

Card Payments and Consumer Protection in Germany

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Note that while references to statutes and case law were correct at time of first publication, these may have significantly changed in the meantime.

Abstract (English)

While the lion's share of consumer payments in Germany is still cash-based, card payments are steadily becoming more popular in retail. However, many consumers are unaware of their rights against merchants trying to impose unfair conditions on them. The first part of this article discusses the payments culture in Germany which differs significantly from the situation in many neighbouring EU countries. The second part focuses on consumer protection matters in the cardholder-merchant relationship, discussing the discharge of contractual debt by card payment as performance, potential contractual duties of merchants to accept cards and legal restrictions of surcharges on consumer payments. Furthermore, the practice of certain local government councils to require customers to pay with domestic cards of a specific brand (girocard) in place of cash or cards of other brands, is analysed with reference to European law. The article concludes with an overall evaluation of the statutory framework.

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Abstract (German)

Während der Löwenanteil der Bezahlungen immer noch bar erfolgt, nimmt auch in der Bundesrepublik die Zahl der Kartentransaktionen im Einzelhandel stetig zu. Doch kennen viele Verbraucher ihre Rechte nicht, die ihnen zustehen, wenn ein Händler an die Bezahlung mit Karte Bedingungen knüpft. Der erste Teil dieses Beitrags führt in die deutsche Zahlungskultur ein, die sich von der in vielen EU-Nachbarstaaten stark unterscheidet. Der zweite Teil konzentriert sich auf den Verbraucherschutz im Karteninhaber-Händler-Verhältnis. Es werden Fragen über die Erfüllungswirkung einer Kartenzahlung und nach der Kartenakzeptanzpflicht des Händlers sowie der Zulässigkeit von Gebührenaufschlägen diskutiert. Auch wird die Praxis einiger Kommunen, kein Bargeld mehr in Bürgerämtern anzunehmen und nur die *girocard* zu akzeptieren, im Hinblick auf die europäische Rechtslage diskutiert. Abschließend erfolgt eine Gesamtbewertung des gesetzlichen Ordnungsrahmens.

A. Introduction and Background

Thirty years ago, Millett LJ decided *In Re Charge Card Services [1986] Ch. 150*, a historically significant case addressing the question in English law whether card payments are accepted as conditional or absolute payment and, consequently, whether the customer's payment obligation re-emerges if an intermediary bank goes into liquidation, leaving the merchant out of pocket. Three decades on, card payments are firmly on track to become the UK's most frequently used payment method,² whereas cash still accounts for more than 75% of all retail payments in Germany.³

This article has been written on the occasion of this anniversary. It is firstly conceived to serve as a short introduction to the distinct German payment culture. Furthermore, the legal nature of card payments in relation to the contractual duty of payment in German law is discussed. Whereas the cardholder – issuing bank relationship has been covered in great detail by other authors,⁴ this article aims to address everyday questions in the cardholder – merchant relationship. References are made to the law of the UK and in particular England, considered a more mature market for payment cards by the ECB,⁵ where appropriate.

I. The German Payment Culture

“Nur Bares ist Wahres” – the German equivalent of “cash is king” – is a saying popular with old and young alike in the Bundesrepublik. Visitors quickly notice that cash plays a bigger role in German life than it does in many neighbouring countries. Casual dining places, pubs, newsagents and dry cleaners are often cash-only

² Payments UK, ‘Debit cards to overtake cash payments by 2021’.

³ Deutsche Bundesbank, *Zahlungsverhalten in Deutschland 2014*, 9.

⁴ See Hofauer, ‘Bankentgelte – Was dürfen Banken berechnen und was nicht?’ for a recent overview on the lawfulness of specific fees.

⁵ European Central Bank, *Fourth report on card fraud*, 24.

establishments. Local public transport operators usually prefer cash, may accept domestic debit cards, and are often unable to accept international cards.

The Bundesbank's 2014 report on retail payments notes that cash is still used for 79% of all face-to-face payments in Germany, down from about 83% in 2008.⁶ However, Germany is not underbanked: 97% of consumers have at least one debit card and 32% of consumers have at least one credit or charge card.⁷ While the Bundesbank does not expect an abrupt change in consumer habits, it notes that especially younger Germans are indeed interested in new payment methods. The German figures strongly contrast with trends in other European countries. According to the European Central Bank's 2015 report on card fraud, Swedes are the most avid card users in the EU with 256 transactions per inhabitant and year. With 226 transactions per inhabitant and year, Britain is also considered a mature card market by the ECB. Germany with just 71 transactions per inhabitant and year is sandwiched between Lithuania (73) and Spain (69), falling behind the SEPA⁸ average of 101.⁹ Many possible reasons have been brought forward. Some of these are intrinsic to consumers (opting not to use cards even given the opportunity) but extrinsic reasons must also be considered (where consumers refrain from using cards as they cannot be relied on).

