

Justis- og beredskapsdepartementet  
Submitted electronically.

Oslo, 15. December 2017

## **PUBLIC CONSULTATION RESPONSE – REVISED FINANCIAL CONTRACTS ACT – AMERICAN EXPRESS**

### **1 INTRODUCTION**

American Express welcomes the opportunity to respond to the consultation paper issued by the Ministry of Justice and Public Security in September 2017 regarding implementation of the EU's revised Payment Services Directive (PSD 2), the Mortgage Credit Directive (MCD) and the Payments Account Directive (PAD).

We set out below our views on the following two issues:

- **proposal to remove the currently applicable exemption for credit granted free of interest.**<sup>1</sup> The exemption encompasses for example **deferred debit cards**. We will argue that it is both necessary and advisable to maintain the current exemption for credit granted free of interest.
- **the use of member state discretion to entirely prohibit surcharging.**<sup>2</sup> We strongly urge the government to entirely prohibit surcharging as there is a strong rationale for doing so.

---

<sup>1</sup> See the currently applicable Financial Contracts Act ("**FCA**") sect. 44 (2) letter a. There is no mention of a similar exemption in the proposal for a revised FCA section 73.

<sup>2</sup> See PSD 2 art. 62 nr. 4 and 5 and the proposal for a revised administrative regulation to the FCA sect. 3.

## 2 PROPOSAL TO REMOVE EXEMPTION FOR DEFERRED DEBIT CARDS

### 2.1 Introduction

American Express notes that the currently applicable exemption for credit granted free of interest (encompassing inter alia deferred debit cards) has been removed in the proposal for a revised FCA.<sup>3</sup> The exemption has been removed without any apparent supportive arguments and there is no provided rationale. We can find no evidence of any impact assessment. The removal of the exemption will make Norway one of the few countries in the EU/EEA which is fully subjecting deferred debit cards to the regulation applicable to ordinary credit agreements. In our view, this is not an advisable approach and seems to be contrary to the prevailing view both in the CCD, the regulation of deferred debit cards in other major European countries (such as Sweden, Denmark, Finland, UK, Germany, France, Belgium and Spain) and it will be detrimental to the fair competition and level playing field between otherwise equal products.

In the following, we will elaborate on each of these points and **strongly urge the government of Norway not to prematurely remove a well-established exemption** without properly conducting impact assessments and without considering the impact on fair competition in the market as well as considering how similar products (debit cards, deferred debit cards etc.) are regulated in other the other major European and Scandinavian jurisdictions.

### 2.2 What is a deferred debit card?

American Express offers a wide range of payment card products, including deferred debit cards (also called charge cards, and in Norwegian *faktureringskort*).<sup>4</sup> Deferred debit cards are not credit cards, but offers the cardholder an alternative way of payment by card. Deferred debit cards offer the cardholder an opportunity to postpone payment of the purchase of a good or service for no more than a month. Failure to repay the full outstanding amount is considered a default on the part of the cardholder. No interest rate applies to the payment instrument.

American Express' deferred debit cards have no pre-defined spending limit. Upon payment with a card, an internal credit assessment is run based on American Express' internal risk models which is based on more than thirty years' experience from issuing deferred debit cards. As there is no pre-determined spending limit, each transaction is approved or denied individually depending on the internal credit assessment. Upon approval of the transaction, the merchant is paid in full by American Express. In comparison, credit assessments for credit cards are conducted at the time of onboarding, and is a prognosis of the cardholder's future ability to repay the capital and accrued interest. The cardholder receives an invoice from American Express every month indicating the total amount charged to the card. The cardholder is required to pay the full amount charged to the card every month. As the deferred debit card is not directly connected to a bank account, the cardholder must use another bank account to pay the invoice.

Deferred debit cards are more akin to debit cards than credit cards, and are very similar to the situation when a merchant issues an invoice to the buyer of goods/services. In short, deferred debit cards are not advertised, nor indeed used by customers, as a form of borrowing, but rather give the customer flexibility and constitute a deferred payment. It is therefore logical and appropriate that deferred debit cards are regulated in the same manner as debit cards or

---

<sup>3</sup> See the currently applicable FCA sect. 44 sect. 44 (2) a. The currently applicable exemption encompasses inter alia deferred debit cards (also called charge cards) and other credit agreements where no interest rate or other credit charges are applicable. There is no mention of a similar exemption in the proposal for a revised FCA section 73.

