Brief Considerations on the "Behaviour" of Professional Traders and Consumers in the Context of the Shift from Brick-And-Mortar to E-commerce. Union and Transposition Regulations

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Abstract

The way in which goods and services are marketed in the European Union is in a continuous process of change and this fact has different implications in all investment levels. Given that citizens, as consumers as well as professional traders from the European Union, are increasingly active on markets outside their country of origin (acting as international investors), the possibility of resorting to electronic payments greatly simplifies their current activity. That is why this article deals with the specific problems that appear closely interconnected by the most modern aspects with an impact on the cross-border investment environment. As a result, the Green Paper of the European Commission entitled "Towards an integrated European market for card, internet and mobile payments" notes the increasing proportion of online or internet payments (electronic payments) and payments from the mobile phone. The present scientific study aims to highlight the main advantages conferred by the presence of electronic payments on the markets of the member states among which we mention: many possibilities for consumers and professional traders to choose those tools and those providers that best meet their needs; it gives more innovation, thus generating an integrated market in this respect and last but not least the increased security of payments and more trust from customers. The scientific material also notes that this innovative payment system has also disadvantages, among which we mention the activities included in the scope of crimes, committed in the case of non-cash payment transactions carried out with any kind of payment instrument, whether physical, such as bank cards, whether virtual, such as payments through a mobile payment application. So, for a good understanding of the criminal phenomenon, the study approaches the union and transposition legislation in the matter.

Keywords: *investments, cashless payment instruments, users, monetary value, crime.*

JEL Classification: E20, F21, K20

1. Introduction

Advantages versus disadvantages of using electronic payment mechanisms. In an increasingly diversified market[2], such as the EU one, we wonder what the criteria are in relation to which consumers select the instruments with which they understand to pay for purchased goods and services. In order to select payment instruments, consumers rely either on convenience criteria or on the potential advantages that they could obtain by using a particular payment method.

However, the payment instrument chosen by consumers may not be cost-optimal in the sense that merchants may include transaction costs in the prices of the goods and

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services they offer, resulting in consumers paying for their purchases a higher price by including the costs of more expensive payment methods used by some of them.

Thus, we believe that if the total cost of using different payment instruments were more transparent, consumers, in the know, could opt for those packages that involve lower costs. This could be achieved by informing consumers of the cost to merchants of using and/or processing a particular payment instrument.

Another element that would increase price transparency in the consumer-trader relationship and implicitly stimulate the use of the most efficient payment instruments could be the systematic and large-scale use by traders of customer orientation practices (steering), such as the selective acceptance of certain cards such as those for a certain amount or the explicit indication of the preferred means of payment, so that in this way the application of additional tariffs to consumers could be avoided. We are of the opinion that surcharges should not be used by merchants as a source of additional income, but should be limited to the actual cost of using a payment instrument, as stated in Article 19 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights[3].

However, Article 52(3) of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market[4] explicitly authorizes merchants to use mark-ups and rebates in order to use a certain payment instrument[5].. However, under certain conditions, member states can prohibit or limit surcharges (but not rebates), so they have understood to apply the union provision in different ways, taking into account a number of elements specific to their own markets. The differences between the options applied at the level of the member states considerably increase the degree of complexity of the single market, while also creating confusion among both consumers and traders, especially in cross-border transactions.

2. The main non-cash payment instruments

Payment cards. Payment cards are the most common and used electronic payment instruments for retail payments. Over 726 million payment cards were used in the European Union, representing 1.45 cards per inhabitant. However, the integration of the Union market of payment cards continues to represent an aspiration, so that although the volume of card payments has increased significantly over the last ten years, the direct effects have had as an immediate consequence neither a significant decrease in the costs borne by consumers nor the decrease in interchange fees paid by merchants.

Also, national debit card systems are not always accepted outside the home

[3] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Directive 93/13/EEC of the Council and Directive 1999/44/EC of the European Parliament and of the Council and repealing the Directive 85/577/EEC of the Council and Directive 97/7/EC of the European Parliament and of the Council OJ L304, 22.11.2011, p. 64.

