

BA Legal Report

September 2013

Banking & Payment Systems

[Retailers welcome landmark proposal to cap card processing fees](#)

UK retailers have welcomed a landmark proposal by the European Commission to cap fees charged by banks for the use of credit and debit cards.

The commission has proposed new regulations to cap interchange fees, which retailers pay to card schemes and banks to process payments customers make using credit and debit cards. These currently vary from 0.1% to 2.5% and cost UK retailers £850 million a year. The British Retail Consortium has been campaigning for a decade for a cap in the fees, which are absorbed into retailers' costs. The average charge for credit cards is 0.9% of the transaction, but the legislation would cap these fees at 0.3% and debit card fees at 0.2%. The cap will apply initially to cross-border payments, rolling out to UK rates within two years.

Helen Dickinson, BRC director general, said: "While this is great news, there is a real opportunity for the Government to go further and faster by making more substantial and immediate cuts through the proposed economic regulator for payments – this means that UK consumers could benefit much more quickly."

[New rules on Payment Services for the benefit of consumers and retailers](#)

The revised Payment Services Directive brings a number of new important elements and improvements to the EU payment market:

- It facilitates and renders more secure the use of low cost internet payment services by including within its scope new so-called payment initiation services. These are services that operate between the merchant and the purchaser's bank, allowing for cheap and efficient electronic payments without the use of a credit card. These service providers will now be subject to the same high standards of regulation and supervision as all other payment institutions. At the same time, banks and all other payment service providers will need to step up the security of online transactions by including strong customer authentication for payments.
- Consumers will be better protected against fraud, possible abuses and payment incidents (e.g. in case of disputed and incorrectly executed payment transactions).

Consumers may be required to face only very limited losses – up to a maximum of 50 EUR (vs 150 EUR currently)- in cases of unauthorised card payments.

- The proposal increases consumer rights when sending transfers and money remittances outside Europe or paying in non-EU currencies.
- It will promote the emergence of new players and the development of innovative mobile and internet payments in Europe for sake of EU competitiveness worldwide.
- The Regulation on interchange fees, combined with the revised PSD, will introduce maximum levels of interchange fees for transactions based on consumer debit and credit cards and ban surcharges on these types of cards. Surcharges are the extra charge imposed by some merchants for the payment by card and are common notably for purchases of airline tickets. When interchange fees are capped for consumer cards, retailers' costs for card transactions will be substantially reduced and surcharging will no longer be justified.

During a transition period of 22 months, caps on interchange fees for debit and credit cards will apply to cross-border transactions, i.e. when a consumer uses his card in another country, or when a retailer uses a bank in another country. Thereafter these caps will also apply to domestic transactions. The caps are set at 0.2% of the value of the transaction for debit cards and 0.3% for credit cards. These levels have already been accepted by competition authorities for a number of transactions with cards branded MasterCard, Visa and Cartes Bancaires. For the cards that are not subject to the caps (mainly commercial cards issued to businesses and three party schemes such as American Express or Diners), retailers will be able to surcharge for them or to refuse to accept them. In this way, the costs imposed by these expensive cards can be passed directly on to those who benefit from them rather than being borne by all consumers.

Interchange fees are included in the retailers' costs of receiving card payments and are ultimately paid by consumers through higher retail prices. They are unseen by consumers but cost retailers and ultimately consumers tens of billions of euros every year. The level of the interchange fees varies widely between the Member States, which suggests that they do not have a clear justification and create an important barrier between the national payment markets. Capping the interchange fees will reduce costs for retailers and consumers and help to create an EU-wide payments market. This should also encourage innovation and give more scope for payment providers to offer new services.

The future of UK payments policy

HM Treasury has consulted on how UK payment policy should be governed in the future. In addition, the European Commission has proposed regulation on interchange fee levels and removal of payment system restrictions. The proposed changes could have the potential to significantly alter retail payment operations and cost. The BRC has on-going engagement with the European Commission, HM Treasury and Office of Fair Trading to ensure the retail position is fully considered in all decision making stages.

Bank of England publish Code of Conduct on Cash Recycling

The Bank of England is updating industry mechanisms intended to limit the circulation of counterfeit notes passing undetected between tills, self-checkout terminals and retail ATMs. The Bank has provided on-going updates to BRC retail members and the BRC has responded to the Bank's formal consultation.

Child Protection

Online Safety

The BA was asked to about the Online Safety Bill. We consulted with the PA and IPG and both organisations are relaxed about the matter. The PA, in fact, rather welcomes any attempts by government to regulate harmful content on the internet as it demonstrates a willingness and ability to do something about harmful activity online. The only companies which face new obligations from this Bill are the ISPs, mobile operators and device manufacturers.

