

Payments & FinTech

News | March 2023



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Regulatory Updates

Payments



Germany

BaFin: Guidance Notice on notes regarding the Payment Services Oversight Act (*Merkblatt über Hinweise zum Zahlungsdiensteaufsichtsgesetz*)

BaFin has updated its **Guidance Notice** on notes regarding the Payment Services Oversight Act (*Zahlungsdiensteaufsichtsgesetz – ZAG*).

The update includes a revision of section G on notification requirements for payment systems pursuant to Sec. 2(1)(10)(a)-(b) and 2(1)(11) ZAG, as set out in Sec. 2(2)-(3) ZAG, and on publication in the register and notification of the EBA pursuant to Sec. 2(4) ZAG. In particular, relevant changes affect topics on payment instruments, account information services, limited network and limited range exemption, e-money and notification obligations. It is important to note that BaFin now clarifies that granting a power of attorney over an account is not to be classified as money remittance business if certain conditions are met.

Date of publication: 14/02/2023



EU

ECON: Draft report on proposed Regulation on instant credit transfers in euro

ECON has published its **draft report** on the EC's legislative proposal for a proposed Regulation amending the Single Euro Payments Area (**SEPA**) Regulation and the Cross-Border Payments Regulation as regards instant credit transfers in euro. The draft report includes a draft EP legislative resolution, the text of which sets out suggested amendments to the proposed Regulation. These include: (i) clarification with respect to how the

process of effecting bulk and paper payments might be made, with the view to stress that the entire process of this type of payment is not expected to be immediate, but rather the payment should be made as soon as possible from the moment all the necessary details have been processed; (ii) clarifying the sanctions requirements and encouraging a move from transaction-based checks to client-based ones; (iii) a call to re-visit the Settlement Finality Directive in an effort to broaden the scope of the payment services providers included in the current legislation, thereby reflecting the current payments landscape more accurately; and (iv) requiring that IBAN checks would be provided free of charge.

Date of publication: 06/03/2023



EU

EPC: Guidance on the migration to the 2019 version of the ISO 20022-based XML messaging standard

The EPC has published version 3.0 of the **Guidance** for SEPA payment scheme participants and payment service users on how to prepare themselves for and to handle the change-over to the 2019 version of ISO 20022 by 19 November 2023. This migration results from a decision taken by the EPC back in September 2020. The Guidance determines the concrete impact of such ISO version migration on the various SEPA payment scheme processes for the SEPA payment scheme participants and payment service users concerned. It also gives guidance to SEPA payment scheme participants and payment service users on how they can deal with the SEPA payment initiation, acceptance and processing aspects affected by the ISO version migration.

Date of publication: 16/02/2023



EU

EPC: Clarification paper on the use of slashes in references, identifications and identifiers

The EPC has published a **clarification paper** on the use of slashes in references, identifications and identifiers. The implementation Guidelines of the SEPA payment scheme rulebooks contain a rule which stipulates that the content of ‘references, identifications and identifiers’ must not start or end with a ‘/’ (single slash) nor should it contain ‘//’ (double slashes). The purpose of the document is to clarify the impact of the abovementioned rule on ‘references, identifications and identifiers’ related ISO 20022 data elements used in pain.001, pain.007 and pain.008 messages of the SEPA (Instant) Credit Transfer and SEPA Direct Debit Core/Business-to-Business implementation Guidelines. The version of 2015 has been updated to be in line with various changes (e.g., attribute renumbering and migration to the 2019 message version of ISO 20022) made in the 2023 SEPA payment scheme rulebooks and related implementation Guidelines.

Date of publication: 16/02/2023



EU

EPC: Recommendation on ISO 20022 customer reporting of SCTs and SDDs

The EPC has published a **Recommendation** on ISO 20022 customer reporting of SEPA Credit Transfers and SEPA Direct Debits issues implementation. This document aims to present a mapping of the SEPA rulebook requirements vis-à-vis the ‘Transaction Details’ message elements of the ISO 20022 reporting messages. The Recommendation has been amended to be in line with various changes (e.g., attribute renumbering and migration to the 2019 message version of the ISO 20022 standard) made in the 2023 SEPA payment scheme rulebooks and related implementation Guidelines.