[4] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services within 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 relevance for the EEA) was transposed into national legislation mainly by Law no. 209/2019 regarding payment services and for the modification of some normative acts, respectively Law no. 210/2019 regarding the activity of issuing electronic money. DSP2 is a European directive that regulates the provision of payment services in the European Economic Area (the European Union and Iceland, Liechtenstein and Norway).

[5] However, the directive does not apply to cash or check payments.

Member State, which directly hampers the development of the single market at the level of the European Union. Fraudulent use of payment cards is also a problem, especially in relation to remote transactions.

Payments made on the Internet (electronic payments). Electronic payments are payments made over the Internet, usually in one of the following three ways:

1) Carrying out a remote card payment operation via the Internet.

2) Credit transfer or direct debit operations through online banking, in which the payer uses an online[6] portal.

3) Payments through electronic payment providers, where consumers create individual accounts. Accounts can be funded by "traditional" payment methods, for example bank transfers or credit card payments.

In the conditions of the development of electronic commerce, such as the purchase and sale of products on the Internet, electronic payments play an increasingly important role. Thus, according to Forrester Research[7], the number of people who made online purchases in Europe increased from 141 million in 2009 to 190 million in 2014.

In 2021, e-commerce grew by 13%, up to 718 billion euros compared to 2019, after during the Covid 19 pandemic it represented the main source of income and supply for many Europeans. In the same year, 2021, Romania achieved an increase in e-commerce sales of 6.2 billion euros, which represented half of the level achieved by retailers in Eastern Europe, estimated at 14 billion euros, according to the *2022 Report on European e-commerce* published by European Ecommerce and EuroCommerce.

Payments made from your mobile phone. Mobile payments are payments where payment data and related instructions are initiated, transmitted or confirmed via a mobile phone or device. These can be done in the case of the online or offline purchase of services or digital or physical goods.

Mobile payments can be classified into two main categories:

1) Remote payments are mainly made via the Internet/WAP[8] or premium SMS services which are billed to the payer via the mobile network operator. Most of the remote payments made over the Internet are based on card payment systems.

2) In principle, proximity payments take place directly at the point of sale. This type of payment uses Near Field Communication (NFC), considered the most advanced proximity technology currently available, which requires the use of phones equipped so that they can be recognized by reading devices at the point of sale (for example, in stores, in public transport or in parking lots).

Payments made using mobile phones are currently the fastest growing of all payment methods. This evolution has been accelerated by the rapid development of smartphones that offer the option of installing applications specific to making this type

[6] These operations can be carried out either directly via the payer's online banking system or via a third party (e.g., Ideal in the Netherlands, Giropay and Sofortüberweisung in Germany or EPS in Austria) see in this regard See in this sense, the Green Paper - Towards a European market for card, internet and mobile payments, COM/2011/0941 final, p. 10.

[7] http://www.forrester.com/ER/Press/Release/0,1769,1330,00.html, consulted on 1.10.2022.

[8] WAP (Wireless Application Protocol) was developed by the Open Mobile Alliance (OMA), a forum for industry stakeholders to agree on common specifications for the mobile industry. A WAP browser is a web browser commonly used for mobile phones. See in this regard, the Green Paper - Towards a European market for payments made by card, on the Internet and from the mobile phone, COM/2011/0941 final, p. 11.

of payment.

3. Non-cash cross-border payment instruments

The policy of the European Union with a view to the creation and subsequent support of an integrated market of electronic payments in euros, without distinguishing between national and cross-border payments, is in line with the policy on the proper functioning of the internal market. In this sense, SEPA was created as a single and secure area aimed at the development of common payment services at the level of the Union, which offers both consumers, natural or legal persons and professional traders, payment services in euros, under the same conditions, conferring the same rights and identifying the same obligations regardless of where they are in the territory of the European Union.

In order to create an internal cashless payments market in which SEPA will play a leading role, the Union co-legislator adopted the appropriate legal framework, namely Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services within the internal market.

The European Union's interest in SEPA has been constantly manifested so that, in 2009, the European Parliament adopted its resolutions of March 12, 2009, and March 10, 2010, regarding the implementation of SEPA. We also mention here the interest shown by the Council in the Conclusions adopted on December 2, 2009.

In turn, Regulation (EC) no. 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community provides a series of measures to facilitate the realization of SEPA, such as the extension of the principle of equal fees to cross-border direct debit operations and accessibility in the case of direct debit operations.