Consumer Protection

Consumer Bill of Rights

The Business, Innovation & Skills (BIS) Select Committee has begun its pre-legislative scrutiny of the draft Consumer Bill of Rights. The Bill covers: Sale of Goods; Sale of Services; sale of digital content; civil redress for consumer protection issues; revisions to Unfair Contract Terms rules; trading standards powers; and collective actions in competition cases. The BRC will submit evidence which will be generally supportive of the Bill, but be critical of the proposals on opt out collective actions for competition issues. This is on the basis they include none of the protections recommended by the European Commission in its recently published Recommendation to prevent the spread of US style class actions – and indeed the UK goes well beyond the EU proposal in spite of its protestations that in future it would not go further than EU requirements.

Copyright & Piracy

Copyright Hub - Pilot Launched

The Copyright Hub - one of the outcomes of the Hargreaves Review has launched a consultation pilot. The Hub is both a web portal connected to a network of organisations from the audio-visual, publishing, music and images sectors of the creative industries and a forum for collaboration between the various creative sectors and their organisations.

It aims to streamline copyright licensing for the digital age, helping users to find out about copyright and navigate their way through its complexities; to be a place where rights-holders can, if they so choose, register their rights information via organisations connected to the Hub; and to be a place to seek permission from rights-holders to use copyrighted works legally and easily.

www.copyrighthub.co.uk

Copyright Notices Service

The Intellectual Property Office has launched a new Copyright Notices service that lets people ask the Government to clarify unclear copyright law. The new Copyright Notices service is asking people to tell the Government what aspects of copyright law are unclear, and the problems that this causes them. By using an online form, businesses and consumers can request guidance on particular topics.

Taking account of the issues raised, the Government will publish guidance, in the form of a Copyright Notice. This will provide clear and impartial information tailored to non-experts. By providing guidance on what is allowed under copyright law, the Notices will, for example, help schools, colleges and universities make better judgments about lawful uses of copyright works and so improve access to works and reduce the current harm to rights holders from unintentional infringement.

For more details see: <http://www.ipso.gov.uk/c-notice.htm>

Data Protection & Privacy

Data Protection Update From The Ministry of Justice

The European Commission has proposed wide ranging proposals on data protection policy. Recently these have been significantly amended, through the European decision making process. The BRC attended a second MoJ expert panel to ensure retail is engaged in the on-going and evolving policy debate has also met key European officials.

Employment

Settlement Agreements

Settlement Agreements come into effect from 29 July 2013. To support their introduction, Acas has produced a statutory Code of Practice which explains what settlement agreements are and provides guidance on the new law which concerns the confidentiality of settlement agreement negotiations. In addition to the code Acas has also produced a non-statutory guide which provides more detailed guidance on the use of Settlement Agreements.

Download:

[Code of Practice on Settlement Agreements \[1Mb\]](#).

[Settlement Agreements Acas Guide \[695kb\]](#)

Key points about settlement agreements

- Settlement agreements are legally binding contracts that waive an individual's rights to make a claim covered by the agreement to an employment tribunal or court.
- The agreement must be in writing.
- They usually include some form of payment to the employee and may often include a reference.
- They are voluntary.
- They can be offered at any stage of an employment relationship.

Settlement agreements are legally binding contracts which can be used to end an employment relationship on agreed terms. They can also be used to resolve an ongoing workplace dispute, for example, a dispute over holiday pay. These agreements can be proposed by either an employer or an employee, although it will normally be the employer. Once a valid settlement agreement has been signed, the employee will be unable to make an employment tribunal claim about any type of claim which is listed on the agreement. Where the employer and employee are unable to reach an agreement, the settlement discussions cannot usually be referred to as evidence in any subsequent unfair dismissal claim. Where the settlement discussions are held to resolve an existing dispute between the parties they cannot be used as evidence in any type of claim.

Further advice on settlement agreements can be obtained from the Acas helpline on 08457 47 47 47.

RIDDOR Changes

From 1 October 2013 changes will be introduced to the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR) that will simplify the mandatory reporting of workplace injuries for businesses, while ensuring that the data collected gives an accurate and useful picture of workplace incidents. The main changes are to simplify the reporting requirements in the following areas:

- The classification of 'major injuries' to workers is being replaced with a shorter list of 'specified injuries'.
- The existing schedule detailing 47 types of industrial disease is being replaced with eight categories of reportable work-related illness.
- Fewer types of 'dangerous occurrence' will require reporting.

There are no significant changes to the reporting requirements for:

- Fatal accidents.
- Accidents to non-workers (members of the public).
- Accidents which result in the incapacitation of a worker for more than seven days.

Guidance (subject to Parliamentary approval) from 1 October 2013:

[Draft INDG 453: 'A brief guide to the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 \(RIDDOR\)'](#)

Total Reward

In recent years the Living Wage has been gathering greater support as a concept. In response to this, the BRC has worked with retail members to develop a policy paper which outlines the importance of total reward packages within the retail sector. This will allow the BRC to promote the many benefits of working within the sector to policy makers and to stress the need to recognise the value of total reward packages, rather than purely hourly rate, when looking at a Living Wage.

