

Legislation tightens up on loyalty cards

The European Parliament adopted at the beginning of October, then the Council of Ministers also gave the green light on 16 November to the new directive on payment services in the internal market (Directive on Payment Services 2) (PSD2). The new rules are aimed among others to provide greater protection for consumers and to ensure more secure online and mobile payments, but the exclusions regarding the so-called limited networks have also become stricter.

The Directive on Payment Services 1 did not cover the so-called “loyalty” namely the loyalty cards used for payment (e.g., fuel cards, membership cards, vouchers etc.) which were applied only in the premises used by the issuer or within a limited range based on the agreement concluded with the issuer. So, these payment activities did not need to meet the strict requirements imposed by the directive on traditional payment service providers (e.g., credit institutions).

However, these limited networks actually make payments in very significant volume, and the “limited” range is not limited at all since it often involves several thousand kinds of goods and services. In the situation thus created, no legal protection is provided for those using payment services and in particular for consumers, which is especially detrimental to the operators in the regulated markets.

The Directive on Payment Services 2 intends to change this situation among others by tightening up on the exclusions based on which a limited network can be exempted from the regulation. Accordingly, services based on specific payment instruments that can be used only in a limited way can be exempted from the strict rules in the case of which one of the following conditions is satisfied:

1. either instruments allowing the holder to acquire goods or services only in the premises of the issuer or within a limited network of service providers under direct commercial agreement with a professional issuer,
2. or instruments which can be used only to acquire a very limited range of goods or services,
3. or instruments valid only in a single Member State provided at the request of an undertaking or a public sector entity and regulated by a national or regional public authority for specific social or tax purposes to acquire specific goods or services from suppliers having a commercial agreement with the issuer.

The loyalty cards presently in use in Hungary are likely to almost fulfil a condition specified in Clause 1 hereof. On the other hand, the “very limited range” specified in Clause 2 hereof may bring about uncertainty as there is no knowing what can be considered as such, whether



comprising 3 or 5 or 200 products? This question is likely to be answered in the future by the courts of the Member States in developing their case law.

The amendment also endeavours to unify it as the supervisory authorities of each country have been so far engaged in a great diversity of practices in determining whether limited networks are considered to be exclusions or not.

The French supervisory authorities, for example, strictly interpreting the first Directive, granted exclusion status only to the chains of shops which were operating under the same brand name. The courts made it even stricter declaring that a network can only be considered as limited if it satisfies other objective conditions e.g., the network is limited geographically or the members of the network have developed significant economic relations with one another.

The German authorities also interpreted the exclusions in the strict sense using only another approach. No permission from the supervisory authority was needed, when the number of products available through the limited network was sufficiently limited. However, the loyalty card was subject to permission which was allowed to be used in different department stores belonging to the same group of company.

Based on the foregoing, it can be considered that the new Directive alone will continue to be unable to ensure uniform practices to be followed by the Member States except for one rule: if the total value of the payment transactions executed by the service providers in connection with the activities set out in Clauses 1 and 2 above exceeds EUR 1 Million for a period of 12 months, they are required to notify the supervisory authority. The notification must state the services offered and that under which exclusion they think they carry out their activities. The supervisory authority may thereafter adopt a resolution and declare that the service providers are not subject to the exclusions. In such case, the supervisory authority is obligated to advise the European Banking Authority (EBA) on the notification received, indicating the exclusion based on which the service provider carries out its activities.

Certainly, this procedure provides for no uniform practice either, since it is not at all certain that each national authority will equally assess all exclusions. Furthermore, the notification formulated by the supervisory authorities to be sent to the EBA may also have an impact on the ad-hoc decisions of each national supervisory authority, not to mention judicial reviews, if any.

Based on the foregoing, we suggest that payment service providers, and in particular the service providers subject to the aforesaid exclusions, should request approval from the respective supervisory authority regarding their activities as soon as practicable.