1. Intrinsic Reasons: Debts, Privacy and Understanding of the Credit Card Concept

The German aversion to credit is explained by some with the shared root of the German words for debt ("Schulden") and guilt ("Schuld").¹⁰ Germans on the whole

⁶ Deutsche Bundesbank, *Zahlungsverhalten in Deutschland 2014*, 9.

⁷ Deutsche Bundesbank, *Zahlungsverhalten in Deutschland 2014*, 18.

⁸ Single Euro Payments Area, encompassing the 28 EU Member States plus Iceland, Norway, Liechtenstein, Switzerland, Monaco and San Marino.

⁹ European Central Bank, *Fourth report on card fraud*, 24.

¹⁰ Discussed as early as 1887 by Nietzsche, 'Zweite Abhandlung: „Schuld“, „schlechtes Gewissen“ und Verwandtes', in *Zur Genealogie der Moral. Eine Streitschrift*, Chapter 4.

also tend to highly value their privacy.¹¹ Cash payments consequently are praised for data minimisation (*Datensparsamkeit*).¹² Financial education is not a particular priority in schools¹³ and functionalities of payment instruments, such as the interest-free grace period for credit card purchases, are not always understood.¹⁴ Current account overdrafts, even if unarranged,¹⁵ are rather cheap in Germany so there is less need for extended credit facilities provided by credit cards.

Even though Germany saw no coordinated industry-wide effort to adopt Chip and PIN technology, card fraud is fairly uncommon.¹⁶ However, banks have been reluctant to introduce “zero liability policies”, and many consumers believe cash to be an intrinsically safer payment method.¹⁷

2. Extrinsic Reasons: Merchant Acceptance, Fees and Speed

A patchy acceptance network deters consumers from using cards in everyday life. Domestic debit cards (girocard) were accepted at about 770,000 places in Germany in June 2016 (approximately one location per 106 inhabitants),¹⁸ whereas in Britain, the once-dominant Switch/Maestro cards were accepted at 571,268 places in 2001

¹¹ For a historical interpretation see Bloch-Wehba, ‘Confronting Totalitarianism at Home: The Roots of European Privacy Protections’, 763.

¹² Grimm, ‘Elektronische Zahlungssysteme und Datenschutz’, 223.

¹³ Erner, Goedde-Menke and Oberste, ‘Financial literacy of high school students: Evidence from Germany’, 95.

¹⁴ It is claimed that credit card purchases immediately incur interest in Nestler and Mußler, ‘Kreditkarten werden immer beliebter, aber warum?’.

¹⁵ Unauthorised overdraft penalties in Germany are always pro rata through an increased interest rate; fixed fees, common in the UK, are not permitted by German law: OLG Frankfurt am Main, Judgment of 4 December 2014, 1 U 170/13 = VuR 2015, 261.

¹⁶ 0.014% of all card transactions in Germany are fraudulent which is below the SEPA average of 0.020%, European Central Bank, Fourth report on card fraud, 24. On the (slow) progress of Chip and PIN adoption in Germany, see EMV-Kartentest, <http://emv.maxontour.com>.

¹⁷ Deutsche Bundesbank, Zahlungsverhalten in Deutschland 2014, 41.

¹⁸ girocard, ‘überall’.

(one location per 103 inhabitants) and at over 900,000 locations in 2005 – “from high street shops to pubs, opticians, websites, cinemas – even local councils”.¹⁹

Acquiring banks used to take a share of up to 3% off card sales. However, multilateral interchange fees²⁰ were capped throughout the EU in December 2015 by Art. 3(1) and 4 of Regulation (EU) 2015/751 to 0.3% for credit cards and 0.2% for debit cards – about a fifth of the former German rates for international scheme payments. As a result, some processing companies are now offering Visa and MasterCard acceptance for a fee of less than 1%.²¹ While interchange rates were similarly high in Poland before Art. 38a(1) of the Polish Payment Services Act first lowered it to 0.5% in 2014, contactless cards have taken the Polish market by storm through the last decade²² and kebab shops displaying MasterCard and Visa decals are not uncommon. Even cash handling itself comes with issues, whether it is money soiling the hands of a hairdresser or staff “shrinkage” at a bakery.²³

The high service fee of 4.95% on Ticket Restaurant luncheon vouchers²⁴ has not prevented card-avoiding restaurateurs from accepting vouchers. Merchants might profit from voucher breakage – i.e. leftover change that is not redeemed. High turnover merchants also claim that cards slow down operations.²⁵ However, Sweden has been on route to become the world’s first cashless society for years even though it has only adopted contactless technology in 2016.²⁶ With the introduction of

¹⁹ Switch.co.uk, ‘Using your card in the UK’.

