



EUROPEAN CENTRAL BANK
EUROSYSTEM

Template for comments

Public consultation on the draft ECB Regulation amending the Regulation on payments statistics

Institution/Company

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Please tick here if you do not wish your personal data to be published.

General comments

Dear Sir or Madam,

The Federal Association of Payment and Electronic Money Institutions (BVZI) welcomes the opportunity to comment on the European Central Bank's (ECB) consultation on the draft ECB Regulation amending the Regulation on payment statistics.

BVZI promotes the interests of the payment institutions and e-money institutions licensed in Germany. BVZI was established on 21st October 2009 after the enactment of the German Payment Services Supervision Act (Zahlungsdienstenaufsichtsgesetz – ZAG).

The members represented by BVZI form an important interface in the cashless payment system. The payment institutions and e-money institutions are affected by the proposed changes of the draft Regulation (EU) [XX] of the European Central Bank of [date Month 2020] amending Regulation (EU) No 1409/2013 of the European Central Bank of 28 November 2013 on payment statistics (ECB/2013/43) ([ECB/2020/XX]) (Draft Payment Statistics Regulation).

The BVZI understands the need for a revision of the European payment statistics against the background of the dynamic development of the payment market and the regulatory framework changed by the PSD2. This includes the expansion of the group of payment service providers subject to reporting requirements to include those payment institutions and e-money institutions which provide at least one of the two new payment services – payment initiation services, account information services.

Prior to the consultation on the Draft Payment Statistics Regulation, the BVZI submitted comments on the corresponding feasibility study and the cost estimate to the Deutsche Bundesbank in March and November 2018.

Besides some requests for clarification we mainly ask for a delay until 2023 and the waiver of the fraud reporting.

Please consider the complete comments sent to you via email.

Regards,

Stefan Blaenkle on behalf of the BVZI

Template for comments

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Please enter all your feedback in this list.

When entering feedback, please make sure that:

- each comment deals with a single issue only;
- you indicate the relevant article/chapter/paragraph, where appropriate;
- you indicate whether your comment is a proposed amendment, clarification or deletion.

Deadline: 7 May 2020

ID	Chapter	Article	Paragraph	Page	Type of comment	Detailed comment	Concise statement as to why your comment should be taken on board	Name of commenter	Personal data
1	Annex II	Data definitions			Clarification	<p>In the view of the BVZI, there is a need for definitions of terms to be applied consistently throughout the regulatory framework. The definitions of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (PSD2) must be regarded as an unalterable basis for the amendment of the European payment statistics consulted here. However, Annex II of the Draft Payment Statistics Regulation also contains definitions of terms that have not been defined in the PSD2 nor in the legal framework mentioned above. In the absence of a legally binding definition of terms by an European Directive or a European (implementing) Regulation, it is up to the national legislator, at its discretion, to define or interpret definitions of terms which it considers necessary in the course of national implementation and supervisory practice. Against this background, any definition of terms that has not been provided by the European legislator must be rejected. The ECB cannot ensure, within the framework of its own definition, that there is consistency with the respective definitions laid down in national law.</p> <p>Accordingly, to the extent that a term is defined and interpreted under national law, it cannot be amended by Annex II of the Draft Payment Statistics Regulation. In order to prevent inconsistent application and interpretation, a divergent definition of the same terms - already in the respective national reporting procedures - must be avoided.</p>	Inconsistent definitions of terms run counter to the goal of a uniform European regulatory framework and its stringent implementation with a high degree of statistical precision. The reporting institutions see themselves exposed to avoidable additional costs.	Blaenkle, Stefan	Publish
2	Annex I	Section 2.3.1	35;36;37	9	Clarification	"Electronic payment transaction" or "electronically initiated transaction"	Where the Draft Payment Statistics Regulation defines terms that are already used in the PSD2, their definitions must be in line with the PSD2. In addition, there must be consistency with the definitions of terms that are defined and used by the EBA in the published EBA guidelines. In this respect, these EBA guidelines represent the exercise of the mandates explicitly set out in the PSD2 to publish consistent, efficient and effective supervisory practices. Insofar as terms are defined, which are used in the PSD2 legal text, the meaning shall be in congruence with the EBA guideline and the legal text. In particular the term of an "electronic payment transaction" or of an "electronically initiated transaction", which defines the scope of the SCA mandate according to Article 97 Paragraph 1,2 of the PSD2, shall be used in a manner which is not contradicting the meaning of the term in the SCA-context.	Blaenkle, Stefan	Publish