Currently, at the level of 2022, we retain according to our analysis, the applicability of Regulation (EU) no. 260/2012 of the European Parliament and of the Council of March 14, 2012, establishing the technical and commercial requirements applicable to credit transfer and direct debit operations in euros and amending Regulation (EC) no. 924/2009.

What is SEPA? Specifically, SEPA (Single Euro Payments Area) represents that geographical area in which a euro payments system is applied for cashless cross-border bank transfers, considered as safe and efficient as in a context nationally, using a unique code and standardized tools, namely SEPA Credit Transfer (SCT), SEPA Direct Debit (SDD) and card payments according to the harmonized framework at the Union level SEPA Cards.

Currently, SEPA consists of the 27 of the European Union to which one adds the 3 countries from the European Economic Area (EEA) - Iceland, Norway and Liechtenstein, respectively 6 countries outside the EEA - the United Kingdom, Switzerland, the Vatican, Monaco, San Marino and Andorra.

What types of banking operations does SEPA involve? As regulated by Article 1 paragraph (1) of Regulation (EU) no. 260/2012, SEPA involves credit transfer and direct debit operations in euros on the territory of the Union, where both the payment service provider of the payer and the service provider of the payee are located on the territory of the European Union or where the only payment service provider (hereinafter referred to as "PSP") involved in the operation is located in the Union territory. The concrete identification of these categories of operations is made to us within paragraph (2) of

article 1 of the above-mentioned union norm, as follows:

- payment operations by card or similar device, including cash withdrawal operations;

- payment operations through telecommunications, digital or IT devices, if these payment operations do not lead to a credit transfer or a direct debit to and from a payment account identified by BBAN or IBAN;

- money remittance operations, as defined in Article 4 paragraph (13) of Directive 2007/64/EC;

- payment operations through which electronic money is transferred, as defined in article 2 point 2 of Directive 2009/110/EC of the European Parliament and of the Council of September 16, 2009, regarding access to the activity, conduct and prudential supervision of the activity of issuing institutions of electronic currency.

a) *Standard SEPA payment*, involves a transfer time of up to 1 working day, the rate being free for individuals and 0.20 euro for professional traders, The advantage of this type of standard payment is that there is no transfer limit, instead the schedule for making payments is limited, only on working days (Monday-Friday-8 AM-8 PM).

b) *SEPA Instant Payment (also called SEPA Instant Credit Transfers or SCT Inst)* represents those instant transfers in euros that are executed 24/7/365 and reach the recipient in a few seconds. Currently, almost 3,000 banks in 23 countries are part of the SEPA Instant scheme, and in the future this list plans to expand to connect all banks in all 36 SEPA countries and thus eliminate geographical borders for payments in Europe. The advantage conferred by this type of cashless payment consists in the fact that the transfer is carried out instantly, which in reality involves 10 seconds. The rate is free for individuals and 0.20 euro for professional merchants. In the case of this type of online payment, transfers are executed 24/7/365, with a limitation of the amounts transferred to 100,000 euros.

4. Union and transposition legislation on combating fraud and counterfeiting in relation to non-cash means of payment

Along with the exponential growth of the digital economy, new payment technologies have appeared that involve the use of some types of payment instruments that create not only new opportunities for consumers and professional traders but also opportunities for fraud, as a result in the context of these technological developments, the Union legislative framework but also the one of transposition must be constantly updated, thus, in this regard, we recall Directive 2019/713/EU[9] of the European Parliament and of the Council of April 17, 2019 on combating fraud and counterfeiting in relation to non-cash means of payment and replacing the Framework Decision 2001/413/JAI of the Council.

Directive 2019/713/EU criminalizes and sanctions acts in the field of fraud and counterfeiting in relation to non-cash means of payment. To the same extent, the Union directive represents an appropriate legislative framework regarding appropriate measures regarding the prevention of such crimes but also measures regarding assistance regarding the support of victims.

According to the provisions of Article 2 of the Union norm, non-cash payment

[9] JO L 123,10.5.2019, pp.18-29

instrument „means a device, an object or a protected, immaterial record or a combination thereof, other than legal tender and which alone or together with a procedure or a set of procedures, allows the holder or user to transfer money or monetary value, including through digital means of exchange".