²⁰ Card payments involve up to five parties: Cardholder, issuing bank, payment scheme, merchant acquirer, merchant. Merchants are usually charged an ad-valorem service fee that consists of an interchange fee (that is passed to the cardholder’s bank), scheme fees (passed directly to the payment scheme) and the acquiring bank’s mark-up.

²¹ Example: <http://www.cashforless.de>.

²² For a detailed analysis of banking cultures in Europe and (in retrospect, ultimately successful) proposals to reinvent the Polish payments culture, see Koźliński, ‘Cashless transactions in Poland and other European Union countries – Thinking outside the box’.

²³ Birch, ‘It was twenty years ago today’.

²⁴ Edenred, ‘Akzeptanzpartner werden’.

²⁵ Wüstenberg, ‘Berliner Taxirecht zur bargeldlosen Entgeltzahlung rechtswidrig?’, 354 claims that processing a card payment in a taxi takes five minutes – a dubious figure.

²⁶ Lind, ‘Many firsts at the Eurovision Song Contest’.

contactless cards and the recent (if belated) introduction of authorisation by IP in Germany,²⁷ the perceived tediousness of card payments should become a non-issue. While cost and speed concerns are now becoming obsolete, one-off infrastructural costs are still a genuine problem. Ticket vending machines of Hamburg's incumbent public transport operator, Hochbahn, are not equipped with card facilities. Hochbahn claims that the German majority's preference for cash does not warrant costly upgrades,²⁸ notwithstanding the fact that visitors to the city are not necessarily German.

II. The German Payment Card Market

The principal card payment methods in Germany are payment by credit card, payment by domestic debit card, and payment by Electronic Direct Debit (ELV).

1. girocard ("electronic cash")

girocard, formerly known as "EC-Karte" or "electronic cash", is the incumbent debit card service in Germany operated by the German Banking Industry Committee (Deutsche Kreditwirtschaft, DK). The iconic blue-and-red EC branding still found on many German ATMs was originally used for the pan-European eurocheque guarantee scheme and repurposed by German banks for their debit network when electronic cash was launched in West Germany in the late 1980s. EC was extended

²⁷ Dial-in authorisation is still common, see paytec, <http://pay-tec.de/cms/paytec/> advertising a 0800 number for terminals.

²⁸ Pia Gängrich, 'Überall ist' besser als wie hier – Von E-Tickets und bargeldloser Zahlung'.

to the former GDR in 1990, replacing the East German “Geldkarte”.²⁹ Most girocards are co-badged with Maestro or V PAY for international acceptance.³⁰

Banks in neighbouring countries have recently phased out domestic schemes (Switch/Solo in the UK and Laser in Ireland, among others) in favour of international schemes as to satisfy new requirements introduced by SEPA. In Germany, EC was rebranded girocard and deemed “SEPA compatible”, however European banks without operations in Germany have refrained from joining girocard. It is not entirely clear why EC was continued, but it is probable that banks wanted to continue the policy of charging customers of non-affiliated banks ATM access fees without the risk of external interference.³¹

girocard is criticised by some authors for lack of investment and innovation.³² Contactless payments have not yet made it beyond field tests.³³ Card-not-present transactions, a key feature of the once dominant Switch/Maestro scheme in Britain, are not supported by girocard. Germans therefore prefer direct debit for one-off e-commerce payments, or resort to credit cards for international transactions. Some banks consider this need for a credit card an opportunity for cross-selling, i.e. charging the customer another fee in addition to the account maintenance fee.³⁴ Quite a few shops only accept girocard in addition to cash, much to the bewilderment of foreign customers.³⁵

²⁹ Not to be confused with GeldKarte/girogo, a distinct stored value application on most girocards introduced in 1996. For an introduction to the East German Geldkarte ATM and POS scheme, see Günter, ‘Geldkarte’, 33.

³⁰ girocard, Maestro and V PAY are somewhat similar but distinct payment networks operated by the DK, MasterCard and Visa Europe respectively. A co-badged card holds two or more different applications on its chip.

³¹ ATM access fees are common as unaffiliated ATM-operating banks do not receive interbank fees for girocard withdrawals. Some banks charge as little as EUR 1.95 but charges of four or five Euros are common.

³² Deutsche Bundesbank, *Zahlungsverhalten in Deutschland 2014*, 9.

³³ Mascha Schnellbacher, ‘Der Weg zum Mobile Payment ist nicht mehr weit’.

³⁴ Ottmar Bloching, ‘Fünf Jahre V-Pay – eine Bestandsaufnahme’, 13.

³⁵ Tony Hazell, ‘ASK TONY: I was stuck with a £375 bill when a German garage rejected my card’; Sandra Scholz, ‘W Niemczech kartą nie zapłacisz’ (*In Germany, the card does not pay*).