3	Annex II	Data Definitions		2	Clarification	<p>"Card details theft" is a completely new definition which is not aligned with PSD2. Applicability of the reporting request on the single payment service provider has to be clarified.</p>	<p>"card details theft" is defined as follows: „The fraudster received unauthorised access to sensitive payment data, including personalised security credentials (such as card number, expiration date, CVC, PIN) which can be used to carry out fraudulent card-based payment transactions on an existing account (account takeover).“ The definition refers to the concept of personalised security credentials as defined by Article 4 Paragraph 31 of the PSD2, which are defined qualitatively as follows: "personalised security credentials" means personalised features provided by the payment service provider to a payment service user for the purposes of authentication". The definition of „card details theft“, including the addition in brackets "(such as card number, expiration date, CVC, PIN)" is more extensive than the qualitative definition of the PSD2 and is to be rejected. Particularly since the credentials listed in the brackets are not generally understood by market participants as personalized security credentials, since neither authentication nor the initiation of a payment transaction is possible with any of these credentials. The same applies to the definition of „sensitive payment data" within the meaning of Article 4 Paragraph 32 of the PSD2. The credentials "card number, expiration date, CVC, PIN" listed individually in the brackets of the term "card details theft" are not personalised security credentials. Consequently, they cannot constitute "sensitive payment data" within the meaning of PSD2. Whether an individual data is sensitive must be decided by means of an analysis to determine the need for protection by the "controller" – in this case the payment institutions and the e-money institutions – within the meaning of Article 4 Paragraph 7 of the General Data Protection Regulation. The analysis is related to the respective use of the data concerned. Even if data is individually assessed as a non-sensitive payment data, the combination of these data can lead to a different assessment. The impression created by the brackets that the named data should be regarded as sensitive payment data for all payment service providers is not compatible with the requirements of PSD2. Furthermore, the definition in Article 4 Paragraph 31 of the PSD2 refers to "personalised features" provided by the payment service provider to the payment service user for authentication purposes. Cards are regularly issued by those payment service providers which are holding the payment accounts, i.e. payment service providers in the form of a credit institution. The payment institutions and e-money institutions licensed in Germany do not issue cards to their customers in general. The customers of the payment institutions and e-money institutions licensed in Germany are regularly to be qualified as "merchants" operating commercially. The payment service users connected to the payment institutions and e-money institutions in Germany are regularly payees who, on the basis of the contractual relationship, are enabled to accept a cashless payment from a card holder. Due to this role, it is not at all objectively possible for the payment institutions and e-money institutions to collect and fill the currently proposed type of information in Tables 5a or 5b. Rather, the role of the payment service provider, whether or not cards are issued to payment service users at all, must already be differentiated when the tables are defined. This means that those payment service providers who do not issue cards are excluded from the data collection of Tables 5a or 5b.</p>	Blaenkle, Stefan	Publish
4	Annex I	Fraudulent payment transactions involving nonMFIs , reporting tables 5a / 5b	1.1	2	Clarification	Table 5a or 5b - Definition of Fraud	<p>In principle, it should be noted that there is no uniform European definition of "fraud" or a correspondingly harmonised normative legal basis. Based on the national legal systems and the individual interpretations of the national supervisory authorities, a uniform and consistent collection of the requested data and their concurrent interpretation at the level of two supranational institutions, EBA and ECB, is questionable. It should be noted that even at national level there is no uniform understanding of the terms "fraudulent access", "fraudulent use" or "fraudulent initiation", which are not defined by law in this respect. Apart from that, it is not within the legal and sovereign competence of the payment service provider to determine whether or not the criminal offence of "fraud" has been fulfilled.</p>	Blaenkle, Stefan	Publish
5	Annex II	Data Definitions		4	Clarification	<p>The term "card-based payment instrument" is defined both in Annex II of the Draft Payment Statistics Regulation and Article 2 Paragraph 20 of the IFR. A comparison of the definitions demonstrate that they are not identical and that the definition of the Draft Payment Statistics Regulation therefore needs to be amended. Draft Payment Statistics Regulation: "A payment instrument (a card, mobile phone or any other means) enabling the payer to initiate a card-based payment transaction (debit or prepaid or a credit card transaction) based on a payment card scheme's infrastructure" vs. Article 2 Paragraph 20 of the IFR : "'card-based payment instrument' means any payment instrument, including a card, mobile phone, computer or any other technological device containing the appropriate payment application which enables the payer to initiate a card-based payment transaction which is not a credit transfer or a direct debit as defined by Article 2 of Regulation (EU) No 260/2012;"</p>	<p>The different definition of the term "card-based payment transaction" has an effect on the definitions of "card-based payment transaction" and "card details theft" provided in the Draft Payment Statistics Regulation. However, it must also be noted that the "card-based payment transaction" according to Article 2 Paragraph 7 of the IFR does not correspond to the understanding of the term in the sense of the Draft Payment Statistics Regulation. The following defining wording is included in the definition of the "card-based payment transaction": "...card-based payment transaction (debit or prepaid or a credit card transaction) based on payment card scheme's infrastructure". This definition is thus in clear contradiction to the term uniformly regulated throughout Europe by Article 2 Paragraph 7 of the IFR: "'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;". The presumed differentiation by the ECB to record new payment procedures is problematic in the specific case. One example is the question of modern payment procedures such as Alipay or Apple-Pay, where, as a rule, the card data used to balance the clearing accounts inherent in these payment procedures are not transmitted to the merchant's acceptance device. The payment institutions and e-money institutions therefore do not have information to the extent to which this is a card transaction or card-based transaction under IFR, which leads to uncertainty in the reporting format.</p>	Blaenkle, Stefan	Publish

