

Combating money laundering and terrorist financing: information on the payer accompanying transfers of funds, transposition of the Special Recommendation VII on “wire transfers” (SR VII) of the Financial Action Task Force (FATF) into Community legislation

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The European Central Bank gives its opinion on the Commission's proposal as follows:

Obligations of intermediary payment service providers: With reference to the definition of ‘intermediary payment service provider’, it appears that both operators of payment, clearing and settlement systems and providers of messaging services seem to be covered by the scope of application of the proposed regulation, since they take part in the execution of transfers of funds. The ECB strongly recommends inserting an explicit exemption from the scope of application of the proposed regulation for both operators of payment, clearing and settlement systems and providers of messaging services, plus an explanatory recital. This is due to the fact that such operators and service providers do not have a direct customer relationship with payers or payees and do not, therefore, hold all the information required under the proposed regulation. Therefore, obligations should only be imposed on credit institutions that are directly involved in customer contacts or on financial entities that are part of the payment chain for the execution of funds, since such entities would possess the necessary information.

Furthermore, the ECB advises against the proposal to make the intermediary PSP responsible for informing the PSP of the payee that the information is incomplete. It would be more appropriate for this obligation to fall upon the parties who are directly involved, namely the PSP of the payer and the PSP of the payee, since they would in any event possess the required information. The only obligations of an intermediary PSP should be those under Article 12 and Article 13(1) of the proposed regulation, which require that all information on the payer received as part of the transfer is retained with the transfer and that such information is kept on record for five years.

Definitions: The ECB suggests that:

- the definition of ‘payment service user’ should be consistent with the same term in the proposed directive on payment services in the internal market; (COM(2005)0603)
- the definition of ‘payment service provider’ should cover money remitters, to ensure consistency with Special Recommendation VII on wire transfers;
- a definition for ‘unique identifier’ should be added, which should reflect the various possible combinations of data required for identifying the payer.

Commercial transactions: a recital to the proposed regulation concerns the exemption of transfers of funds that flow from ‘commercial transactions’. There is no definition of the term ‘commercial

transaction'. In addition, article 2(2) specifies that the proposed regulation does 'not apply to transfers of funds which flow from a commercial transaction carried out using a credit or debit card or any other similar payment instrument'.

The ECB suggests that these clauses should be redrafted to ensure consistency with the Interpretative Note SR VII on wire transfers. In addition, with reference to Article 2(2), the ECB understands the desire to exempt transactions carried out using a credit or debit card to pay for goods and services from the requirement to include full information on the payer. However, the proposal seems impracticable as the entities subject to the proposed regulation have no means which would in all circumstances allow them to identify the underlying reason for a payment. The intention behind Article 2(2) may be that the settlement (via the PSP of the payer) of the bill relating to the underlying credit card transactions made by the payer is not part of any credit transfer that could have been initiated using the credit card, but a completely separate credit transfer from the payer to the credit card company. If this is the case, the ECB agrees with the content of Article 2(2) but, in the interests of legal certainty, would suggest making this intention clearer in the proposed regulation.

Batch file transfers: Such transfers concern individual transfers from one payer to different payees, which have been bundled and are then usually 'unbundled' by the first PSP in the process or a payment system operator and subsequently sorted according to the PSP of the payee. Therefore, neither the payee nor its PSP will be able to identify that the funds received have originally been transferred via a batch file. If the payee is situated in a country which is a member of the FATF, the country in question must also apply SR VII. Consequently, the PSP of the payee would need to contact the PSP of the payer within the Community or the first intermediary PSP to obtain the relevant information. Therefore, it is noted that the use of batch file transfers at a cross border level will generate a large number of requests for provision of information on the payer.

Agreements with territories or countries outside the Community: the proposal states that the European Commission may authorise agreements between Member States and countries or territories outside the Community which contain derogations from the proposed regulation. Such authorisation requires fulfilment of a number of conditions. In view of the consolidation of financial markets in the EU and the development of the Single Euro Payments Area, the first and third conditions seem to be sufficient to achieve the aims of the authorisation requirement. Therefore, the second condition (that the country or territory is a member of the payment and clearing systems of the Member State concerned) could be deleted.