EUROPEAN PAYMENTS COUNCIL
Towards our Single Payment Area

Doc EPC-0464/04 (Version 1.0)

16.02.2004
PP/NBI/MVB

RESPONSE TO THE EC COMMUNICATION ON A NEW LEGAL FRAMEWORK FOR PAYMENTS IN THE INTERNAL MARKET

General Remarks / Key Messages

1. Internal Market and SEPA (Single Euro Payment Area)

The objective of the Commission's initiative of establishing a coherent and comprehensive legal framework for SEPA is shared by the European banking industry.

To achieve by 2010 the single payment area in the Internal Market the European banking industry is aware that it must step up its efforts in market self-regulation but the latter may not supersede national legislation. There is a need for long-term migration of Community Law into a simplified set of rules in order to make intra-EU payments domestic. This, of course can be a long and complex process.

The major questions the Commission should address today are:

1) Do significant barriers to payments exist in the Internal Market?
2) If yes, what is the most efficient way to ensure the removal of these barriers?
3) Does this need to happen immediately?

The response of the European banking industry to these fundamental questions is as follows:

1) While there are certainly barriers to the Internal Market for payments, these are a product of differences in national legislation. Payments in the Internal Market today are still very largely governed by national rules and/or conventions. With 99% of all European payments are made domestically, consumer demand for cross-border payments in the EU is obviously limited. Any legal measure/framework needs to ensure that the conditions for the 1% cross-border EU payments have to be compatible with the remaining 99% of domestic payments (which are not predicted to substantially decrease in the foreseeable future).

The Communication has analysed certain areas in which there are national legal obstacles to the Single Payments Area. These comparative tables of national rules were published alongside the Communication. However they do not cover all topics included in the annexes.

Two examples of distortions existing in some countries are:

- Price control of payment services
- Specific taxes on payment instruments

2) The framework for payments in the internal market should consist of a combination of measures, those offered by legislation and those offered by self-regulation (interbank practices, codes of conduct, rule books...).

The Commission should limit its focus to removing the legal obstacles that prevent the creation of EU-wide market conventions and agreements, but not impose regulation on aspects that can be covered by those conventions and agreements. In the same vein, the industry suggests that the overall framework should concentrate on providing transparency to consumers and try to build as much as possible on existing practises and self-regulatory rules. For instance, it is not necessary to regulate further where the market has already achieved the objectives of the legislator (e.g. there is no immediate need to update the Directive on Credit Transfers to shorten the execution times). Nevertheless, in certain areas a common approach is the right solution.

3) Concerning the immediate necessity of this exercise the European banking industry urges the Commission to give priority to legislative measures covering annexes 2, 8, 17, 18 and 19. In particular, the annexes on Information Requirements (2), Information on the Originator of a Payment/SR VII of FATF (8) and the Data Protection Issues (18) urgently require attention.

Besides these issues, it has to be highlighted that many domestic markets for payments in Europe are highly efficient. Therefore, legislation should be limited to removing barriers to cross-border payments, so as to achieve a common efficiency level.

In addition, the Internal Market for payments must be internationally competitive. If the new EU legislative Framework leads to an increase in payment related costs, there is a real risk that payments business will be increasingly operated by non-EU players outside Europe and that the legislation will fail to meet its goals.

2. Clarity of Scope and Definitions

The industry accepts that the proposed scope should be retail payments of up to 50.000 euro in the Internal Market (of 25 member states from May 2004), including non-euro currencies with the understanding that those currencies will gradually disappear and covering, according to the issue addressed, all payment instruments except those stated in the Communication on page 17.

More specifically however, the scope of each annex needs to be more clearly defined and a consistent set of definitions provided. It is not clear which payment instruments are covered by each annex since some of the annexes clearly cannot apply to all instruments.
Furthermore, certain annexes should be dealt with separately of payments legislation (strictly speaking) because of their much broader scope, for example annexes 3, 4, 9, and 11.

Although cash is excluded it is considered in its own right in Annex 17. European banks believe that it would in fact be granted a special treatment as a result of the proposed provisions, as is further explained below.

Industry comments on Scope & Definitions can be summarised as follows:

A. Scope

Retail payments only

Wholesale and interbank payments should remain excluded from the scope of new legislative proposals.

Nature of payment in the Internal Market

There needs to be clarity over what is "domestic", what is "cross-border" and what is “intra-EU”. This is particularly relevant in the case of Annex 2. The 1997 Directive on cross-border credit transfers introduced information requirements for cross-border payments, which far exceed the requirements for domestic transactions. If the additional requirements were to be now put in place for domestic payments (99% of transactions) the impact would be considerable.

‘One Size Fits All’ Approach

The imposition of one unique regulatory framework for different instruments should be carefully considered. In some cases this would be very welcome: there is for example no due consideration of the analogies between cash and non-cash instruments. At the same time the use of cash is often encouraged by measures such as Regulation 2560/2001 on the withdrawal of cash at ATMs to the detriment of non-cash instruments. Thus, neutrality between payment instruments and a level playing field are not ensured.