6	Annex I	Fraudulent payment transactions involving nonMFIs, reporting tables 5a / 5b	1.1	2	Deletion	Table 5a or 5b - Fraud Reporting - The EBA Fraud Guidelines establish consistent, efficient and effective supervisory practises to ensure the common, uniform and consistent application of Union law. The present Draft Payment Statistics Regulation contains as an essential reporting table the reporting of fraud cases. This involves the retrieval of data which, under the PSD2 in accordance with the EBA Fraud Guidelines, must be reported by reporting agents to the national supervisory authority. In addition, data are retrieved that are based on independent reporting requirements of the ECB. Fraud reporting is included in the newly inserted Tables 5a and 5b due to the extension to the ECB payments statistics. The Draft Payment Statistics Regulation and the EBA Fraud Reporting are neither congruent in content nor in time.	Therefore, a considerable and additional effort in the implementation of the reporting requirements in the institutions' systems and processes is to be expected. Taking into account the legal framework it is the current understanding of BVZI that payment institutions and e-money institutions will have to use two reporting channels of two national authorities (Deutsche Bundesbank, German Federal Supervisory Authority - BaFin). The differing regulatory requirements of the EBA and the ECB also create an additional risk of implementation errors and thus of distorted reporting. In the view of the BVZI, a redundant reporting obligation of uniform data to different reporting recipients in a divergent reporting rhythm is not appropriate and means unreasonable additional expenditure. Pursuant to Article 96 Paragraph 6 Sentence 1 of the PSD2, the European legislator has finally regulated that payment service providers must provide the nationally competent authority with statistical data on fraud involving the various means of payment. Subsequently, it is the responsibility of the national competent authority to provide these statistical data to EBA and the ECB in "aggregated form" in accordance with Article 96 Paragraph 2 Sentence 2 of the PSD2. Both the original and the amended versions of the EBA Fraud Guidelines are fully aligned between EBA and the ECB. Consequently, it is still not clear which legal change has been come into force since 20th January 2020 that would justify a different reporting obligation to the ECB. In particular, the consultation does not explain the legal basis on which one would like to go beyond the provision of statistical data in "aggregated form" in accordance with Article 96 Paragraph 2 Sentence 2 of the PSD2. The BVZI suggests deleting Tables 5a and 5b without replacement. Alternatively, the requirements of Tables 5a and 5b should be sent to a single competent authority in consolidated form, with the same content and timing.	Blaenkle, Stefan	Publish
7	Annex I	Payment transactions involving non-MFIs, reporting tables 4a / 4b	1.1	2	Deletion	The reporting formats Tables 4a/4b and 5a/5b require the identification of a subset of card-based contactless payments at the physical Point-of-Sale (POS) that were processed using near field communication (NFC) according to the ISO/IEC 18092 technology standard. The differentiation can not be provided.	Due to the contactless payment identifiers in the market standard of the General ISO-8583 Credit Card (GICC) Protocol for POS Authorization, the payment service provider operating the terminal is only able to make an appropriate evaluation of the number and total value of contactless payment transactions. A further differentiation of contactless payment transactions according to whether they were initiated by means of NFC, QR code, Bluetooth or another technical variant is currently not technically possible. It is the understanding of the BVZI that the requirement for differentiation should be deleted without substitution due to its non-feasibility. It is not within the legal authority of payment service providers to oblige payment system operators to adapt technical taxonomies.	Blaenkle, Stefan	Publish