The provisions of article 2 of Directive 2019/713/EU are transposed into national legislation within article 180 of the Criminal Code as amended by Law no. 207/2021[10] in the sense that the text of the article of the transposition norm reiterates in paragraph (1) the terminological meaning given to the non-cash[11], payment instrument, by the Union norm, thus it is defined „a device, an object or a record, protected, respectively protected, material or non-material, respectively material or non-material, or a combination thereof, other, respectively other than a currency with circulation value and which, alone, respectively alone or together with a procedure or a set of procedures, allows the holder or the user to transfer money or monetary value, including through electronic currency or virtual currency".

This directive refers to classical forms of acts criminalized as crimes, such as fraud (fraudulent use), forgery, theft and misappropriation, which were already defined in the domestic law of the Member States before the "digital era". Therefore, the extended scope of this directive regarding immaterial payment instruments requires the definition of equivalent forms of acts applicable to the digital sphere, supplementing the provisions of Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against IT systems and replacing Council Framework Decision 2005/222/JHA[12].

As regulated by articles 3, 4 and 5 of Directive 2019/713/EU, the following acts, when committed with intent, constitute crimes:

a) fraudulent use of a non-cash payment instrument that was, as the case may be, stolen or illegally appropriated;

b) fraudulent use of a counterfeit or falsified cashless payment instrument;

c) stealing or otherwise illegally misappropriating a payment instrument without physical cash;

d) counterfeiting or fraudulent falsification of a material or non-material cashless payment instrument;

e) possession for the purpose of fraudulent use of an immaterial non-cash payment instrument, obtained through illegal means, counterfeit or falsified, at least if

[10] Law no. 207/2021 for the amendment and completion of Law no. 286/2009 on the criminal code as well as for the disposition of measures to transpose Directive 2019/713/EU of the European Parliament and of the Council of April 17, 2019, on combating fraud and counterfeiting in relation to the means of payment without cash and to replace the Framework Decision 2001/413/JAI of the Council.

[11] Article 180: paragraph (2) Electronic payment instrument means an instrument that allows cash withdrawals, loading and unloading of an electronic money instrument, as well as fund transfers, other than those ordered and executed by financial institutions; (3) By electronic money is meant the monetary value stored electronically, including magnetically, representing a claim on the issuer, issued upon receipt of funds for the purpose of carrying out payment operations and which is accepted by a person other than the issuer of electronic money; (4) Virtual currency means a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily linked to a legally established currency and does not have the legal status of currency or money, but it is accepted by natural or legal persons as a medium of exchange and can be transferred, stored and traded electronically. See in this regard Law no. 207/2021 for the amendment and completion of Law no. 286/2009 of the Criminal Code.

[12] JO L 218, 14.8.2013, p. 8.

the illegal origin is known at the time of possession of the instrument;

f) acquisition for one's own benefit or that of another person, including receiving, appropriating, buying, transferring, importing, exporting, selling, transporting or distributing for the purpose of fraudulently using a stolen, counterfeited or falsified physical or immaterial cashless payment instrument[13].

g) inciting or complicity in any of the crimes stated above.

We believe that some clarifications are required regarding the meaning of the phrases "payment instruments without tangible cash" and "payment instruments without immaterial cash". Thus, physical means of payment such as payment cards are considered to be "payment instruments without tangible cash". Digital means of mobile payment, such as payments through a mobile payment application, digital wallets and virtual currencies, are also considered "intangible cashless payment instruments".

In accordance with the provisions of Article 6 of the Union framework norm, the crime of "fraud related to computer systems" is the causing of patrimonial damage to a person with the aim of obtaining an illegal profit for the author or for a third party by making a transfer of money of monetary value or virtual currency causing (a) either the disruption or unlawful impairment of the functionality of a computer system (b) or the unlawful entry, modification, deletion, transmission or suppression of computer data.

Last but not least, it is a crime to produce, purchase, including through import or export, sell, transport or make available, for one's own use or that of another person, a device or an instrument, or computer data designed or adapted in order to commit one of the crimes provided for in the analysed directive, when they are committed with intent[14]. Regarding the previously mentioned crimes, we make it clear that the notion of *intent* applies to all their constituent elements in accordance with the internal law of the state competent to investigate or judge the respective case.