Ruling on Collective Redundancy

A recent judgement by the Employment Appeal Tribunal (EAT) removes the concept of "establishment" from the law on collective redundancy consultation meaning the threshold is now twenty proposed redundancies per employer, rather than twenty per employer per establishment, in order for an employer to be obliged to collectively consult. The BRC wrote to the Secretary of State for Business to highlight the impact this judgement will have on the retail sector and to urge the Government to appeal the EAT decision. As a result, the Government has now sought an appeal and we currently await the outcome.

Transfer of Undertaking Protection of Employment (TUPE)

The consultation to the proposed changes cover the service provision and should they be retained or repealed, whether or not the employee liability information should be provided earlier to the transferee and whether an amendment to TUPE would be possible to ensure that a change to the location of the place of work would not necessarily lead to automatic unfair dismissal. This is expected in October/November 2013.

Early Conciliation

From April 2014 before lodging a claim to the Tribunal all claimants will need to notify Acas first, where conciliation will be offered. If conciliation is unsuccessful within the set period the claimant can proceed to lodge a tribunal claim.

Flexible Working

The Government proposes to extend [the right to request flexible working](#) to all employees and remove the current statutory procedure for considering requests. Instead employers will have a duty to consider all requests in a reasonable manner; employers will have the right to refuse requests on business grounds.

Environment & CSR

[Carrier Bag Statistics Reflect Changing Shopping Habits](#)

A small increase in the number of carrier bags being used by supermarket shoppers across the UK reflects changing shopping trends and shouldn't detract from areas where excellent progress has been made, the BRC says. The latest annual statistics show consumers' bag use in 2012 was 1 per cent higher than the previous year. However, the weight of bags issued has fallen by almost 3 per cent, and bag use is still a third lower than the baseline year of 2006 despite sales volumes having increased by 8.6 per cent during that period.

Changing consumer habits mean that people are increasingly using 'top-up shopping' in addition to their larger weekly shops. These shops also typically use smaller and lighter bags. The data also shows 60 per cent of stores have front-of-store recycling points.

Retailers operating across the four UK nations may have to work to four different policies on carrier bag charging. Retailers are likely to be asked for their opinions on a carrier bag charge in England.

WRAP is the Government's Waste and Resources Action Programme. All figures are available at: www.wrap.org.uk/content/carrier-bags-reducing-their-environmental-impact

Carrier Bag Charging in Scotland

The Scottish Government announced at the end of June its intention to bring forward regulations to introduce a mandatory charge for single-use carrier bags. The charge will be set at a minimum of 5 pence and will come into force during October 2014. The Scottish Government has confirmed that the proceeds of the charge are expected to be donated to charitable and good causes.

Consultation on the Energy Savings Opportunities Scheme

The Government has just published their consultation on the Energy Savings Opportunity Scheme (ESOS) with responses required by 3 October 2013. ESOS is the UK Government's response to Article 8 of the EU Energy Efficiency Directive which places a requirement for Member States to carry out energy audits. It requires all large enterprises to undertake an energy audit by 5 December 2015 and then at least every four years thereafter.

Electricity Market Reform

The Government has launched its consultation on the Electricity Market Reform. The consultation outlines the proposals for reform of the electricity market in the UK. Proposals include the development of a capacity market for the UK which will enable companies to benefit from their energy savings through a direct market. The consultation also proposes the Levy Control Framework which places a threshold on the level of costs relating to energy regulation that can be passed through to consumers over the next five years.

Loss Prevention

The Home Office Commercial Victimisation Survey

The Home Office are conducting their 2013 Commercial Victimisation Survey (CVS) which provides information on how businesses in England and Wales are affected by crime; particularly the nature, extent and cost of crime against businesses including the wholesale and retail sector. The information will be used by the Home Office to identify where government support, advice and information could have the greatest impact. The survey is being carried out on behalf of the Home Office by the independent research organisation TNS BMRB. In order to obtain a true picture of crime against businesses, it is essential that selected businesses take part in this research, whether they have been a victim of crime or not. For further information see: <http://www.commercialvictimisationsurvey.org.uk/>

In addition, the of the 2012 CVS results (which cover wholesale and retail, accommodation and food, manufacturing, and transportation and storage) are available at:

<https://www.gov.uk/government/organisations/home-office/series/crime-against-businesses>

Property & Rates

BRC Business Rates Update

Following consultation with retail member CEOs, the BRC has updated its plan of activity on Business Rates issues. The main objective of the BRC's long term activity will be to secure solid commitments from politicians and officials to reform Business Rates. While we are undertaking activity to achieve this objective, the BRC is conscious of the need for a position on the 2014 uplift and will align with the CBI's call for a 2% cap.