2. Electronic Direct Debit (“Elektronisches Lastschriftverfahren”, ELV)

ELV is not a distinct scheme but a secondary processing method for German domestic debit cards.³⁶ The associated current account’s number forms a large part of a girocard’s number, allowing the merchant to determine the IBAN and carry out a non-guaranteed SEPA Direct Debit transaction. While payments authorised through girocard require PIN verification, ELV bypasses this and the payer merely has to sign a receipt. Even a stolen card blocked by the issuing bank can still be used to pay by ELV. To reduce ELV-facilitated fraud, German police operates a secondary register of lost cards called KUNO that is shared with acquirers.³⁷ It is also possible for a dishonest legitimate cardholder to commit “friendly fraud”³⁸ by cancelling the Direct Debit transaction.

While issuing banks have been indifferent or sceptical, ELV is heavily advocated by the Retailers’ Association of Germany for its low costs.³⁹ Disabling ELV through an industry-wide move to a new and more secure card numbering system would likely trigger adverse reaction by the German competition authorities.⁴⁰

³⁶ At the time of writing, it is still unclear whether girocard cardholders will be able to opt out of ELV through the right to choose the payment application conferred by Art. 8(6) of Regulation (EU) 751/2015 as it is not a payment scheme in its own right. An analogy extending the right to ELV is certainly conceivable as direct debits may be refused (with the consumer ultimately incurring debt collection costs passed to him by the acquirer) or push the consumer into unauthorised overdraft – issues that can be avoided by upfront authorisation through a card scheme.

³⁷ EHI Retail Institute, ‘Informationen zu KUNO’.

³⁸ “Friendly fraud” is a wider term for what is known as “chargeback fraud” in the context of payment cards: a consumer using a debit or credit card to make a purchase and disputing the charge with their issuing bank once goods have been delivered or services have been performed.

³⁹ Handelsverband Deutschland, ‘Zukunft des ELV gesichert’.

⁴⁰ PaySys, ‘Die Zukunft des kartenbasierten ELV’, 17.

3. Credit and International Debit Cards

Most German “Kreditkarten” are deferred-debit cards, with the amount due debited in full from the cardholder’s account every month. Genuine credit cards (with the possibility of extended credit) are only issued by a small number of banks. In everyday language, “Kreditkarte” often refers to any card carrying a brand historically associated with credit cards, including Visa and MasterCard-branded debit cards. This is in sharp contrast to UK practice where credit and debit cards are differentiated by the underlying settlement method.⁴¹ International scheme debit cards (Visa Debit or Debit MasterCard) are uncommon and mostly issued by online banks and ethnic banks catering to a specific clientele.⁴²

Some authors expected credit cards to disappear from the German market as the domestic debit cards were generally cheaper to process⁴³ before interchange fees were lowered by EU legislation. However, Germans have actually become more accustomed to credit cards over the last years, with the increasing importance of E-commerce playing a part in this.⁴⁴

B. Conditionality of Card Payments in Germany

Within the cardholder-issuer relationship, the cardholder was traditionally considered to issue a mandate (Auftrag) to his issuing bank whenever he used a card to pay.⁴⁵ But what is happening between cardholder and merchant when the merchant accepts payment by card?

⁴¹ Visa Debit cards are a relative novelty in Germany but have been already issued in the UK for more than 20 years, where the now-abolished Credit Cards (Price Discrimination) Order 1990 (S.I. 1990 No. 2159), Regulation 2(1)(b)(iii) required debit cards to be readily distinguishable from credit cards.

⁴² Visa Debit: Consorsbank, ING-DiBa; Debit MasterCard: Number26, Fidor Bank, KT Bank.

⁴³ Willenbrock, ‘Warum soll man noch Kreditkarten akzeptieren?’; Von Hippel, ‘Abschied von der Kreditkarte?’, 185.

⁴⁴ Mertens, ‘Online Payments in Germany: Invoicing loses, PayPal and Credit Card win’.

⁴⁵ Fandrich, ‘Kreditkartenvertrag’, para 16.

Whenever a contracting person incurs a money obligation, payment is generally due in legal tender (cash – i.e. coins and banknotes), and the creditor is neither entitled to demand nor obliged to accept any other form of payment unless agreed otherwise.⁴⁶ By payment in legal tender, the debtor is discharged of the money obligation, s 362(1) of the German Civil Code.

Now, are card payments accepted absolutely or conditionally? Given the number of participants in a card payment and the various procedures (including ELV), there are significantly more uncertainties than in a cash payment, including the insolvency of a participating bank, chargebacks or the cancellation of a direct debit.