<sup>4</sup> See the CCD recital 16 which uses the term deferred debit card.

an invoice from a merchant. Hence there is a need to maintain the current exemption in the FCA sect. 44(2)a.

### **2.3 Why deferred debit cards should remain exempted from the FCA**

The current exemption in the FCA sect. 44 (2)a should not be discontinued in the revised FCA. Deferred debit cards and other products where the outstanding amount is provided free of charge should remain exempted for a number of reasons. Please consider the following:

#### **A. Removing the exemption is at odds with the consumer credit directive.**

The consumer credit directive does not apply to credit agreements such as deferred debit cards and other credit agreements where the credit has to be repaid within three months and only insignificant charges apply.<sup>5</sup>

There are good reasons why deferred debit cards are exempted. First, deferred debit cards are more akin to a debit card or an invoice from a merchant. Regulating deferred debit cards the same way as credit cards would put deferred debit cards at a competitive disadvantage from a regulatory perspective. Second, the rules in the consumer credit directive are not designed for products such as deferred debit cards. As such, many of the rules in the CCD, and in the proposed revised FCA, are not suitable or simply irrelevant for deferred debit cards. We will elaborate on this topic in point F below.

#### **B. Most other major European jurisdictions provide for an exemption for deferred debit cards for good reasons – by removing the exemption, Norwegian legislation will be at odds with the prevailing view in Europe**

Most other European jurisdictions provide for an exemption for deferred debit cards. We are familiar with how deferred debit cards are regulated in several other European jurisdictions. The following countries have fully exempted deferred debit cards from the relevant legislation implementing the CCD: UK, Germany, France, Belgium and Spain. Further, the following jurisdictions have partially exempted deferred debit cards: Sweden, Denmark and Finland. We are not aware of any country within the EEA where deferred debit cards are fully in scope of the legislation implementing CCD.

For instance, in Sweden, deferred debit cards would be exempt from the following CCD obligations

- Credit assessment (article 8 of the CCD (no preset line of credit and no interest rate makes it impossible to perform a such assessment.);
- Marketing disclosures (article 4 of the CCD) (see below discussion regarding the APR – annual percentage interest rate);
- Pre-contractual disclosures (articles 5 and 6 of the CCD) (see below discussion regarding the APR);
- Documentation of the credit agreement (article 10 of the CCD);

---

<sup>5</sup> Consumer Credit Directive recital 13.

- Assignment of rights (article 17 of the CCD)
- Right to withdrawal (article 14 of the CCD); and
- Termination of open-ended credit agreements (article 13 of the CCD).

These are just examples of how deferred debit cards are regulated in other jurisdictions.

To ensure a level playing we **strongly urge the Norwegian government to maintain the currently applicable exemption** for deferred debit cards and other credit agreements granted free of interest. Maintaining the exemption will keep Norwegian legislation aligned with most other major European jurisdictions, including other Scandinavian countries.

If the full exemption is not maintained, deferred debit cards should only be subject to provisions which are relevant.

**C. There is no apparent rationale for removing the exemption, and we can find no evidence of an impact assessment**

We are unable to locate any impact assessment regarding consequences of removing the exemption. In our view, it is not advisable to remove the exemption without due regard for the consequences of doing so. In this respect, the proposal may be in contravention of *utredningsinstruksen* section 2-1.