Date of publication: 16/02/2023



International

BCBS: Consultation on ISO 20022 harmonisation requirements for enhancing cross-border payments

The Basel Committee on Banking Supervision (BCBS) has published a **consultative report** on ISO 20022 harmonisation requirements for enhancing cross-border payments for the Committee on Payments and Market Infrastructures (CPMI). The proposed requirements aim to provide overarching guidance for global and domestic market practice guidelines, to ensure that the ISO 20022 messaging standard, where adopted, is consistently used to facilitate faster, cheaper, more accessible and more transparent cross-border payments. The CPMI explains that the harmonisation requirements would complement existing market practice guidance by providing high-level requirements to be adopted by the various international and local usage guidelines. Following the consultation period, the report will be revised and the final report will be delivered to the Indian G20 Presidency by end-2023. The CPMI proposes that payment system operators and participants begin preparations to align their ISO 20022 usage guidelines with the finalised CPMI requirements to be effective in November 2025. The proposed 2025 introduction of the requirements would align with SWIFT’s decision to remove the ability to send cross-border MT payment messages over its network.

Date of publication: 01/03/2023



International

FSB: G20 roadmap for enhancing cross-border payments: priority actions for achieving the G20 targets

The Financial Stability Board (FSB) has set out its **priority actions for achieving the G20 targets** for enhancing cross-border payments. In October 2022, the FSB published a prioritisation plan and engagement model for taking the cross-border payments roadmap forward. The plan reflects that the roadmap has reached an inflection point and needs to move to implementing practical projects to enhance cross-border payment arrangements to

achieve the quantitative targets that have been established. Drawing from the analyses to date and the feedback received from stakeholders, the FSB, the CPMI and partner bodies have identified three interrelated themes for orienting and focusing on the next phase: (i) payment system interoperability and extension; (ii) legal, regulatory and supervisory frameworks; and (iii) cross-border data exchange and message standards. This report details the specific actions that will be taken under the priority themes to move the roadmap forward and achieve the targets by the 2027 target date. The FSB notes that successfully implementing the requisite changes will require ongoing close collaboration and coordination among the FSB and its partner bodies tasked with taking forward the roadmap, the private sector, and authorities from jurisdictions beyond the G20.

Date of publication: 23/02/2023



International

BCBS: Report on the operational and technical considerations for extending and aligning payment system operating hours for cross-border payments

The BCBS has published a **report** on the operational and technical considerations for extending and aligning payment system operating hours for cross-border payments.

The report sets out, inter alia, that an extension and alignment of payment system operating hours across jurisdictions could help to speed up cross-border payments, especially between jurisdictions with significant time zone differences. It could also improve liquidity management, reduce settlement risk and enhance the performance of cross-border payment arrangements.

The BCBS has also published **an invitation for market stakeholders** to join a cross-border payments interoperability and extension task force. Therein, it invites stakeholders to submit expressions of interest in the task force or inquiries by 10 March 2023.

Date of publication: 17/02/2023

FinTech/Digital finance



EU

EC: Launch of the European Blockchain Regulatory Sandbox

The Commission has launched the **European Blockchain Regulatory Sandbox**. This Sandbox aims to provide legal certainty for decentralised technology solutions, including blockchain, by identifying obstacles to their deployment from a legal and regulatory perspective and providing legal advice, regulatory experience and guidance in a safe and confidential environment. The Sandbox should also allow regulators and supervisors to enhance their knowledge of cutting-edge blockchain technologies and share best practices through dialogues. It will run from 2023 to 2026, and will support 20 projects annually, including public sector use cases on the European Blockchain Services Infrastructure (EBSI). The first call for applications will be open until 14 April 2023.