English authors have considered card payments absolute discharge of the underlying indebtedness,⁴⁷ as opposed to payment by cheque which is presumed conditional payment, i.e. a suspension of the creditor's right of action on the original consideration.⁴⁸ By accepting the card payment unconditionally, the merchant accepts the bank's payment obligation in place of the customer's liability.⁴⁹ Therefore, the cardholder is not required to reimburse the merchant if the third party fails to pay the merchant.

The situation is superficially similar in German law which differentiates between the “performance accepted in lieu of performance of contract” (*Leistung an Erfüllungs Statt*) in s. 364(1) of the Civil Code and the “new obligation assumed for the purpose of satisfying the latter” (*Leistung erfüllungshalber*) in s. 364(2). While acceptance under s. 364(1) is unconditional, an assumed obligation under s. 364(2) is only accepted by the payee under the condition that his original claim can be satisfied through the new obligation. Whether the performance is accepted conditionally or

⁴⁶ Gramlich, ‘Zahlungsformen und –modalitäten im Lichte des Geld- und Währungsrechts’, 640.

⁴⁷ In *Re Charge Card Services* [1989] Ch. 497. Criticised by Tyree, ‘Payment by credit card’ as most modern payment schemes would have a chargeback procedure in place.

⁴⁸ In *Re Charge Card Services* [1989] Ch. 497; Hooley, ‘Payment in a Cashless Society’, 258.

⁴⁹ Hooley, ‘Payment in a Cashless Society’, 259.

absolutely depends on the intention of the parties regarding the distribution of risks,⁵⁰ but a money obligation is generally only discharged if the creditor gains a position as safe as that of a cash recipient.⁵¹

Cheques are usually accepted under the condition of the cheque being honoured. Similarly, any SEPA direct debit can be refused due to insufficient funds or recalled by the payer in a time frame of up to 8 weeks. Therefore, ELV payments are only accepted conditionally.⁵² Credit card payment is also considered conditional payment⁵³ as international card schemes operate chargeback procedures for disputed transactions and a successful chargeback will “revive” the original obligation.⁵⁴ As the girocard scheme does not operate any institutionalised chargeback procedure, girocard is usually accepted unconditionally.⁵⁵ As German courts have emphasised the “cash replacement function” (Bargeldersatzfunktion) of card payments when interpreting contracts with acquirers, i.e. the need for the card-accepting merchant to be in a position as safe as that of a cash recipient,⁵⁶ there may even be a point in also considering credit card transactions absolute payment. Unlike the cancellation of a direct debit transaction, a card chargeback is only permitted under certain exceptional circumstances laid out by the payment schemes’ rules. Conversely, bank credit transfers – widely considered absolute payment⁵⁷ – can also be recalled within

⁵⁰ Bamberger/Roth/Dennhardt, *Beck’scher Online-Kommentar BGB*, § 364 BGB, para 5.

⁵¹ BGH, Judgment of 28 October 1998, VIII ZR 157/97 = NJW 1999, 210; Bamberger/Roth/Dennhardt, *Beck’scher Online-Kommentar BGB*, § 362 BGB, para 22.

⁵² Bamberger/Roth/Dennhardt, *Beck’scher Online-Kommentar BGB*, § 362 BGB, para 37.

⁵³ LG Düsseldorf, Judgment of 24 October 1990, 23 S 885/89 = NJW-RR 1991, 310 (311).

⁵⁴ Bamberger/Roth/Dennhardt, *Beck’scher Online-Kommentar BGB*, § 362 BGB, para 38.

⁵⁵ Bamberger/Roth/Dennhardt, *Beck’scher Online-Kommentar BGB*, § 362 BGB, para 39. However, other authors consider girocard payment conditional payment: Prütting/Wegen/Weinreich/Pfeiffer, *BGB Kommentar*, § 364 BGB, para 18.

⁵⁶ BGH, Judgment of 16 April 2002, XI ZR 375/00 = NJW 2002, 2234 (2235); OLG Köln, Judgment of 14 November 2001, 13 U 8/01 = NJW-RR 2002, 620 (621); Gößmann, ‘Die Kreditkarte’, 115.

⁵⁷ Bamberger/Roth/Dennhardt, *Beck’scher Online-Kommentar BGB*, § 362 BGB, para 23; Schulze/Schulze, *Bürgerliches Gesetzbuch*, § 364 BGB, para 4 citing the Federal Court of Justice in BGH, Judgment of 13 March 1953, V ZR 92/51 = NJW 1953, 897; this decision may be outdated due to revised interbank agreements regarding bank transfers.

10 business days of settlement under certain circumstances,⁵⁸ and isolated cases of potential “friendly fraud” facilitated through the “SEPA SCT Recall” procedure are documented.⁵⁹

That said, it must be remembered that in case of doubt, according to s. 364(2) of the Civil Code, the acceptance of any different performance must be considered conditional. By strictly applying the statutory presumption in s. 364(2), most modern payment methods must be considered conditional payment, including not only direct debit but also credit and debit card payments as well as bank transfers.