Further, the consultation paper offers no apparent rationale for removing the exemption. The specific remarks for the relevant provision (section 73) in the consultation paper does not mention the removal of the exemption. The only relevant remarks we can find on the issue is in the specific remarks for the proposed section 90 (page 147) which regulates another matter entirely:

*Bestemmelsen er en videreføring av den tidligere kredittkjøpsloven § 8. Gjeldende kapittel 3 i finansavtaleloven gjelder for avtale med «kredittgiver». §§ 44 og 44 a, jf. § 1 sjette ledd, innebærer at enhver som yter kreditt i næringsvirksomhet til en forbruker, er å anse som kredittgiver etter kapittel 3. I den forbindelse kan unntaket for vederlagsfrie kreditter etter § 44 annet ledd bokstav a synes problematisk. Denne bestemmelsen innebærer at ved vederlagsfri kreditt gjelder ikke § 54 b [which regulates the consumer's objections and claims against a credit provider who is not the seller]. Typisk vil kreditt som er ytt en forbruker i relasjon denne paragrafen, være skjedd ved bruk av kredittkort. Mange kort gir i dag opp til 45 dager rentefri kreditt, slik at dersom forbrukeren betaler det skyldige beløpet i sin helhet, er kreditten ikke omfattet av reglene i kapittel 3. Etter kredittkjøpsloven § 8 ville en vederlagsfri kreditt vært omfattet. Departementet kan ikke se at denne problemstillingen har blitt særskilt vurdert.*

The Ministry seems to argue that credit cards with a 45 day interest free period may be covered by the currently applicable exemption for credit agreements where there is no applicable interest rate. In our view, this interpretation is not correct. For credit cards with an interest free period, the credit is not granted free of interest. The relevant interest rates will accrue from day 45 onwards. The applicable interest rate is clearly

stated in the credit agreement, and both the creditor and the debtor is aware – and may even be relying on the fact – that the debtor may decide to make use of the credit for longer than 45 days and that interest will accrue from this point onwards. Please note the crucial difference with regards to deferred debit cards: with deferred debit cards there is no option for the debtor to make use of any credit beyond the first month. No charges or interest will apply to the use of credit. If the debtor fails to repay on time, the debtor will be in breach of the agreement (and will consequently have to pay customary default interest).

Further, the Ministry's concern that credit cards with interest free periods are covered by the exemption, may be mitigated by other measures which are more suitable. The ministry may simply state, in law or the preparatory works, that credit cards with an interest free period are not covered by the exemption. This approach is more advisable as it does not entail any consequences which have not been examined and considered. Such an approach is therefore more in line with *utredningsinstruksen*, and will not entail undue regulatory uncertainty for the payment card industry.

Separately, in the quote above, the Ministry seems to argue that the current section 54 b should be applicable even if the agreement is covered by the exemption for credit agreements with no interest and no charges applicable. This is a relevant argument. However, the argument does not justify that deferred debit cards are subjected to the whole catalogue of legislation regarding credit agreements – it simply implies that there are some reasons why this specific provision should be applicable. Given this, the Ministry may partially subject deferred debit cards to specific provisions which, after an impact assessment, are deemed relevant and justified.

**D. Maintaining the exemption does not imply that deferred debit cards are unregulated**

Maintain the exemption does not imply that deferred debit cards are unregulated.

Deferred debit cards are considered a payment instrument under both PSD 1 and PSD 2. Deferred debit cards are therefore regulated as payment instruments which are subject to strict regulation and a number of provisions protecting consumers/cardholders. Further, marketing and consumer protection legislation is also applicable. Consequently, maintaining the current exemption will not leave deferred debit cards unregulated. Rather, by maintaining the exemption the government will allow deferred debit cards to compete with other similar products on a level playing field.

**E. Maintaining the exemption is necessary to ensure fair competition and a level playing field for otherwise equal products**

Deferred debit cards are more akin to debit cards or an invoice from a merchant than a regular credit card. Regulating deferred debit cards in the same manner as credit cards will therefore place deferred debit cards at a competitive disadvantage from a regulatory perspective.

For consumers, it will likely be confusing if the regulation of deferred debit cards is the same as for credit cards. This is because many of the provisions regulating credit cards are not suitable/relevant for deferred debit cards. An example is the information requirement to state a (pro-forma) annual percentage interest rate even though there

is no such interest rate for deferred debit cards. Many of the information requirements will not be relevant for deferred debit cards and will therefore be misleading. In turn, this entails that consumers will be faced with greater difficulty in making an informed and fair choice between different payment instruments. See further on this issue below.