Coins and banknotes, the most costly yet least secure payment instruments, are the only legal payment instruments that the Central Banks and Treasuries offer to the public. Legislators should always take into account the consequences of a certain legislative action on cash payments. If cash payments are excluded, this implies that proportionally additional regulatory demands are set on more secure and cheaper payment methods. This will in turn slow down their implementation and the development of innovative payment solutions. This has a clear bearing on the overall efficiency of the payments market – which is one of the principles of the Commission’s action.

Also, the New Legal Framework (NLF) must be clear as to whether each proposal covers all types of payment instruments or just specific ones, and evaluate the relative impact on those payment instruments that would not be covered by any specific proposal. This will be particularly important as new instruments are developed - will they be covered by the NLF or not and will this impact the relative use of different methods?

B. Definitions

Payment Service Provider

The Commission needs to be clear on this definition as the impact of each annex and the legislative approach required will vary according to the interpretation and scope of the definition.

Domestic Market

The notion of a domestic market where borders are an anachronism fluctuates in meaning depending on the issue addressed and the interests at stake. There needs to be a clear political consensus on this notion.

In addition, the industry asks whether it reasonable to talk about a true “domestic market” when many different currencies co-exist with the euro, as will be the case after enlargement?

“Payments” and “Transactions”

The scope of the Communication is often much broader than just payments. Certain annexes apply to account management or even go beyond banking to deal with general trade undertakings.

There is a need to distinguish between commercial services and payment systems. When considering the functioning of the Internal Market, the legislator should recognize that any general legislative measure related to payments should explicitly exclude issues relating to the fulfilment of undertakings unrelated to the payment itself (as in Annex 11).

Payment Service Providers must of course be free to offer any differentiated or value-added products with special qualities or features, for example guarantee features.

3. A legal framework for Payments

There is a real danger that well-intended legislation may hinder competition or discourage potential new entrants to the payments market. In a market economy, the preferred way to encourage competition is to let market forces develop on a level playing field. The key role for policymakers is to promote this level playing field by means of a framework to identify problems and solutions within a comprehensive and consistent policy for the payment industry.

The European banking industry welcomes a framework for payments but believes the framework must recognise the responsibilities not only of the banking sector but of all stakeholders, including:

- Payment Services Providers
- Supervisory and oversight authorities (ECB and ESCB)
- Market Participants: Consumers, Merchants, Corporates and Government entities
- EU legislative bodies

Where the nature of the issue is technical and pertains to the realm of payment system oversight it may be better to leave regulatory intervention to the ESCB. The banking industry stresses the importance and the need of co-ordination between the authorities.

4. Legal Instrument: do not over-regulate, give priority to self-regulation

The industry wishes to highlight that the main objective of the Commission’s initiative should be to harmonise current legislation and not to introduce new legislation.

As a matter of principle community legislation is only indispensable when:

a) Differences in national legal systems pose a concrete obstacle to efficient cross-border payments, and/ or distort competition,
b) And/or where a clear threat to consumer protection can be evidenced.

A number of the Commission's initiatives can be achieved through independently audited self-regulation. This approach would provide a flexible and market led mechanism, as well as providing a vehicle for greater competition in payments. Security, for example, is best dealt with by cooperation between the central banks and market participants.

In this response, those areas are identified where **self-regulation can play a more effective role than regulation.** This is particularly the case for areas where market practices are crucial to the attainment of the objectives, for example execution times, value dates, customer mobility, agreement on technical standards, revocability rules, etc. A clear "distribution of labour" needs to be established between the Commission (consumer protection, legal certainty), supervisory and oversight authorities (oversight of payment instruments and systems) and market participants for the payments infrastructure and payment products and services.

The NLF should ensure a stable and consistent framework from a regulatory point of view as well as ensuring in the best possible way of co-ordinating among different authorities at EU and national level. The NLF should pave the way to an equal approach of controlling market operators among the different authorities (particularly relevant for Annex 01).

A light-touch approach by the Commission could also strengthen Europe's capabilities to compete within the global payments market.

In the areas where the market feels that legislation is required to ensure a level playing field – and those are specified in the comments to the annexes – the industry advocates the use of a EU Regulation, directly binding for Member States.

The industry fully supports measures to improve transparency for consumers. However, the Commission should ensure that the legal framework does not over-protect or hinder competition in payment services to the detriment of consumers, through the following unintended consequences:

- Decreased choice of payment service provider, payment product or commercial merchant
- Increased costs for basic payment services
- Differentiation of costs between face-to-face and distance transactions
- Compulsory provision of unnecessary information

The responsibilities of PSPs need to be balanced with the fact that consumers also have a duty of care, for example with regard to safeguarding their payment card / PIN/ other personal information and informing their PSP in good time of unauthorised transactions etc, as set out in the Commission's seven guiding principles.