C. Acceptance Issues

In practice, a consumer cannot always rely on stickers on a window or card scheme logos on a merchant’s website as some smaller businesses refuse low value card payments. A similarly controversial but common practice of airlines, train companies and some neighbourhood shops is surcharging card-paying customers. Holders of foreign cards may encounter specific issues, namely dynamic currency conversion and the sole acceptance of domestic cards.

It is occasionally claimed that any acceptance of cashless payments is merely a convenience to the customer and can be withdrawn or refused at any time.⁶⁰ The relative ubiquity of card payments even in Germany, however, warrants a more careful examination of the legal situation.

⁵⁸ European Payments Council, ‘SEPA Credit Transfer Scheme Rulebook Version 7.2’, para CT-02.01.

⁵⁹ Example: *konsel*, ‘Von meinem Geschäftskonto ist Geld verschwunden’.

⁶⁰ A newspaper article claiming that consumers are required to obtain cash (at their own cost) if the merchant, for any reason, refuses to accept their card: *Nierenz*, ‘Erst ab 10 Euro: Weshalb Sie nicht überall mit EC-Karte zahlen können’.

I. The Merchant's Duty to Accept Valid Cards

Traditionally, German courts as well as authors held that acquiring contracts are also agreements benefiting a third party, conferring a duty on the merchant to accept any valid card produced by the legitimate cardholder.⁶¹ This duty to accept cards was not considered an unfair contract term under the Civil Code's s. 307(1) as the payment scheme, represented by the acquiring bank, has a legitimate interest in providing cardholders with purchase opportunities, whereas there are no compelling contrary interests of the merchant (who has deliberately chosen to accept cards).⁶² But it has always been difficult to prove that the merchant was bound by a specific acquiring contract. In addition to that, Article 11 of Regulation (EU) 751/2015 abolished anti-steering rules in payment scheme terms. As indicated by Recital 35 of the Regulation, merchants should therefore now be allowed to reject card payments for small amounts, rendering the traditional interpretation obsolete.

Unlike German law, English common law has strictly adhered to the principle of privity of contract until the Contracts (Rights of Third Parties) Act 1999 came into force. English authors had to resort to other arguments to construe a merchant's duty to accept cards. Most merchants display decals of the card schemes that they have signed up for, on their shop door or cash register, in order to increase footfall, and they may be required by the acquiring agreement to display the logos on their premises.⁶³

Some authors have disputed the legal significance of decals, considering these mere advertising.⁶⁴ However, a bank account number on an invoice is generally considered

⁶¹ LG Düsseldorf, Judgment of 24 October 1990, 23 S 885/89 = NJW-RR 1991, 310 (311); Hadding, 'Zahlung mittels Kreditkarte', para G 21; Fandrich, 'Kreditkartenvertrag', para 74.

⁶² Fandrich, 'Kreditkartenvertrag', para 65.

⁶³ Hooley, 'Payment in a Cashless Society', 258.

⁶⁴ Hadding, 'Zahlung mittels Kreditkarte', para G 15.

an implied consent to accept bank transfers as payment⁶⁵ and the same argument can also be considered in the context of card payments.⁶⁶

If a merchant displays card signage but does not communicate a minimum purchase policy, the implied consent to card payment therefore prevails if a contract is concluded. As many shops both in Germany and abroad do not operate minimum purchase policies, there is no duty arising out of “manners” or “common practice”⁶⁷ to pay small amounts in cash. In practice, a cardholder might be outright refused service in a souvenir shop, whereas when eating out, the conclusion of the contract and the conveyances are taking place at different points in time. Even if the bill is deemed “too small to pay by card” by the restaurateur, he is under the duty to accept the card as long as the device is working, and the diner cannot be forced to withdraw cash at a nearby ATM at his own expense. While in principle, consent can be withdrawn at any time before performance, the merchant should be precluded to act contradictory to his previous behaviour by the obligation to act in good faith laid out by s. 242 of the Civil Code⁶⁸ as he is establishing trust with the customer by displaying decals.

A minimum purchase policy that is advertised together with the card acceptance would have to be considered legitimate steering. The mere presence of a payments terminal without any advertised card acceptance does not imply any readiness to accept cards as these devices can also be used for other purposes.

⁶⁵ BGH, Judgment of 13 March 1953, V ZR 92/51 = NJW 1953, 897; Schulze/*Schulze*, *Bürgerliches Gesetzbuch*, § 364 BGB, para 4.

⁶⁶ AG Neuss, Judgment of 20 November 1989, 30 C 496/89 = NJW-RR 1990, 253.

⁶⁷ Anecdotal evidence, see Inlandsvägen, ‘Kreditkartenakzeptanz’.