Date of publication: 14/02/2023



EU

ESMA: SMSG advice on potential practical challenges regarding the implementation of DORA

ESMA has published **advice** it has received from its securities and markets stakeholder group (**SMSG**) on potential practical challenges regarding the implementation of the Digital Operational Resilience Act (**DORA**). Ultimately, the SMSG welcomes the introduction of the DORA framework, and is looking forward to supporting ESMA in the exercise of its mandate. However, SMSG also makes a number of recommendations regarding DORA's implementation, which include: (i) formal arrangements between authorities implementing DORA, the Directive on Network and Information Security (**NIS 2**) and the Directive on the Resilience of Critical Entities (**CER**), frameworks to create permanent structures. The SMSG notes that there are significant overlaps between these legislative frameworks, which could dilute their effectiveness unless their respective

scopes of application are clearly delineated and criteria and definitions aligned as closely as practicable; (ii) the risk assessment recommended under recital 31 of DORA should be made in a balanced way, bearing in mind that the potential benefits of tighter control of in-house units sometimes fail to materialise. The SMSG suggests that this balance should also be addressed, and incorporated into regulatory standards and guidance, where appropriate; (iii) guidance from the ESAs and the European Data Protection Board to align and integrate the process for issuing notifications under Art. 19(3) DORA and Art. 34 of the General Data Protection Regulation in all cases when both provisions apply; and (iv) the SMSG also considers it of critical importance to align criteria for the designation of Critical Third Party Service Providers under DORA with the definition of 'essential' and/or 'important entities' under NIS 2 and CER. Overall, the SMSG stresses the importance of not creating overly cumbersome or costly rules and that the principle of proportionality should be applied by the ESAs when drafting standards or Guidelines.

Date of publication: 14/02/2023



International

FSB: Report on the financial stability risks of decentralised finance

The FSB has published a **report** on the financial stability risks of decentralised finance (**DeFi**). DeFi is an umbrella term commonly used to describe a variety of services in crypto-asset markets that aim to replicate some functions of the traditional financial system (**TradFi**) while seemingly disintermediating their provision and decentralising their governance. The report considers the risks that can arise as a result of DeFi, and the specific risks related to the crypto-assets underpinning much of DeFi. The report: (i) describes the DeFi ecosystem, its key elements and players, as well as the main products; (ii) discusses financial vulnerabilities of DeFi, including those stemming from its specific features;

(iii) sketches possible scenarios for DeFi and the implications for financial stability; and (iv) sets out additional work to analyse, monitor and address vulnerabilities in the DeFi ecosystem.

While the report notes that current interlinkages are limited, should the DeFi ecosystem grow significantly there is the potential for the stress originating from DeFi to spill over to TradFi and the real economy. Looking forward, the FSB will be analysing the financial vulnerabilities of the DeFi ecosystem as part of its regular monitoring of the wider crypto-asset markets, as well as in collaboration with standard setting bodies (**SSBs**) and regulatory authorities, exploring approaches to measure and monitor such interconnectedness. The FSB also aims to explore the extent to which its proposed policy recommendations for the international regulation of crypto-asset activities may need to be enhanced to take account of DeFi-specific risks and facilitate the enforcement of rules. In coordination with the SSBs, the FSB will also be assessing the regulatory perimeter across jurisdictions to determine which DeFi activities and entities fall or should fall within that perimeter or outside of it.

Date of publication: 16/02/2023



International

UKJT: Legal statement on the issuance and transfer of digital securities under English private law

The UK Jurisdiction Taskforce of LawtechUK (UKJT) has published a **legal statement** on the issuance and transfer of digital securities under English private law. This statement focuses on the aspects of digital securities, including blockchain- and DLT-based systems, that are potentially novel and distinctive, and discusses the extent to which general legal principles apply in this area. In particular, it considers the following legal challenges: (i) protection of the rights and duties of the holder and issuer of digital securities; (ii) compliance of digital equity securities with the share transfer and registration requirements imposed on companies; and (iii) conformity with requirements resulting from digital securities linked to proprietary rights. Although the scope of the statement is limited to considerations under English private law, some of the approaches presented can be applied more generally to other jurisdictions.

Date of publication: 09/02/2023

News from the Courts

Payments



Germany

Higher Regional Court of Brandenburg, 19 October 2022 – 4 U 217/21: Burden of proof for cash deposit lies with the depositor

In a recently published decision by the Higher Regional Court of Brandenburg, the Court has made it clear that for a claim of refund against a bank under Sec. 675y(1) sent. 1 of the German Civil Code (*Bürgerliches Gesetzbuch* – **BGB**), the burden of proof for the existence of a payment transaction according to Sec. 675f(4) sent. 1 BGB lies with the payer. Consequently, the Court dismissed the claim of the bank's customer as he was not able to prove the fact that he had made a cash deposit at an ATM in the amount claimed by him.



