A lack of payment options blights e-commerce in Spain

While e-commerce is gaining traction in Spain, the sector suffers from a lack of available payment options online. While this can be viewed as an obstacle to the growth of e-commerce, it also presents an opportunity for e-payment platform providers that are now emerging on the Spanish market. Carlos Pombo, an Associate at Asensi Abogados law firm, discusses the state of Spain's online payments market and explains why some e-payment platform providers are currently unregulated under Spanish legislation.

The number of online transactions in Spain has increased by about 15%-20% annually in recent years, and this trend is expected to continue in the medium and long term.

That growth stems from several factors such as, for instance, the high percentage of the population that has access to the internet in Spain, the proliferation of smartphones and tablets, and the gradually increasing confidence on the part of users when it comes to providing their bank details or their credit or debit card details in order to buy goods over the internet.

E-commerce offers numerous advantages to the user, such as the convenience of purchasing without moving from your location and the consequent saving of time, a wider product choice, and the possibility to compare prices, etc. However, the limited supply of payment methods avaliable in Spain still represents the main obstacle to online transactions, since payment methods currently are basically confined to payment with credit or debit card, through PayPal or, more recently, with Trustly.

Nevertheless, the use of exclusively electronic payment platforms is gaining ground on card payments, as transactions with cards in the last few years have decreased practically at the same extent that those performed via electronic payment methods have increased. This is largely due to the high non-conversion rate of online purchasing operations which were initially going to be carried out using a card - which is normally due to rejected transactions involving amounts that exceed the card limits.

The aforesaid non-conversion rate in purchasing operations via a card (around 35%), added to the limited choice of payment methods on the Spanish e-commerce market, are the main reasons that users who are at the payment stage of online commerce abandon the transaction.

New providers in the sector actually view the high non-conversion rate and the limited supply of payment methods as an opportunity to enter and make an impact on Spain's payments services market, being additionally able to offer added value to banks, retail businesses and end users with payment methods which have so far not been available on the Spanish market, but whose business models are fully consolidated in other neighbouring countries.

Depending on their business model (for instance, at what point they use the payer's or the beneficiary's funds during the transaction), the role of these new payment providers may lie within the scope of application of the current Spanish legislation on payment services or electronic money institutions and they are therefore subject to the obligation to obtain the corresponding authorisation from the Ministry of Economy and Finance following a report by the Bank of Spain, which ascertains whether it is a payment service institution or an electronic money institution.

However, at present, and pursuant to the Spanish legislation, some of these new providers (depending on their business model) are not regulated in terms of payment methods, thus a legal vacuum exists in Spain to some extent.

This is the case, for example, for providers known as 'payment initiators,' which base their business mainly (i) on taking advantage of the non-conversion percentage for operations carried out via a payment card; (ii) on being more profitable than card payments for the retailer; and, obviously, (iii) on allowing consumers to buy goods through the internet even if they do not have their credit or debit cards available at that very moment - and all without using the payer's or the beneficiary's funds at any time.

This type of provider, whose services are based on access to the payment account without being the actual account manager, has been included in the proposed Directive of the European Parliament and the Council on payment services in the internal market approved on 24 July 2013 (known as 'PSD2') and whereby Directives 2002/65/CE and 2009/110/CE are modified and Directive 2007/64/CE is repealed.

PSD2 defines these providers as 'third party providers' in Item 7 of Annex I, and confers upon them the capacity to deliver (a) payment initiation services; and/or (2) account information services.

By virtue of PSD2, these 'third party providers' are subject to authorisation and supervision duties. Likewise, PSD2 contains an exhaustive regulation for such providers that will favour fair competition between the providers of such services as well as providing security for users of this payment method.

These new providers will essentially be obliged (i) to notify users of incidents; (ii) to send updated information to the competent authority about operational risks and the suitability of palliative measures and control mechanisms applied to combat such risks; (iii) to implement the authentication requirements which are determined in each case; (iv) to respect the conditions for access to information on user accounts; (v) to comply with the obligations regarding the rectification of operations; and (vi) to remain subject to a balanced distribution of liability with the payer for unauthorised payment operations.

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To our mind, the fact that this new type of payment service provider is regulated will promote the emergence of new 'players' in the payment services sector, thus providing e-commerce users with a wider choice of payment methods that will become even more secure, faster and more economical than those we currently have on offer, which will simultaneously lead to a reduction in the non-conversion percentage and, as a result, will increase the conversion rate per entry, that is to say, the number of purchases successfully completed per user that embarks on online commerce.

We will have to wait for at least several months to see the final text of PSD2 though, essentially because it has received over 590 amendments and it is going to be difficult to reach a compromise on each one of them before the next election to the European Parliament, which is set to take place in May this year. After the election, PSD2 could see the light in 2014 if the group that currently has the majority in the Parliament does not change. Nevertheless, if this were not the case and a change occurs the final approval of PSD2 might be postponed until the second semester of 2015. To this it must be added that Italy will be the next country to hold the Presidency of the Council of the European Union and that, unlike Greece, Italy will most probably have something to say with regard to PSD2, which could delay its approval even longer.

In any case, PSD2 is bound to be approved sooner or later, and after being approved, it will be transposed into Spanish law, presumably within a maximum period of two years, as this has been the approximate period fixed in the European legislation on the matter (Directive 2007/64/CE and Directive 2009/110/CE).

Meanwhile, 'third party providers' must cautiously comply with Spanish legislation relating to money laundering, information society and electronic commerce services, and personal data protection, which, because of there extensive legal and operational requirements and sanctioning regimes (with economic penalties that can reach up to EUR €600,000, for example, in the case of a serious infraction regarding personal data protection or EUR €1,500,000 for a serious infraction regarding money laundering matters), must be carefully taken into account, and progressively adapt as much as possible to the provisions contemplated in PSD2 so that the homework is done when the time comes for the implementation of PSD2.

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