Further, an unintended consequence of the proposal is that the rules may be circumvented. For instance, if a merchant provides credit by way of an invoice and subsequently sells the claim to a third party (e.g. by way of factoring), the FCA would not apply. However, where the invoice service is provided by a third party, the FCA would be applicable. This has a detrimental impact on consumer choice and may drive consumers away from payment solutions provided by regulated entities (such as American Express which is a fully authorized and supervised payment institution) specialized in providing payment products and towards non-regulated entities which are not specialized in providing consumer payment products or credit. The current proposal will thus hamper efficient competition.

**F. Many of the provisions in the consumer credit directive and the FCA are not relevant for deferred debit cards and will have detrimental and unintended effects**

Many of the provisions in the FCA are not relevant for deferred debit cards. In fact, many of the provisions are simply unsuitable and will serve to confuse consumers.

For instance, with regards to pre-contractual disclosure requirements, deferred debit cards do not have a fixed credit amount or any applicable interest rate. This means that the SECCI-form (*SEF-skjema*) will not provide relevant information to debtors as the key information in the form will not provide a clear or fair representation of the actual contractual arrangement. This defeats the purpose of the SECCI-form.

Another example is the calculation of an annual percentage rate (APR, *nw. årlig effektiv rente*). The calculation of APR will normally be distorted when this is calculated for deferred debit cards. By way of a practical example from the UK, American Express's U.K. platinum charge card, which levies a £300 annual fee, would need to advertise an APR of approximately 1,355 per cent. Similarly, our Green Card, which has a £60 annual fee, would have to advertise an 80 per cent APR. Clearly, these figures – which have been independently verified by an actuary – are extremely misleading if the calculation prescribed by the CCD were to apply, as they do not provide consumers with an accurate indication of the true cost of borrowing. Moreover, they falsely suggest to the consumer that these card products levy an interest rate, which is patently not the case. In contrast, American Express's U.K. platinum cashback credit card, which does levy a monthly interest rate on goods and services purchased, only has to advertise an APR of 19.9 per cent. As you can see, disclosing APRs in this way has the perverse effect of portraying the more expensive product as being the more attractive product. Partly as a result of this effect, deferred debit cards are now fully exempt from the CCD-regime in the UK.

**G. Deferred debit cards entail far less risk for over-indebtedness from a consumer perspective compared to credit cards**

Credit provided by merchants (e.g. by way of an invoice) to the buyer of goods/services is exempted from the proposed FCA. However, if American Express or

another third party issues the invoice to the consumer, the credit agreement will not be exempted from the proposed FCA. The rationale behind this is not clear. The consumer is not exposed to any incremental risk if American Express is the credit provider rather than the merchant – indeed it is rather the opposite. American Express will conduct a proper credit assessment on a transaction by transaction basis, and will as such provide the consumer with more protection against becoming over-indebted. The only difference in the two situations is who will accept the credit risk. In our view, it should be assumed that companies who specialize in providing payment products to consumers will be better placed than merchants to accept the credit risk and assess the credit worthiness of the consumer.

Globally, American Express has the lowest credit losses of any card provider. The reason why is that the majority of American express cards are deferred debit cards.

### **3 SURCHARGING**

American Express believes surcharging should be entirely prohibited in Norway. American Express notes that the Norwegian Government is proposing not to take up the option provided to it under PSD 2 to prohibit surcharging entirely.<sup>6</sup> In the consultation paper, we find no discussion of whether Norway should make use of its discretion to entirely prohibit surcharging.<sup>7</sup> We believe that not prohibiting surcharging is a missed opportunity and strongly urge the Government to revisit this topic.

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

#### **A. Restrictive of competition**

Article 62.4 of PSD2 states that merchants must not request charges for the use of payment instruments for which interchange fees are regulated under Chapter II of the EU Interchange Fee Regulation. In practice this will mean surcharging is prohibited on well over 90 % of credit and debit card transactions.

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 dominant networks in Norway: BankAxept, Visa and Mastercard. This is because these additional charges understandably will deter cardholders of brands such as American Express from using their cards.

