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 (Text with EEA relevance)

DIRECTIVE (EU) 2015/2366 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 25 November 2015

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) In recent years, significant progress has been achieved in integrating retail payments in the Union, in particular in the context of the Union acts on payments, in particular through Directive 2007/64/EC of the European Parliament and of the Council[(4)], Regulation (EC) No 924/2009 of the European Parliament and of the Council[(5)], Directive 2009/110/EC of the European Parliament and of the Council[(6)], and Regulation (EU) No 260/2012 of the European Parliament and of the Council[(7)]. Directive 2011/83/EU of the European Parliament and of the Council[(8)] has further complemented the legal framework for payment services by setting a specific limit on the ability of retailers to surcharge their customers for the use of a given means of payment.

(2) The revised Union legal framework on payment services is complemented by Regulation (EU) 2015/751 of the European Parliament and of the Council[(9)]. That Regulation introduces, in particular, rules on the charging of interchange fees for card-based transactions and aims to further accelerate the achievement of an effective integrated market for card-based payments.

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(3) Directive 2007/64/EC was adopted in December 2007 on the basis of a Commission proposal of December 2005. Since then, the retail payments market has experienced significant technical innovation, with rapid growth in the number of electronic and mobile payments and the emergence of new types of payment services in the market place, which challenges the current framework.

(4) The review of the Union legal framework on payment services and, in particular, the analysis of the impact of Directive 2007/64/EC and the consultation on the Commission Green Paper of 11 January 2012, entitled, 'Towards an integrated European market for card, internet and mobile payments', have shown that developments have given rise to significant challenges from a regulatory perspective. Significant areas of the payments market, in particular card, internet and mobile payments, remain fragmented along national borders. Many innovative payment products or services do not fall, entirely or in large part, within the scope of Directive 2007/64/EC. Furthermore, the scope of Directive 2007/64/EC and, in particular, the elements excluded from its scope, such as certain payment-related activities, has proved in some cases to be too ambiguous, too general or simply outdated, taking into account market developments. This has resulted in legal uncertainty, potential security risks in the payment chain and a lack of consumer protection in certain areas. It has proven difficult for payment service providers to launch innovative, safe and easy-to-use digital payment services and to provide consumers and retailers with effective, convenient and secure payment methods in the Union. In that context, there is a large positive potential which needs to be more consistently explored.

(5) The continued development of an integrated internal market for safe electronic payments is crucial in order to support the growth of the Union economy and to ensure that consumers, merchants and companies enjoy choice and transparency of payment services to benefit fully from the internal market.

(6) New rules should be established to close the regulatory gaps while at the same time providing more legal clarity and ensuring consistent application of the legislative framework across the Union. Equivalent operating conditions should be guaranteed, to existing and new players on the market, enabling new means of payment to reach a broader market, and ensuring a high level of consumer protection in the use of those payment services across the Union as a whole. This should generate efficiencies in the payment system as a whole and lead to more choice and more transparency of payment services while strengthening the trust of consumers in a harmonised payments market.

(7) In recent years, the security risks relating to electronic payments have increased. This is due to the growing technical complexity of electronic payments, the continuously growing volumes of electronic payments worldwide and emerging types of payment services. Safe and secure payment services constitute a vital condition for a well-functioning payment services market. Users of payment services should therefore be adequately protected against such risks. Payment services are essential for the functioning of vital economic and social activities.

(8) The provisions of this Directive on transparency and information requirements for payment service providers and on rights and obligations in relation to the provision and

use of payment services should also apply, where appropriate, to transactions where one of the payment service providers is located outside the European Economic Area (EEA) in order to avoid divergent approaches across Member States to the detriment of consumers. Where appropriate, those provisions should be extended to transactions in all official currencies between payment service providers that are located within the EEA.

(9) Money remittance is a simple payment service that is usually based on cash provided by a payer to a payment service provider, which remits the corresponding amount, for example via a communication network, to a payee or to another payment service provider acting on behalf of the payee. In some Member States, supermarkets, merchants and other retailers provide to the public a corresponding service enabling them to pay utilities and other regular household bills. Those bill-paying services should be treated as money remittance, unless the competent authorities consider the activity to fall under another payment service.

(10) This Directive introduces a neutral definition of acquiring of payment transactions in order to capture not only the traditional acquiring models structured around the use of payment cards, but also different business models, including those where more than one acquirer is involved. This should ensure that merchants receive the same protection, regardless of the payment instrument used, where the activity is the same as the acquiring of card transactions. Technical services provided to payment service providers, such as the mere processing and storage of data or the operation of terminals, should not be considered to constitute acquiring. Moreover, some acquiring models do not provide for an actual transfer of funds by the acquirer to the payee because the parties may agree upon other forms of settlement.

(11) The exclusion from the scope of Directive 2007/64/EC of payment transactions through a commercial agent on behalf of the payer or the payee is applied very differently across the Member States. Certain Member States allow the use of the exclusion by e-commerce platforms that act as an intermediary on behalf of both individual buyers and sellers without a real margin to negotiate or conclude the sale or purchase of goods or services. Such application of the exclusion goes beyond the intended scope set out in that Directive and has the potential to increase risks for consumers, as those providers remain outside the protection of the legal framework. Differing application practices also distort competition in the payment market. To address those concerns, the exclusion should therefore apply when agents act only on behalf of the payer or only on behalf of the payee, regardless of whether or not they are in possession of client funds. Where agents act on behalf of both the payer and the payee (such as certain e-commerce platform), they should be excluded only if they do not, at any time enter into possession or control of client funds.

