

UK merchant acquirers now data-holders

The UK Finance Act 2013 (FA 2013), which came into force on 1 September, has extended the data gathering authority of HMRC to include the ability to obtain payment card transaction data for the past four years from merchant acquirers to combat tax fraud.

“Card payment processors were not specified as data-holders in the Finance Act 2011 and did not fall within any other categories of data-holder,” explain Fiona Ghosh and Alastair Harris of Eversheds LLP. “The FA 2013 extends the definition to include any person with a contractual obligation to make payments to retailers in settlement of payment card transactions.”

The Data-gathering Powers Regulations 2013 set out the relevant data merchant acquirers may be required to provide.

“HMRC has developed a computer system, which enables it to cross reference data from different sources,” said Angela Savin, Partner at Norton Rose Fulbright LLP. “If a merchant acquirer receives a data-holder notice, it will need to check the scope carefully, and satisfy itself that compliance does not breach any of its contractual obligations.”

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German Ministry risks rendering Bitcoin “unfeasible” for business

The German Federal Ministry of Finance issued on 19 August a public opinion on Bitcoin as ‘private currency’ and a ‘unit of account,’ legitimising Bitcoin for private transactions.

“In the media, the Ministry’s decision was celebrated as ‘official governmental acceptance’ of Bitcoin,” said Lutz Auffenberg, Attorney at Winheller. “In my opinion, from a legal point of view this is not completely correct, since we’re talking about a decision of the Ministry of Finance, which is not responsible for regulatory questions regarding Bitcoin.”

Bitcoin’s classification as ‘private currency’ means that Bitcoin is not e-money or legal tender. “Bitcoin is not accepted as a full and legally equal currency in the sense that it would be VAT-free like other legal currencies,” adds Mirko Sprengnether, Attorney at Winheller. “Every Bitcoin-

accepting company would have to pay 19% VAT on the Bitcoin-value in case of selling. This would mean additional 19% costs on the value of each good, which is paid with Bitcoins. If this legal opinion of the Ministry prevails, Bitcoin will become unfeasible as a currency in business life.”

Commercial entities selling Bitcoin in Germany will first need permission from the Federal Financial Supervision Authority. Auffenberg, however does not foresee further regulatory involvement. “Companies that only accept Bitcoin for payments do not need the permission of the German financial authority,” said Auffenberg. “I do not see any indications that this will be changed soon.”

In the UK, government representatives met with Bitcoin community members on 4 September in Downing Street,

with some Bitcoin users reportedly advocating Bitcoin regulation as a means of achieving growth through legitimacy; media reports suggest the Financial Conduct Authority will soon regulate Bitcoin.

“A lot of the exchanges are in favour of regulation,” said Julia Dixon, Editor of DGC Magazine. “They don’t have much of a choice. To function as an exchange they need access to traditional banks and their highly regulated fiat currencies. They see regulation as inevitable and are trying to influence it.”

An FCA spokesperson said on 5 September that the regulator is merely “keeping an eye” on Bitcoin, but Dixon believes “Bitcoin will almost certainly be regulated in the UK. Regulation poses a threat to Bitcoin as regulations are often hijacked by the current powers that be in a given industry.”

FCA’s m-banking review could lead to “new barriers to entry”

The FCA published an interim report as part of its ongoing review into mobile banking on 27 August, which outlines the potential risks posed by mobile banking to consumers.

“The FCA decided to review mobile banking services to ensure the protection and fair treatment of consumers. This involves checking that firms have business strategies in line with the FCA’s expectations,” said Michael McKee, Partner at DLA Piper UK LLP.

The interim report sets out the areas of potential risk that

providers should be considering, which include: fraud; security; technology risk; and consumer awareness; and highlights ‘common sense’ considerations for consumers when using mobile banking services like protecting their phone against malware, and being careful not to enter incorrect account details.

“The FCA is naturally concerned to make sure that providers properly factor the risks into the design, build and delivery of mobile services,” said Ben Regnard-Weinrabe

and Rachel Savary of Hogan Lovells LLP. “Naturally, there is a focus on security and reliability, with a call not to rush services to market until they are underpinned by a robust and compliant technical solution.”

The FCA’s full report is expected in the first half of 2014. “The full report is likely to make further recommendations and best practice guidelines,” adds Dr Nathalie Moreno, Partner at Speechly Bircham. “Accordingly, it is likely that there will be some new barriers to entry in this industry.”