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Subject matter

The Implementation of the electronic communications exclusion in the voiced-based premium rate services market

Question

Considering the organisation of the voiced-based premium rate services market, and considering the interpretations proposed for the electronic communications exclusion (ECE) in the different countries, as far as a payment transaction complies with the conditions imposed by the ECE, does the ECE apply to the whole value chain, and therefore, all the providers of electronic communications networks or services involved in payment transactions covered by the ECE should not have to register as payment institutions or agents for these operations?

Background on the question

The EU Directive 2015/2366 defines a 'payment transaction' in article 4 as an 'act, initiated by the payer or on his behalf or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee'.

Under the EU Directive 2015/2366, the digital download exemption has been replaced by the electronic communications exclusion (ECE) in its article 3 'Exclusions'.

The ECE excludes payment transactions by a provider of electronic communications networks or services where these are provided in addition to electronic communications services provided to a customer.

The ECE is limited to the purchase of digital content and voice based services. It also includes charitable giving and the purchase of tickets but only via electronic devices, charged to the subscriber's bill.

The ECE also introduces value limits for transactions that are within the ECE: 50€ per single payment transaction and 300€ cumulative value for an individual subscriber per month.

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The purchase of digital contents and voice based premium rate services involves several "intermediaries" (as premium rate operators or transit operators) implied in the delivery of the services and contents as well as in the invoicing/cashing, in the same way they proceed for other telco services.

This mesh architecture enables stakeholders to provide content and premium rate services while being assured of reaching every potential customer and of being paid for every delivered content or service, whoever is the customer's local access network operator.

The question rises of the practical application of Directive (UE) 2015/2366 to these intermediaries.

NCA's interpretation:

The NCA does not consider the payment transaction as an 'end to end' activity but as a succession of payment services between intermediaries, where only the first transaction in the chain provided by the local access network operator benefits of the ECE.

Therefore, intermediaries as premium rate services operators and transit operators should not benefit from the ECE and would have to register as payment institutions or agents of payment institutions.

Other interpretations in Europe:

Given the room left to the interpretation regarding the implementation of the ECE, two countries, Member State A and Member State B view favouring its application across the value chain involved in the provision of the service and the payment transaction.

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Despite different interpretations it is important to note that these two countries came to the same conclusion.

In Member State A, the financial supervisor, and the regulatory authority for telecommunications, jointly agreed.

They decided not to classify as Payment Services the so-called "Online Billing" flavor of Intelligent Network services, i.e. when the value of the call is entirely determined by the local access network operator to which the subscriber is connected (counting the number of calls or of minutes), based on the logic of recital 52 of EU Directive 2015/2366, which consists in saying that, since three-corner services (consumer, operator to which the subscriber is connected, Intelligent Network service provider) were not classified as payment services, then four-corner services (consumer, local access network operator, Intelligent Network operator, Intelligent Network service provider) should also be not classified as payment services, for competition promotion purposes; And therefore the ECE applies for all the intermediaries.

In Member State B the exclusion historically applied to all operators in the voice-based premium rate services value chain and nothing has changed since EU Directive 2015/2366.

Member State B's financial supervisor considers that "where a network operator benefits from the exclusion with respect to a particular transaction, the provider of any other payment service resulting from that transaction will also benefit from the exclusion" and specifies in its Handbook that this exclusion 'cascades' to include intermediaries that facilitate the transfer of money to merchants;

As far as the rest of Europe is concerned, no other country has commented, to our knowledge, on the scope of application of the ECE, and probably continue to include all the intermediaries of the chain as when the PSD1 was the current law.

EBA answer

According to Article 3(1) of PSD2, PSD2 does not apply if a provider of electronic communication networks or services provides payment services in addition to electronic communication services for a subscriber to the

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network or service. The objective of this exclusion is the same as the exclusion defined in Article 3(1) of PSD1. The reasons for the changes introduced in this provision were "to clarify and narrow the scope of eligibility for that exclusion for such service providers by specifying the types of payment transactions to which it applies" (see Recital 15, PSD2). The scope of the exclusion has been further narrowed down by focusing specifically on micro-payments for digital content and voice-based services and on payments for the purchase of electronic tickets or within the framework of a charitable activity (see Recital 16 of PSD2).

For the application of Article 3(1) PSD2, the telecommunications operator must provide the payment services in addition to the electronic communications services it provides to its subscriber. This implies that there is a direct contractual arrangement between the telecommunications operator and the subscriber for the provision of the electronic communication services and that the payment service is an additional service to these services. Therefore, Article 3(1) PSD2 does not apply to cases where the service provider ('intermediary') does not have a direct contractual relationship with the payer for the provision of telecommunication services.

There are situations in which a digital content provider or the provider of services defined in Article 3(1) sub (i) and (ii) PSD2, for which the subscriber has paid through its own telecommunication operator, makes use of further service providers ('intermediaries') for the collection and transfer of the funds. The latter, although they may also provide telecommunication services within the meaning of Article 4(42) of PSD2, cannot benefit from the exclusion of Article 3(1) PSD2 as they do not have a direct contractual relationship with the subscriber regarding the provision of telecommunication services.

Disclaimer:

This question goes beyond matters of consistent and effective application of the regulatory framework. A Directorate General of the Commission (Directorate General for Financial Stability, Financial services and Capital Markets Union) has prepared the answer, albeit that only the Court of Justice of the European Union can provide definitive interpretations of EU legislation. This is an unofficial opinion of that Directorate General, which the European Banking Authority publishes on its behalf. The answers are not binding on the European Commission as an institution. You should be aware that the European Commission could adopt a position different from the one expressed in such Q&As, for instance in infringement proceedings or after a detailed examination of a specific case or on the basis of any new legal or factual elements that may have been brought to its attention.

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