(12) This Directive should not apply to the activities of cash-in-transit companies (CITs) and cash management companies (CMCs) where the activities concerned are limited to the physical transport of banknotes and coins.

(13) Feedback from the market shows that the payment activities covered by the limited network exclusion often comprise significant payment volumes and values and offer to

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consumers hundreds or thousands of different products and services. That does not fit the purpose of the limited network exclusion as provided for in Directive 2007/64/EC and implies greater risks and no legal protection for payment service users, in particular consumers, and clear disadvantages for regulated market actors. To help limit those risks, it should not be possible to use the same instrument to make payment transactions to acquire goods and services within more than one limited network or to acquire an unlimited range of goods and services. A payment instrument should be considered to be used within such a limited network if it can be used only in the following circumstances: first, for the purchase of goods and services in a specific retailer or specific retail chain, where the entities involved are directly linked by a commercial agreement which for example provides for the use of a single payment brand and that payment brand is used at the points of sale and appears, where feasible, on the payment instrument that can be used there; second, for the purchase of a very limited range of goods or services, such as where the scope of use is effectively limited to a closed number of functionally connected goods or services regardless of the geographical location of the point of sale; or third, where the payment instrument is regulated by a national or regional public authority for specific social or tax purposes to acquire specific goods or services.

(14) Payment instruments covered by the limited network exclusion could include store cards, fuel cards, membership cards, public transport cards, parking ticketing, meal vouchers or vouchers for specific services, which are sometimes subject to a specific tax or labour legal framework designed to promote the use of such instruments to meet the objectives laid down in social legislation. Where such a specific-purpose instrument develops into a general-purpose instrument, the exclusion from the scope of this Directive should no longer apply. Instruments which can be used for purchases in stores of listed merchants should not be excluded from the scope of this Directive as such instruments are typically designed for a network of service providers which is continuously growing. The limited network exclusion should apply in combination with the obligation of potential payment service providers to notify activities falling within its scope.

(15) Directive 2007/64/EC excludes from its scope certain payment transactions by means of telecom or information technology devices where the network operator not only acts as an intermediary for the delivery of digital goods and services through the device in question, but also adds value to those goods or services. In particular, that exclusion allows for so-called operator billing or direct to phone-bill purchases which, starting with ringtones and premium SMS services, contribute to the development of new business models based on the low-value sale of digital content and voice-based services. Those services include entertainment, such as chat, downloads such as video, music and games, information such as on weather, news, sports updates, stocks and directory enquiries, TV and radio participation such as voting, competition entry, and provision of live feedback. Feedback from the market shows no evidence that such payment transactions, trusted by consumers as convenient for low-threshold payments, have developed into a general payment intermediation service. However, due to the ambiguous wording of the relevant exclusion, it has been implemented differently across Member States, leading to a lack of legal certainty for operators and consumers

and occasionally allowing payment intermediation services to claim eligibility for an unlimited exclusion from the scope of Directive 2007/64/EC. It is therefore appropriate 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.

(16) The exclusion relating to certain payment transactions by means of telecom or information technology devices should focus specifically on micro-payments for digital content and voice-based services. A clear reference to payment transactions for the purchase of electronic tickets should be introduced to take into account the development in payments where, in particular, customers can order, pay for, obtain and validate electronic tickets from any location and at any time using mobile phones or other devices. Electronic tickets allow and facilitate the delivery of services that consumers could otherwise purchase in paper ticket form and include transport, entertainment, car parking, and entry to venues, but exclude physical goods. They thus reduce the production and distribution costs connected with traditional paper-based ticketing channels and increase customer convenience by providing new and simple ways to purchase tickets. In order to ease the burden on entities that collect charitable donations, payment transactions in relation to such donations should also be excluded. Member States should, in accordance with national law, be free to limit the exclusion to donations collected in favour of registered charitable organisations. The exclusion as a whole should apply only where the value of payment transactions is below a specified threshold in order to limit it clearly to payments with a low risk profile.

(17) The Single Euro Payments Area (SEPA) has facilitated the creation of Union wide -'payment factories' and 'collection factories', allowing for the centralisation of payment transactions of the same group. In that respect payment transactions between a parent undertaking and its subsidiary or between subsidiaries of the same parent undertaking provided by a payment service provider belonging to the same group should be excluded from the scope of this Directive. The collection of payment orders on behalf of a group by a parent undertaking or its subsidiary for onward transmission to a payment service provider should not be considered to be a payment service for the purposes of this Directive.

(18) Directive 2007/64/EC excludes from its scope payment services offered by deployers of automated teller machines (ATMs) independent from account servicing payment service providers. That exclusion has stimulated the growth of independent ATM services in many Member States, in particular in less populated areas. Excluding that fast-growing part of the ATM market from the scope of this Directive completely could, however, lead to confusion about withdrawal charges. In cross-border situations, this could lead to double charging for the same withdrawal by the account servicing payment service provider and by the ATM deployer. Consequently, in order to maintain the provision of ATM services while ensuring clarity with regard to withdrawal charges, it is appropriate to maintain the exclusion but to require ATM operators to comply with specific transparency provisions of this Directive. Moreover, charges applied by ATM operators should be without prejudice to Regulation (EC) No 924/2009.