⁶⁸ A similar argument has been applied by the Federal Court of Justice in the context of a bank transfer, BGH, Judgment of 17 March 2004, VIII ZR 161/03 = NJW-RR 2004, 1281 (1282).

II. Payment Card Surcharges

Surcharges or checkout fees are additional fees added by merchants to consumer's bills for the use of a specific payment instrument. Many payment schemes have attempted to ban surcharges through their merchant regulations as surcharges may impair price transparency and discourage custom.⁶⁹ Opposing legislation in many countries has nevertheless enabled merchants to surcharge card-paying customers. Art. 52(3) of the Payment Services Directive (2007/64/EC, PSD) allowed surcharging in general but also allowed Member States to ban surcharging.

Neither the UK⁷⁰ nor Germany have adopted anti-surcharge legislation, but s. 312a(4) of the Civil Code requires that merchants accept at least one common means of payment free of charge, do not charge more than their own costs, and disclose surcharges before payment. If a customer is charged more than the direct costs incurred by the merchant for the individual transaction,⁷¹ the surcharging agreement is invalid and the cardholder is entitled to a refund of the entire surcharge through an unjust enrichment action.⁷² The consumer cannot claim contractual damages as the fee would have been paid "voluntarily" in a formal sense and therefore does not constitute damage.⁷³

Section 312a(4) goes beyond the requirements of Art. 19 of the Consumer Rights Directive (2011/83/EU) but legislators on the German state level have been complacent. Taxi drivers in Berlin are required by the Taxi Carriage Fares Regulation (Verordnung über Beförderungsentgelte im Taxenverkehr) 2005's s. 5(2)(b) to apply a fee of EUR 1.50 on any cashless transaction which, in many cases,

⁶⁹ Visa Europe, 'FAQs'.

⁷⁰ In fact, surcharging was already allowed by Art. 3(1) of the Credit Cards (Price Discrimination) Order 1990 (SI 1990/2159), revoked in 2012 by the Competition Commission.

⁷¹ It is disputed whether surcharges may also cover administrative efforts or infrastructural costs in addition to the fees charged by the acquirer.

⁷² Omlor, 'Zahlungsentgelte unter dem Einfluss von Verbraucherrechte- und Zahlungsdienste-Richtlinie', 1707.

⁷³ Buchmann, 'Das neue Fernabsatzrecht 2014 (Teil 4)', 456.

exceeds the cost incurred by the operator.⁷⁴ Art. 31 of the Basic Law of Germany declares that federal law generally overrides state law, meaning that the surcharging practice mandated by Berlin state law is in violation of federal law.

Art. 62(4) of the second Payment Services Directive (Directive (EU) 2015/2366, PSD2) disallows surcharging for card payments with regulated interchange fees, i.e. consumer credit and debit cards, in Article 62(4). PSD2 is to be transposed by the member states by 13 January 2018. This ban on surcharging is a much-needed adjustment as it incentivises merchants to switch acquirers for lower transaction costs, which is important to achieve an efficient payments market. It is unclear whether the upcoming ban on surcharging will be enforced. While payment schemes have recently been allowed to ban surcharges in Switzerland,⁷⁵ many merchants, among them household names such as international airline Swiss, are still surcharging consumers. The card schemes have now implemented a reimbursement procedure through the issuing banks.⁷⁶

III. Dynamic Currency Conversion

Dynamic currency conversion (DCC), also known as point of sale currency conversion, is a service offered by acquiring banks and ATM operators to customers using cards denominated in foreign currencies. Customers choosing DCC are immediately charged in their home currency, with the purchase amount converted by the acquirer rather than the card-issuing bank, providing customers with an exact amount in their home currency at the point of sale. However, many consumers are unable to make an informed decision due to lack of information at the point of sale,

⁷⁴ As reported by Schulz and Huber, ‘Nicht alle Berliner Taxis akzeptieren Kartenzahlung’. The same fee applies to any Berlin taxi fare, whether paid by debit or credit card, cheque or invoice, hinting at its disproportionality.

⁷⁵ Wettbewerbskommission, ‘Untersuchung 22-0389 gemäss Art. 27 KG betreffend Kreditkarten Domestische Interchange Fees II’, 44.