Germany

Higher Regional Court of Cologne, 23 June 2022 – 18 U 8/21: No claim of reimbursement against the payment service provider in the case of online gambling

The Higher Regional Court of Cologne decided that in the case of online gambling, a bank is not obliged to reimburse its customer under German payments law even if the respective online gambling operator did not possess the required gambling licence. According to the Court, even though this violates German gambling law, the lack of a licence does not impact the validity of the gambling contract between its customer and the gambling operator. The Court stressed that the bank did not violate any contractual obligations *vis-à-vis* its customer by transferring the amounts of e-money from its customers account to the gambling operator's account. On the contrary, the bank is generally not allowed to refuse the execution of an authorised payment order in accordance with Sec. 675o(2) BGB.

FinTech/Digital finance



Germany

**Higher Regional Court of Stuttgart,
17 November 2022 – 2 U 219/21:
Claim of restitution in the case of
incorrect money transfer**

The Higher Regional Court of Stuttgart ruled that an account holder is obliged under Sec. 812(1) sent. 1 BGB to pay back money obtained due to an incorrect money transfer from an unknown source. The defendant holding the account received money from a dubious third party for the purpose of buying bitcoins. According to the Court, the defendant could not claim that he was no longer enriched under Sec. 818(3) BGB after spending the received money on buying the bitcoins and transferring them to the third party's wallet, as he was subject to increased liability under Sec. 819(1), 818(4) BGB. The Court argued that it was evident that the money made available to him for the purpose of buying bitcoins came from a criminal activity. It should therefore have been clear to him that he was not entitled to keep the transferred money.

Contacts

Payments and FinTech Regulatory



Dr Alexander Behrens
Partner
Tel +49 69 2648 5730
alexander.behrens@allenovery.com



Lukas Wagner
Tel +49 69 2648 5000
lukas.wagner@allenovery.com



Judith Bremer
Associate
Tel +49 69 2648 5526
judith.bremer@allenovery.com



Niklas Germayer
Associate
Tel +49 69 2648 5973
niklas.germayer@allenovery.com



Suzana Cvejic
Associate
Tel +49 69 2648 5868
suzana.cvejic@allenovery.com



Lisa Huber
Professional Support Lawyer
Tel +49 69 2648 5467
lisa.huber@allenovery.com

Derivatives and Structured Finance, Debt Capital Markets



Martin Scharnke
Head of ICM Germany
Tel +49 69 2648 5835
martin.scharnke@allenovery.com



Sascha Fröhlig
Associate
Tel +49 69 2648 5463
sascha.froehlig@allenovery.com



ECB in focus

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The blog features views and commentary from members of Allen & Overy's market-leading German financial services regulation practice.

For enquiries regarding Allen & Overy's ECB in focus blog, please contact us.

Some of our recent posts

ECB BANKING SUPERVISORS IMPOSE BIGGEST FINE TO DATE

21 February 2023

The ECB announced on 10 January 2023 that it had imposed an administrative penalty on the German bank Landesbank Hessen-Thüringen Girozentrale (Helaba) in the amount of almost EUR 7 million for misreporting its capital needs to the ECB for three consecutive reporting periods in 2020.

[Read more →](#)

ECB STRENGTHENS TIES WITH SUPERVISORS IN SIX EU MEMBER STATES NOT PART OF THE COMMON BANKING SUPERVISION

13 February 2023

The ECB has signed a Memorandum of Understanding with the national competent authorities of six EU Member States that are not part of the European banking supervision under the Single Supervisory Mechanism to improve the exchange of information and the coordination of supervisory activities.

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For more information, please contact:

Frankfurt

Allen & Overy LLP
Bockenheimer Landstraße 2
60306 Frankfurt am Main
Germany

Tel +49 69 2648 5000

Fax +49 69 2648 5800

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