from our network of offices, including offices in all the major financial centres.

The practice covers traditional payment services as well as technology driven innovations that affect products, business structures, services and markets.

Our Clients

The team provides strategic advice to all market participants including:

- lenders
- card issuers (including banks and e-money institutions)
- acquirers
- money remitters
- payment schemes
- mobile operators
- retailers
- payment platforms or technology providers
- payment processors
- networks and settlement services

How we can help

In addition to advising on payment specific regulation, the team:

- advises on all related regulation such as money laundering, data and privacy, technology law and IP, e-commerce and consumer protection
- negotiates commercial contracts
- leads or supports on mergers and acquisitions in the payments sector
- engages with Government on new regulation and implementing new legislation
- advises on multi-party arrangements to develop new payment services or networks and on related loyalty and incentive programmes
- negotiates outsourcing of payments processing and settlement
- drafts related customer and commercial documentation

The global payments practice is part of Hogan Lovells market leading Financial Institutions Group, one of the largest practices of its kind with approximately 200 lawyers worldwide.

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