⁷⁶ Fritsche, ‘Kreditkarten-Gebühren können zurückgefordert werden’.

which is particularly detrimental as DCC operators often charge commissions of up to 12%.⁷⁷

Article 49 of the PSD (and Article 59 of the PSD2), implemented in Germany by Article 248 Section 17(1) EGBGB, require the cardholder's consent for DCC and the disclosure of the applicable exchange rate and any charges. A cardholder charged in their home currency without consent is entitled to recover damages from the merchant. While a number of complaints about DCC can be found on the Internet, there are no reported court decisions, suggesting that non-compliant merchants are seldom penalised.⁷⁸

IV. Discrimination of EU Citizens by German Authorities

Some local authorities have stopped accepting cash altogether whereas others have introduced surcharges on cash payments.⁷⁹ As local government services are usually beyond the realm of contract law, the question whether cash payments can be lawfully refused by local authorities shall be left for other authors to discuss.⁸⁰

Several Berlin boroughs are neither accepting cash nor international cards but only girocard cards.⁸¹ Art. 18(1) TFEU prohibits discrimination by member states on grounds of nationality. This ban encompasses both overt and indirect discrimination in all situations “falling within the scope *ratione materiae* of EU law”, including the exercise of the freedom to move and reside within the territory of other member

⁷⁷ Backofen, ‘Moderne Wegelagerei’, 12.

⁷⁸ Discussed in detail in Yang, ‘Dynamic Currency Conversion – ein grenzüberschreitendes verbraucherpolitisches Problem’, 407.

⁷⁹ The register office of the city of Düsseldorf applies a surcharge of EUR 1 to all cash payments over EUR 10, Landeshauptstadt Düsseldorf, ‘Standesamt’.

⁸⁰ See Gramlich, ‘Zahlungsformen und –modalitäten im Lichte des Geld- und Währungsrechts’, 637.

⁸¹ The author personally witnessed this in the borough of Reinickendorf in late 2015 when his international Maestro and MasterCard cards were refused and staff advised him that only domestic “EC-Karten” were accepted.

states as conferred by Art. 21(1) TFEU.⁸² A need for certain local government services, such as the issuance of criminal record certificates as well as the certification of document copies,⁸³ may well arise with newly arrived EU citizens who have not yet had an opportunity to open a local bank account without proof of a German address.

Discrimination can only be justified if it is based on objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate objective of the national provisions.⁸⁴ The de-facto requirement of operating a German bank account counteracts the political goal of a single market for payments, irrespective of whether girocard is nominally SEPA compatible. As the federal customs administration as well as other municipalities, such as Jena in Thuringia, have accepted Visa and MasterCard for years,⁸⁵ it is difficult to see any legitimate objective pursued by the “girocard only” policy. To ensure compliance with European law, a local authority not accepting cash must therefore ensure that international cards are accepted.

D. Conclusion

In some ways, Germany still resembles an emerging rather than fully developed market for cashless payments. The German market offers opportunities for expansion that should definitely be considered by overseas banks and technology providers. However, educational efforts are required in the run-up to a successful introduction of new services.⁸⁶

⁸² Case C-75/11 *European Commission v Austria* [2013] 1 C.M.L.R. 17, paras H5-H6 and H11.

⁸³ Certified copies are required, for example, for legal traineeship applications: Kammergericht Berlin, ‘Antragstellung’.

⁸⁴ Case C-75/11 *European Commission v Austria* [2013] 1 C.M.L.R. 17, para H13.

⁸⁵ Laudien, ‘Städtische Kassen akzeptieren Kreditkarten’.

⁸⁶ Lack of consumer knowledge can be a major obstacle to quality improvement in supply-and-demand-based free-market economies: Krugman, ‘Supply, Demand and English Food’.

Mobile and contactless payments are still considered a novelty but local consumer attitudes are only part of the equation. Merchants and banks should consider whether consumer spending can be boosted by improving card acceptance within music festivals and in rural regions or other places where access to cash is difficult. Political decision makers should consider the ill-effects on society caused by predominant reliance on cash, including an increased incidence of tax evasion and also theft.⁸⁷ Nevertheless, cash may still be the most convenient payment method in some situations given the availability, ease of use and appreciation by society, and should not be abolished.

Card payments are reasonably safe for both consumers and merchants under the current legislative framework. The main challenge is enforcing an adequate level of consumer protection. Merchants are not generally required to accept cards, but if a merchant voluntarily commits themselves to accepting cards and displays the logos within their shop, they are under the duty to accept these cards. The expected ban on surcharges will improve price transparency. Public authorities contemplating to go cashless must consider European Union law that strictly requires non-discrimination. While the statutory framework is sufficient, the political attitude towards electronic payment has been rather inconsistent. State laws that contradict federal or European law must be amended. Ongoing political commitment, including the strict enforcement of consumer-protecting laws, is required to build more trust among consumers.

⁸⁷ For example, Asian tourists are specifically targeted by pickpockets as they are said to carry huge amounts of cash due to spotty card acceptance, as described by Jocham, ‘Täter haben Hochsaison: Darum nehmen Weihnachtsmarkt-Diebe am liebsten Asiaten aus’. This has been partially alleviated by the co-badging of cards of Japanese and Chinese schemes with international ATM or POS schemes (JCB with Cirrus, UnionPay with Visa or MasterCard).

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