Given the fact that most of the time the crimes covered by this directive are often cross-border in nature, the competence to investigate and judge is attributed to the competent judicial authorities of the member state: (a) on whose territory the crime was

[13] The offenses regulated by the Union directive are transposed within the framework of article 250^1 called "Illegal operations with non-cash payment instruments" as it was introduced into the Criminal Code by Law no. 207/2021, as follows: (1) Possession for the purpose of fraudulent use of a non-cash payment instrument appropriated by committing one of the acts provided for in art. 228, art. 229, art. 233-236, art. 238, art. 239, art. 243, art. 244 and art. 295 is punishable by imprisonment from 2 to 7 years. (2) Acquisition for oneself or for another, including by receipt, appropriation, purchase or as a result of an operation such as transfer, import, export, sale, transport, distribution or making available for fraudulent use of a non-cash payment instrument obtained by committing one of the acts provided for in art. 228, art. 229, art. 233-236, art. 238, art. 239, art. 243, art. 244 and art. 295 is punishable by imprisonment from 2 to 7 years. (3) Manufacturing, producing, receiving, owning, transmitting or making available a device, instrument, computer data, equipment, including hardware or software, or any other means, with the aim of serving to appropriate a payment instrument without cash by committing one of the acts provided for in art. 228, art. 229, art. 233-236, art. 238, art. 239, art. 243, art. 244 and art. 295, is punishable by imprisonment from 2 to 7 years. (4) With the punishment provided for in para. (3) the acquisition for oneself or for another, including through the import, export, sale, transport or distribution of a device, instrument, computer data, equipment, including hardware or software, or any other means with the aim of serving appropriation of a non-cash payment instrument by committing one of the acts provided for in art. 228, art. 229, art. 233-236, art. 238, art. 239, art. 243, art. 244 and art. 295.

[14] See in this regard, Article 7 of Directive 2019/713/EU.

committed in whole or in part[15] or (b) of which the offender is a national. We note, therefore, that in the case of these crimes, the applicability of the mechanisms of the union judicial cooperation between the competent authorities of the member states, whenever necessary.

5. Conclusions

The presence of cashless means of payment on the Union market and implicitly on the national market represents an innovation in terms of payments, generating at the same time the increase in operational efficiency, leading to the strengthening of competition, which implicitly generates a decrease in the prices of electronic payment services based on the best products. On the other hand, we cannot fail to note that fraud and counterfeiting in relation to non-cash means of payment can have particularly serious consequences in the case of identity theft, since such a crime can generate not necessarily financial damages but more professional or moral damages. Both at the level of the European Union as a whole, and at the level of each individual state[16] in the Union, we believe that the authorities must focus on preventing and combating such practices.

Also of interest are the regulations[17] on the protection of personal data [e.g., Regulation No. 679 of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation[18])], which could be a point to build on in future research.

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3. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending and repealing Directive 93/13/EEC of the Council

[15] The offense is considered to have been committed in whole or in part on the territory of a member state if the offender commits the offense when he is physically present on the territory of the state in question, regardless of whether the computer system used is located on the territory of that state or not. See in this regard, Article 12 of Directive 2019/713/EU.

[16] On the concept of "state" from the perspective of Romanian administrative law, please see Cătălin Silviu Săraru, *Tratat de contencios administrativ*, Universul Juridic Publishing House, Bucharest, 2022, p. 17.

[17] Iulia Boghirnea, *The Creation of the General Legal Norm*, „Annales Universitatis Apulensis, Series Jurisprudentia", no 11/2008, pp.28-38.

[18] For such a study, please see Marta-Claudia Cliza, Laura-Cristiana Spătaru-Negură, *Règlement Général de l'Union européenne sur la Protection des Données: tout le monde est-il prêt?*, published in Matthias Waechter, Jean-Claude Verez (eds.), *Europe Between Fragility and Hope*, Nomos Publishing House, Baden-Baden, 2020, pp. 177-184, available online at https://www.nomos-elibrary.de/10.5771/9783748909767/europe.

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