There is a powerful editorial in the Telegraph arguing that 'if the Government is serious about supporting the high street then it has to reform business rates:

<http://www.telegraph.co.uk/finance/personalfinance/consumertips/tax/10243577/An-overhaul-of-business-rates-is-vital-to-save-Britains-high-streets.html>

And a wider piece from Graham Ruddick concerning the campaign:

<http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/10243415/British-Retail-Consortium-abandons-call-for-business-rates-freeze.html>

The Guardian reported that the BRC 'accused the Treasury of refusing to change its position over business rates and hoped new suggestions published by the BRC in the new year will make ministers "receptive to the idea of reform":

<http://www.theguardian.com/business/2013/aug/14/retailers-drop-business-rates-freeze>

City AM reported that 'until a long term solution for business rates was found, [we] agreed with the CBI (Confederation of British Industry) stance of a two per cent cap on rates':

<http://www.cityam.com/article/1376528202/retail-industry-body-changes-tune-rates>

There are also two articles in retail week which also give more information:

<http://www.retail-week.com/in-business/policy/comment-brcs-helen-dickinson-how-were-stepping-up-a-gear-on-business-rates/5052132.article?blocktitle=Hot-topic:-Business-rates&contentID=7892>

<http://www.retail-week.com/in-business/policy/comment-the-brcs-new-approach-to-business-rates-is-refreshing/5052111.article?blocktitle=Hot-topic:-Business-rates&contentID=7892>

Blueprint to Overhaul Business Rates in Scotland

The Scottish Government responded to the *Supporting Business: Promoting Growth* consultation with an Action Plan for Scottish Businesses. The announcement can be found [here](#). The Government's response to the consultation outlines 20 points of action. Some of the key points include:

- To undertake a review of the recent changes to empty property relief in 2015.
- To create a power to allow councils to respond better to local need and create their own localised relief schemes.
- To continue the Small Business Bonus Scheme (SBBS) until 2016 and consider which relief thresholds can be established on a longer term basis ahead of the 2017 review.
- To consult on transitional relief ahead of the next revaluation in 2017.
- A separate review of the appeals system will begin in 2014, concluding in time for the next revaluation in 2017.
- The current property based tax system will be retained.
- To confirm that the next rates revaluation will take effect on 1 April 2017.
- The national poundage will continue to be set at the same level as in England. There will be no new local poundage supplements.

Greater Flexibilities for Change of Use

The proposals in this consultation support government priorities for making better use of existing buildings. The consultation seeks views on five proposals for permitted development rights including shops and financial and professional services to change use to a dwelling house and retail uses to change to banks and building societies only.

Consultation closes: October 15 2013:

[Greater flexibilities for change of use: consultation](#)

Consultation on Property Owners and Business Improvement Districts

DCLG issued a consultation on Property Owners and Business Improvement Districts. The consultation considers how the role of property owners who are not Business Rates payers can be formalised in Business Improvement Districts. A key recommendation of the Portas Review, the proposed change would allow property owners to match the funding that retailers put into BIDs - a vehicle that allows traders to come together to fund improvements to their area - and be able to vote and have a voice on proposals such as planning and strategic decisions that affect their property.

BRC Planning Roundtable

The BRC held a planning roundtable to review the impact of the National Planning Policy Framework (NPPF) a year on from its publication. While the NPPF was welcomed for its role in streamlining the planning process, the roundtable recognised that significant issues in consistency and capacity still existed within and between local authorities. This continues to lead to additional and unnecessary costs being placed on developments which were affecting viability. There were also key concerns around the implementation of the Community Infrastructure Levy and how it was being used by Local Authorities to deliver objections to certain developments through disproportionate levy charges. Other areas included the proposed relaxation in the use of class and permitted development rights system.

Sales Promotion

Advertising Standards Authority to Present Two Year Review of Online Retail

Advertising Regulation

Two years ago the Advertising Standards Authority (ASA) extended its remit to include the regulation of online retail advertising. The ASA's extended remit means that the rules in the UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) apply to marketing communications online, misleading advertising, social responsibility and the protection of children. This is a considerable extension and has caused concern that this could lead to a new raft of regulations and compliance costs. The ASA has conducted a two year review of its code extension. The review contains a retail-specific section that will analyse, both quantitatively and qualitatively, the number and type of complaints and the nature of the outcomes. The review also covers the ASA's own analysis of its performance to perform the extended role.

Taxation & VAT

BRC Tax Roundtable

The BRC hosted a senior Tax roundtable which identified core work streams which will be required to take forward research and lobbying on the future corporate tax landscape. Our retail members agreed that the Business Rates system is the primary concern for the sector and some form of "rebalancing" in the way property is taxed should be a consideration for the research. The aim is to develop a strong research base, to enable the BRC to identify and promote alternatives and/or improvements.