The PSD2 seeks to increase competition, and as Article 62.5 says, surcharging may be prohibited given “the need to encourage competition”. Yet perversely the proposed surcharging rules in Norway will have the opposite effect and drive more transactions on to the larger networks. This will undermine our relevance in the sector and therefore mean American Express is less able to compete with the dominant players, which ultimately would distort competition and choice in the sector.

American Express is a smaller player in Norway and is a choice for merchants. Indeed, across the E.E.A. we have a sector share of around 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

---

<sup>6</sup> See the proposal for a revised administrative regulation (*finansavtaleforskriften*) section 3.

<sup>7</sup> See the consultation paper page 37 ff.

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 BankAxept, Visa or Mastercard products.

A merchant that displays the "American Express Cards Welcome" logo should not be able to "free ride" on the strength and value of the American Express brand and attract our cardholders into its place of business, only then to penalise them through surcharging. The benefits and the value we deliver will ultimately not be sustainable to provide if fewer transactions are taking place on American Express cards due to merchant surcharging practices.

In general, surcharging also discriminates against electronic payments in favour of cash, which has a higher risk of money laundering and tax evasion and are more expensive than electronic payments. Clearly, these are important considerations for any government focused on growing the economy.

## **B. 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. Indeed, 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.

## **C. Very difficult to implement**

Operationally, the selective surcharging rules under PSD2 would be near-impossible to implement and not clear for merchants or consumers to understand. There would be a substantial lack of transparency as to whether a card could be surcharged or not, as merchants will not be able to differentiate at the point-of-sale between price-regulated and non price-regulated card transactions. The inevitable consequence will be that merchants inadvertently fall foul of the law, leading to greater confusion and frustration for consumers.

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 can be surcharged). Permitting surcharging on inbound cards would therefore be extremely discriminatory to tourists.

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 consumers at a severe disadvantage.

In order to illustrate the operational difficulties of selective surcharging – as the current proposal will allow – we have attached a document showing the complex and confusing situation both consumers and merchants will be faced with if surcharging is not entirely prohibited. American Express believes both consumers and merchants will be hard-pressed to understand why some cards are subject to a surcharge ban while others are not.

As you may be aware, the U.K. government recently announced its intention to completely ban surcharging on consumer transactions. HM Treasury stated that the ban “will create a level playing field between payment instruments and create a much clearer picture for consumers.” We fully support this point and believe the same principle applies equally to Norwegian consumers.

Given the factors as set out above, in addition to the U.K., a number of E.U. member states (such as, Austria, Croatia, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Romania, Slovakia and Sweden) already completely ban the practice of surcharging.

In sum, we believe that not prohibiting surcharging is a missed opportunity and strongly urge the Government to revisit this topic. A ban on surcharging in its entirety will increase competition, strengthen consumer rights and make it easier for both consumers and merchants to navigate between different payment cards.

We therefore urge the government to introduce a ban on surcharging in its entirety.

#### **4 CONCLUDING REMARKS**

We are grateful for the opportunity to express our views on the consultation paper and would welcome the opportunity to explain our business model and discuss these issues. We will contact your office to see when you might be available for a meeting.

Yours faithfully,

Helena Forsgardh Alstrup  
Senior Counsel  
American Express Services Europe Ltd.

---

# The Operational Difficulties of the Current Surcharging Proposals

Operationally, selective surcharging would be near impossible for merchants to implement and for their customers to understand. Such a scenario would be fraught with the potential for abuse across all networks.



Surchargeable

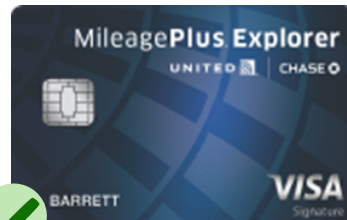


Non-surchargeable

## United Airlines Visa card



MBNA UK-issued Visa card



Chase US-issued Visa card

---

## Virgin Atlantic card



Bank of America US-issued Mastercard



MBNA UK-issued Visa card

---

## American Express Gold Card



Amex UK-issued Gold Card



EU Partner-issued Gold Card

---

## HSBC Premier Mastercard



HSBC US-issued Mastercard



HSBC UK-issued Mastercard

---