

Green Paper makes its mark

“Given the current lack of commitment to such an important initiative for the European economy as a whole, achieving an integrated market requires taking a comprehensive approach involving regulation, self-regulation and competition law compliance and enforcement.”

by Richard Willis and Anthony Balloon

On 11 January 2012, the European Commission released its ambitious Green Paper, “Towards an integrated European market for card, internet and mobile payments.” With the stated goal being to “identify the obstacles that potentially prevent European integration in the card, internet and mobile payment markets,” its release opened a three-month public consultation period which morphed into a vigorous debate over the future of European payments.

And while the Commission was seeking input from stakeholders across the payments industry, the Green Paper made clear its view that active efforts of the Commission would be necessary: “Given the current lack of commitment to such an important initiative for the European economy as a whole, achieving an integrated market requires taking a comprehensive approach involving regulation, self-regulation and competition law compliance and enforcement.”

Consultation period draws interest

Now, over fifteen months since the release of the Green Paper what is its status? What has the reaction been? Has the Green Paper effort already stagnated, or is progress being made? As discussed below, seemingly the only conclusions to be drawn are: (1) the Commission likely grossly underestimated the complexity of their self-appointed task, and (2) there is no shortage of regulatory and quasi-regulatory bodies, in addition to industry groups, desiring a seat at the table, which has compound-

ed the Commission's challenges in seeking a comprehensive, yet workable framework for the payments industry.

Commission strikes active note

A remarkable indicator of the passion and controversy that the Green Paper engendered was on display at the Green Paper conference – a public stakeholder meeting – in Brussels in May 2012. The payments industry gathered at the Conference on Card, Internet and Mobile Payments to discuss the Green Paper and the future of payments in the EU.

Mr. Joaquín Almunia, Vice-President of the Commission and responsible for competition policy, opened the conference with a speech titled “Integrating payments in the EU: A new approach.” Striking a tone suggestive of a more active Commission, Mr. Almunia commented: “The more we understand the markets for payments, the bigger are our concerns.” Noting the failure to achieve desired results through self-regulation (particularly the Single Euro Payments Area and the related efforts of the European Payments Council), Mr. Almunia gave notice that the Commission would consider new legislation to provide a stronger regulatory framework, and greater legal certainty, to the payments industry: “The new mix of regulation, self-regulation and competition enforcement that I am advocating today will have to respond to these new challenges and opportunities.”

Following these tone-setting introductory remarks, the conference featured four panels:

- “Single Market, Market Access, Market Entry” was dedicated to issues concerning market access and entry, and the role of a level playing field in promoting a “Single Market” throughout Europe.
- “Standardisation, Interoperability, Security” addressed the current lack of harmonised technical and interoperability standards.
- “Transparency” discussed the transparency of payment services pricing.
- “Governance” focused on governance and enforcement, with a focus on SEPA – and the mixed results to date of a self-regulatory approach.

In closing the conference, Mr. Jonathan Faull, Director-General for Internal Market and Services at the EC, anticipated that a synopsis of conclusions/recommendations would be issued by the end of July 2012, with any applicable proposals to be adopted by the first quarter of 2013. It soon became clear, however, that the task of regulating payments would lead the Commission to soften the approach and timing of deliverables.

Feedback feeds confusion

In June 2012, the Commission published a Feedback Statement summarising the more than 300 Green Paper responses. While the Feedback Statement brings order to the responses, it also signals that consensus will be elusive. Responses are available on the Commission's website, and the Feedback Statement provides insight into the disparity and complexity of views across the spectrum

of issues raised by the Green Paper.

To appreciate the Commission's challenge, the Green Paper must be considered in the broader context of efforts to regulate payments emanating from throughout the EU apparatus.

This array of effort, agencies, reports, recommendations and directives includes but is not limited to: the Digital Agenda and Digital Single Market; the Commission Communication on e-commerce and other online services; cross-border payments regulation; the Directive on Payment Services (PSD); the Single Euro Payments Area (SEPA); and related efforts by the European Payments Council (EPC); Regulation (EU) No 260/2012 (technical and business requirements for credit transfers and direct debits in euro credit/debit transfer); the Single Market Act (April 2011) and the Single Market Act II (October 2012); the E-Money Directive; the European Central Bank's (ECB) European Forum on the Security of Retail Payments (SecuRe Pay); the ECB's Contact Group on Euro Payments Strategy (COGEPS); and the Economic and Monetary Affairs Committee of European Parliament (ECON).

Thus is the challenge to the Commission's Green Paper effort compounded: in addition to having to synthesise disparate industry points-of-view, the Commission also must navigate disparate regulators with disparate agendas.

October 2012 – The Roadmap

Perhaps the most substantive follow-up by the Commission was the Green Paper "Roadmap" dated October 2012.¹ While heavily caveated as indicative only, the Roadmap notes that there are a number of regulatory gaps and market failures in the card, internet and mobile payments market. Particular attention is paid to the PSD, and the Commission acknowledges that there are gaps in the PSD framework and inconsistencies in implementation and application². More to the point, the Commission notes that the PSD may suffer from "ambiguous and to some extent outdated scope."

In the Roadmap, the Commission identifies four principal options: (1) 'do nothing,'

(2) 'soft law,' involving communication or recommendations addressing the hurdles for integration; (3) a revision of existing legislative instruments, principally the PSD and the cross-border payments regulation, and (4) a new legislative instrument. And the Commission strongly indicates that new legislation will not be part of the approach. Rather, adjustment of current legislation appears the most likely course: "Due to inherent links between the identified problems and already existing legal instruments, in particular the PSD, a new legislative instrument would not seem to be the most efficient legislative approach."

Note, however, the inconsistency: other EU sources have indicated that new legislative approaches to payments are critical. For example, in Single Market II (3 October 2012) the Commission acknowledges that not only will the PSD be revised, but a legislative proposal on multilateral interchange fees (MIFs) for card payments will also be forthcoming.

What's next?

The payments industry waits for further word from the Commission, but perhaps with less anxiety than at the conclusion of the conference of May 2012, where Mr. Almunia seemed to presage a very interventionist approach. In the words of the EPC Chair, Javier Santamaría, in the EPC's January 2013 newsletter:

"The hope is that the Commission's current silence indicates a willingness to revisit regulatory ambitions... to establish the EU authorities as a main arbitrator on what constitutes innovation in payments and which solutions should be taken forward through cooperation and standardisation."

We are left to await what appears will be a "package" offering from the Commission: an update of the PSD, perhaps with a particular focus on "leveling" the playing field among payment service actors, enhancements to the cross-border payments regulation, and new legislation to address the long-debated MIFs.

To the Commission's credit, that its timelines have slipped and its ambitions trimmed is perhaps indicative of a thoughtful Commission that came to realise that the agenda framed by the Green Paper was more ambitious, more fraught with peril and more difficult to implement than originally envisaged. ■

About the authors: Richard Willis and Anthony Balloon are partners in the Payments Group at Alston & Bird, based in Brussels and Atlanta, respectively.

¹ "Follow up to Green Paper: Towards an integrated European market for card, internet, and mobile payments, including the reviews of Directive 2007/64/EC on payment services in the internal market (PSD) and Regulation (EC) No. 924/2009 on cross-border payments in the Community."

² See our earlier Payments Cards & Mobile article on this very point: "PSD – SEPA Success in Tough Times; March/April 2012."