



BaFin Consultancy

Legal Opinion No: 01

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To: [REDACTED]

Legal issue: Whether or not Wirecard's "Merchant Cash Advance" product is legal in Turkey. If not, necessary documentation and process to submit a complaint to the Banking Regulation and Supervision Agency (the BRSA).

Background of the issue:

Question: "In the past 18 months, they launched a product called "merchant cash advance" in countries where payment delays are long, to effectively pre-pay, or fund merchants (for a fee) who would otherwise be getting paid in 30+ days. The company has stated that the merchant cash advance product is mainly offered in Brazil and Turkey, and a small amount in Europe and Asia. In total, at the end of Q1 2019, the company's "merchant cash advance" product portfolio was EUR 400M. Our question then is:

- 1) Is this legal in Turkey? Based on our conversations, it sounds like it is not.
- 2) If this is not legal, what documentation would need to be gathered to submit a complaint to the BRSA?"

Opinion:

`Merchant Cash Advance` as a financial service

Wirecard's product "Merchant Cash Advance" was analyzed through their web site¹. According to the information on the website the company opens online business accounts including payment acceptance for merchants. The company provides immediately available credits via bank transfer or debit card and additional liquidity at any time through a credit line linked to payment volume.

The product is announced as part of "the Next Generation Wirecard Platform". It is mentioned that the platform is a "revolutionary combination of comprehensive payment and banking services that are tailored precisely to the needs of merchants." The product is defined as a "credit" on the website and this credit is paid back as a percentage of each payment transaction processed by Wirecard. The Company's Turkish web site², however, does not have any mention of the product "Merchant Cash Advance".

Relevant Turkish Regulations and Wirecard

Turkish payment and e-money market is regulated since 2013 by the Law on Payment and Securities Settlement Systems, Payment Services and Electronic Money Institutions No: 6493 (the Law No:6493)³. So far 14 electronic money and 34 payment institution licenses were granted by the Banking Regulation and

¹ <https://www.wirecard.com/company/press-releases/wirecard-revolutionizes-payment-and-banking-for-merchants> Accessed on 18 June 2019.

² <https://www.wirecard.com.tr/index.html>, accessed on 19.06.2019

³ The English version of the Law is accessible at http://www.bddk.org.tr/ContentBddk/dokuman/mevzuat_0140.pdf

Supervision Agency (BRSA). Wirecard is one of the licensed e-money companies operating in the Turkish Market under the official name of 'Wirecard Ödeme ve Elektronik Para Hizmetleri A.Ş.'.

Unlike the EU practice, the Article 11 of the by-law on Payment Services, Electronic Money Issuance, Payment Institutions and Electronic Money Institutions (the Regulation) clearly prohibits the provision of credits by licensed payment and e-money institutions. Payment and e-money companies cannot send payments (wholly or partially) before they collect them from the customer. Likewise, they cannot guarantee the amounts that need to be paid by the customers.

Another important article in this regard is the Article 10 of the Regulation which clearly limits the operations of payment companies to payment services, exchange services and operation of payment systems. Similarly, the Regulation restricts the operations of e-money companies solely and exclusively to electronic money issuance, payment services, exchange services and operation of payment systems. Therefore, Wirecard Turkey cannot conduct any activities other than those mentioned in the Regulation.

Potential violations of the regulations

The provision of a service like “Merchant Cash Advance” would most probably be regarded by the Authority as extending loans and thus as a violation of the Regulation. Another possible position that the Authority may take is that the “Merchant Cash Advance” product would be regarded as a sale of the future

receivables of the merchant. In this case too, the payment or e-money company purchasing those future receivables would be in breach of its operation limits since buying future receivables can only be practiced by factoring or asset management companies in Turkish finance market. Conducting such activities without an appropriate license would violate the regulations related to factoring and asset management companies.

The Law No:6493 has brought heavy administrative and criminal sanctions for breaches. Failure to comply with the mentioned requirements results firstly in inspections by the BRSA, and may thenceforth trigger administrative and/or criminal proceedings.

Sanctions

Relevant articles regulating administrative and criminal sanctions are as follows:

- Section Seven of the Law No:6493 entitled “Sanctions, Investigations and Legal Proceedings”:
 - o Article 27/(1) mentions that violating the Law and its sub-regulations would be subject to an administrative fine ranging from twenty thousand Turkish Liras to five hundred thousand Turkish Liras (approximately 3,5-86 thousand USD at current exchange rates). In case any benefit is gained by the violation, the amount of administrative fine would not be less than two times of the benefit gained.

- Article 34 regulates criminal liability of the employees and relevant persons of the electronic money institutions. “The employees and the relevant persons of the electronic money institution who violate the fourth paragraph of Article 18, and Article 20 of this Law shall be sentenced to imprisonment (*ranging*) from one year to three years and a judicial fine up to five thousand days.” Article 20/(4) clearly bans electronic money institutions to extend loans.

Conclusion:

Given the explanations above, it is not legally possible for e-money or payment institutions to provide a service like “Merchant Cash Advance” in Turkey. Such a case would be a clear violation of the regulations and therefore those offering this service are to be subjected to heavy administrative and criminal sanctions.

In order to initiate the process of taking action against the entity and those responsible, a written complaint should be submitted to the BRSA together with all relevant evidences. If the BRSA concludes that the allegations are serious, as a first step inspectors are assigned for an investigation and depending on their report a criminal procedure could be started. The BRSA imposes administrative fines directly, without necessitating a court ruling.