Bonn, 21/04/2017

**Opinion of the Bundeskartellamt [Federal Cartel Office] on the
Draft Act of the German Federal Government
"Draft Act Implementing the Second Payment Services Directive"
- BT-Drucksache-18/11495 –
[Printed matters of the Bundesrat (German Federal Council)]**

The opinion of the Bundeskartellamt solely relates to the Draft Act Implementing the Second Payment Services Directive, and in this context particularly to the provisions under § 48 of the Payment Services Supervision Act (Zahlungsdiensteaufsichtsgesetz – ZAG).

Preliminary Observation:

One of the regulatory objectives of the Second Payment Services Directive ("PSD2") is to support the business activities of payment initiation service providers. Where the successful transposition of the PSD2 into national law is concerned, the issue of whether a payment initiation service provider is granted direct access to the payment account of the payer bears central significance.

Direct access to the payment account to this effect is provided for in the PSD2 and is also recognised as being secure. It was only during the consultation process in relation to the drawing up of the "Draft Regulatory Technical Standards" of the European Banking Authority (EBA) that the direct access of the payment initiation service provider was supplemented by the alternative option of the provision of a platform via the account servicing payment service provider (an "interface"). When the final draft of the Draft Regulatory Technical Standards was forwarded to the European Commission in February 2017, a consultation process at the European level was initiated, in which the European Council, the Parliament and the Commission are all participating. Already before this consultation process began, this provision within the Draft Regulatory Technical Standards relating to the direct access to the payment account was criticised by the negotiation team of the European Parliament as not being compatible with the PSD2.

Although, in so far as all statutory requirements are met on the part of the account servicing payment service provider, access via this kind of interface may appear at first glance to be equivalent to direct access, from the point of view of the Bundeskartellamt, this kind of alternative of transferring information to the payment initiation service provider via the account servicing payment service provider should be avoided because solely the granting of direct access ("making accessible") can prevent potential abuses and conflicts from arising. In the opinion of the Bundeskartellamt, it is only the direct access solution which can suitably account for the objectives of the PSD2 in relation to the payment initiation service providers.

The concept of access to information:

The proposed provision under § 48, paragraph 1, section 2 ZAG provides that the account servicing payment service provider must "communicate" the relevant information "or make this available". This means that the payment initiation service provider is not granted its own (i.e. direct) access to the payment account of the payer in every case. Rather, it is merely given the opportunity to grant this direct access. Instead however, the account servicing payment service provider itself (i.e. generally the bank where the account is held) can also transfer information to the payment initiation service provider.

From the point of view of the Bundeskartellamt, this concept is not a suitable means of preventing hindrances where the payment initiation service providers are concerned: the provision of the data required to initiate a payment procedure by the account servicing payment service provider in fact offers the latter numerous potential ways of refusing to provide or providing in limited form the data required for the decision regarding the initiation of the payment or also of simply delaying the issuing thereof to a considerable degree. Experience gained from proceedings before the Bundeskartellamt suggests that where potential opportunities exist in terms of benefitting from hindrances to this effect, these are indeed exploited. In the view of the Bundeskartellamt, even if the obligations to which an account servicing payment service provider is subject are carefully formulated, this risk cannot be excluded when a payment order is being processed via a payment initiation service provider.

Direct access to the payment account of the account servicing payment service provider, in contrast, would ensure that the payment initiation service provider would receive all of the information required for its service offer in complete form, reliably, punctually, and without restrictive costs.

From the perspective of the Bundeskartellamt, it is specifically the actual ensuring of continuous and full compliance with the statutory requirements which bears central relevance where achieving the regulatory aims of the PSD2 are concerned: if legal action has to be taken by the payment initiation service providers in question to enforce this (or if this has to be asserted under antitrust law by way of the control of abusive practices), then, based alone on the lengthy duration of such procedures, the payment initiation service providers will effectively no longer be able to provide the customers with their services. A simple delay in the provision of information on the availability of funds can already result in the transaction being cancelled by the payer authorising the payment if the payment process as a whole takes too long due to having to wait for this information. Just a few occurrences of this

nature would suffice to permanently undermine the trust the payer has in this form of payment processing.

Exclusively granting the payment initiation service provider direct access to the payment account of the payer also does not give rise to any concerns in terms of security. Already at this point in time (i.e. before the implementation of the PSD2), providers such as the company Sofort GmbH in Germany are already subject to data protection controls carried out by the Landesamt für Datenschutzaufsicht [Bavarian Regional Office for Data Protection Supervision], in particular to ensure compliance with § 28, paragraph 1, no. 1 Bundesdatenschutzgesetz (§ 28 BDSG [German Data Protection Act] relates to the collection and storage of data for internal business purposes). This involves the technical examination of the software in the companies in question (§§ 9, 39 BDSG). When the PSD2 is implemented and the EU Data Protection Directive enters into force, the monitoring of the payment initiation service providers will be further intensified. In particular, inspection of the log files, which document all access to the payment account, represents an effective means of supervision in this regard. The PSD2 accounts for this by providing for direct access to the payment accounts via payment initiation service providers.

If, contrary to the concerns expressed, the option of information access is adhered to, in the interests of limiting the risk of potential abuse which will nevertheless continue to apply, attention should be drawn to the following points in the view of the Bundeskartellamt.

The specific wording:
The wording selected in § 48, paragraph 1, section 2 ZAG is unclear and ambiguous in one respect. According to the current provision, the account servicing payment service provider is obliged to communicate information or make it available "*immediately after it is received*". In the opinion of the Bundeskartellamt, instead of the wording "*immediately after it is receive*d" this should be replaced by an instruction to provide the necessary information "*in real time*".

Notice of reservation of rights under antitrust law
Finally, as well as in relation to cases of refusal of access to payment accounts (§ 52, paragraph 2 ZAG), a notice of the reservation of rights under antitrust law would also be desirable with respect to § 48 ZAG. This would make it clear that the Bundeskartellamt can continue to take action in cases of the systematic delaying of access and provision of incorrect information etc. by means of the general control of abusive practices.