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Bundesministerium der Justiz und für Verbraucherschutz
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American Express welcomes the opportunity to respond to the German Federal Government's consultation on the implementation of the Revised Payment Services Directive (PSD2), the *Referentenentwurf* regarding the *Zahlungsdiensterichtlinieumsetzungsgesetz*.

We set out below our views on one specific issue in the consultation – surcharging (Article 62.4, resp. § 270a BGB-E). For the reasons mentioned below and deviating from your draft law, American Express' proposal is to fully ban surcharging when transposing PSD2 into German law.

Consequently, our proposed wording for § 270a BGB-E would be as follows:

„§ 270a Verbot der Vereinbarung über Entgelte bei der Nutzung bargeldloser Zahlungsmittel

Eine Vereinbarung, durch die der Schuldner verpflichtet wird, ein Entgelt für die Nutzung eines bargeldlosen Zahlungsmittels zu entrichten, ist unwirksam.“

American Express believes surcharging should be entirely prohibited in Germany because it is:

1. Restrictive of competition

PSD2 bans surcharging for the vast majority of transactions, but unless member states take up the option to prohibit the practice entirely, a significant minority of transactions would be exposed to the threat of surcharging.

Allowing a small number of non price-regulated card transactions to be surcharged would severely handicap smaller networks, such as American Express, from acting as effective counterweights to the two dominant networks, Visa and MasterCard. This is because these additional charges understandably will deter cardholders of brands such as American Express from using their cards. Indeed, as Article 62.5 says, Member States may prohibit surcharging given “the need to encourage competition”.

American Express is a smaller player in Germany and is a choice for merchants. Indeed, across the E.U. we have a sector share of just 1.6%. Combined with this, American Express negotiates simple and transparent pricing with its merchants, regardless of the card type. When a merchant chooses to accept American Express, the price we negotiate is based on the value we provide, relative to competing cards. It is clear merchants have a choice over whether to accept American Express, especially as the majority of our cardholders also carry Visa and/or MasterCard products.

In general, surcharging also discriminates against electronic payments in favour of cash and cheques, which have a higher risk of money laundering and tax evasion and are more expensive than electronic payments. Clearly, these are important considerations

2. Fundamentally anti-consumer

As well as discriminating against customers' preferred payment method by forcing them to 'pay for paying', surcharging also misleads consumers about the true price of goods and services. This is acknowledged in PSD2 (Recital 66), which states that surcharging has: *"become a source of confusion for consumers, in particular in the e-commerce and cross-border context. There are also many examples of merchants surcharging consumers at levels much higher than the cost borne by the merchant."*

That is why BEUC, the European consumer group, has called for surcharging to be "definitively banned in Europe" arguing that surcharging "is not an optimal policy tool to improve competition in the payments services sector."

We share the view of BEUC and many other consumer advocates that surcharging in any form is never in the best interests of consumers, who should be able to use the payment method of their choice without financial penalty.

3. Very difficult to implement

Operationally, the selective surcharging rules in the draft § 270a BGB-E would be near-impossible to implement and not clear for merchants or card holders to understand. There would be a substantial lack of transparency as to whether a card could be surcharged or not, as merchants would not be able to differentiate at the point-of-sale whether they are entitled to surcharge a card transaction or not. The inevitable consequence would be that merchants inadvertently fall foul of the law, leading to greater confusion and frustration for card holders.

The same applies when trying to distinguish between domestic transactions (the majority of which may not be surcharged) versus inbound non-EU/EEA transactions (which could be surcharged).

In Spain, where selective surcharging was introduced in 2014, these concerns have been widely borne out, as in practice the requirements have proved impossible to implement and police. Indeed, leading Spanish consumer groups such as OCU and Facua have stated that these rules have been completely ineffective, leaving card holders at a severe disadvantage.

Given the factors set out above, as you may know, many member states (such as, Austria, Croatia, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Romania, Slovakia and Sweden) already completely ban the practice of surcharging.

We therefore strongly encourage the Germany Government to take up the option to completely ban surcharging when transposing PSD2 into German law.

We would welcome the opportunity to explain these issues in more detail. I will contact your office to see when you might be available for a meeting.

Yours sincerely,



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American Express