8	Annex I	Quarterly reporting of payment transactions involving non-MFIs, reporting table 9	1.1	2	Deletion	In the reporting format Table 9, the card-issuing payment service providers have to indicate the merchant category code (MCC) of the merchant for each electronically initialised transaction. The BVZI recommends that this reporting requirement be waived without substitution.	The MCC is assigned by the payment service providers of the merchant (not the payment service provider of the payer) in the course of the merchant's onboarding, taking into account the contractual requirements of the respective payment system operator. In the course of the individual recording of a transaction, the transaction data record is automatically enriched with the relevant MCC. The payment service provider of the merchant is contractually obliged to use the MCC specified by the respective payment system operator. Otherwise, a breach of this obligation may result in the risk of contractual sanctions, including exclusion from the payment system concerned. The synchronisation of the specifications of the payment system operators with the ISO 18245 standard, which is not legally binding in this respect, is not guaranteed at all times. Furthermore, there is a statistical imprecision in cases where the merchant provides various services or goods and thus a clear allocation of an individual MCC cannot be made properly. Thus, the definition of ISO 18245 does not represent a homogeneous and qualitative data basis which can be transferred to an international classification (e.g. NACE) by a 1:1 mapping. The envisaged statistical reference therefore appears problematic and inevitably creates a breach of obligations for all payment service providers. The BVZI recommends that this reporting requirement be waived without substitution.	Blaenkle, Stefan	Publish
9	Regulation		8	5	Amendment	The BVZI appeals to the ECB to postpone the application of the amended requirements for eighteen months. Data collection for the first reporting cycle should start on 1st January 2023.	Against the background of the current COVID-19 pandemic, payment service providers are focusing on the continuity of the payment services provided. This is considered to be of systemic importance for coping with the economic and operational distortions triggered by the pandemic. As a result, not only the financial and human resources of payment service providers are tied up. In particular, there is a bottleneck in IT resources, which are not available in the usual way, taking into account travel and restrictions due to the applicable lockdown. Activity via remote access is currently not possible, particularly in view of the requirements for the sensitive payment data and company data involved here. Apart from this, the personnel resources are already tied up in other technical implementation projects, the timing of which is due in particular to delays on the part of the national standard-setting body. Examples include the requirements for strong customer authentication to be met on a mandatory basis by 31st December 2020 and the establishment of account interfaces. The German competent authority BaFin have not yet finalized the EBA fraud reporting requirements either, which ties up capacities for ongoing implementation. Account should also be taken of the typically smaller size of payment institutions and electronic money institutions compared to other payment service providers (credit institutions). In the case of payment institutions and e-money institutions, the cost and effort of implementing these related projects is spread over fewer staff than is typically the case for credit institutions. Furthermore, the implementation of the new requirements resulting from the revision by payment institutions and e-money institutions as a result of the distributed data storage along the value chain must regularly be carried out together with the operators of the payment systems and the technical service providers. The coordination processes with the non-regulated but mandatory parties can only take place once the final reporting plans have been submitted. These parties then set up corresponding implementation projects. A postponement of eighteen months would also relieve the payment institutions and e-money institutions of the double burden of producing yearly evaluations within 2021 and 2022, respectively, according to both the old and the new reporting scheme.	Blaenkle, Stefan	Publish