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<u>In Summary the Key Messages of the European banking industry are:</u>

1. Avoid disruption of efficient domestic infrastructures 2. Ensure a level playing field, striking a balance between open access and prudential oversight / risk management 3. Concentrate on legislation which creates transparency and legal certainty for consumers, but avoid defining technical standards 4. Recognise the complexity of the payments arena – e.g. avoid a ‘One Size Fits All’ approach 5. Promote self-regulation wherever possible

ANNEX 01: RIGHT TO PROVIDE SERVICES TO THE PUBLIC

Industry Response

The European banking industry highly appreciates the treatment of this issue in a new legal framework for payments as it is of vital importance to the safety of the financial system to clarify the right of payment service provision.

Specific comments

This could be achieved either by option 2 or 3 proposed by the Commission, i.e. transforming the e-money Directive into a Payment Institutions Directive (third Commission option) or establishing a special licence for payment services, **provided that:**

i. The supervisory and oversight framework for non-bank PSPs is the same as the framework imposed on credit institutions.
ii. All PSPs are subject to supervision and oversight by the same authorities that are in charge of these functions either nationally or at Eurosystem level.
iii. All PSPs are subject to the same prudential rules and information obligations.
iv. All PSPs are subject to the same consumer protection regime.
v. The ESCB is involved in the drafting of the legislation on any additional category of licensing for payment activities or in the e-money directive redrafting.
vi. Objective criteria for new entrants are established according to the payment instrument(s) provided.

In addition it has to be stressed that an additional category of licence for non-banks raises the question of whether and to what extent such a licence could differ from a full banking licence without departing from the necessary prudential standards. Customer protection and trust in the secure and efficient execution of payments is of utmost importance; caution is therefore indispensable when considering the creation of different kinds of licences.

The Commissions' ambition to be a relay for such innovative payments of closed user groups is understood. However, there is no real hurdle to becoming a bank and the creation of a new class of providers would result in an additional bureaucratic and reporting layer, of which the costs would need to be supported by everyone.

For the above mentioned reason of safety, the industry rejects option 1 as proposed by the Commission: the mutual recognition principle should not be employed without first establishing harmonised minimum licensing requirements for payment services. This principle would neither provide sufficient security for consumers nor a level playing field.

Means of payment require a very secure legal framework in order to:

- maintain the confidence of consumers and companies
- ensure legal and operational security of payment means and systems
- prevent the market fragmentation and competitive distortions that would result from the existence of different legal frameworks for the various providers of payment services of payment technologies.

Issuing and administering means of payment is an integral part of banks' core business, regardless of the medium or technology used. Therefore, it is also a core element of banking supervisory legislation and payment system oversight. It is rightfully an activity subject to mutual recognition pursuant to the Second Banking Directive. Creation of a European passport for banks is directly linked to certain regulatory and supervisory requirements.

Credit Institutions provide payment services as part of their regular business; this statement is true in all Member States, whether expressly mentioned in their banking legislations or not.

The stringent supervisory requirements imposed on banks guarantee the smooth functioning, reliability and security of payment services in the common interest.
Payment services are interwoven with the rest of the services banks regularly offer (account holding, lending, guarantees etc.) and cannot be viewed separately from them. Customers go to banks for a whole array of services, including payment services because a package deal is convenient – and because banks are trustworthy. In practice it is difficult to draw a line between payment service provision and liquidity/credit/deposit management services. Here again there is need for a clear definition of roles and activities: e.g. if a public transport company is allowed to provide payment services with free circulation of money, this is de facto a banking activity. One may wonder what could distinguish customer funds 'exclusively reserved for payments' from bank account deposits which are also generally used for this purpose. The limitation to an activity area may be by-passed in actual application. Thus mixing roles in allowing different actors to operate the same activity may have a negative impact on the transparency and definition of the activity itself.

Newcomers to the payments business, irrespective of the medium or the technology they use, would in most cases (i.e. in *all* cases other than post-payments) need to maintain a customer's account, accept deposits (a pre-paid card is a deposit), provide guarantee for payment and transact in the name of the customer. They would perform equivalent services to those of a credit institution, bear the same risk and demand the same rules.

Achieving and maintaining a level playing field between professional PSPs in terms of access, regulation and supervision is an essential principle from a market, regulatory and legal point of view. To that end the EU area needs compatible and coherent rules which cover all organizations that offer payment transaction services. Level playing field, consumer protection and financial crime concerns dictate that all providers of payment services (credit institutions and newcomers) operate under the same harmonised regulatory environment that exists for credit institutions. This is all the more important in the framework of combating money laundering and terrorism financing.

The industry fully shares the concern of regulators concerning unregulated activity: payments are too critical an activity to allow less trustworthy organizations to over-trade and potentially fail, therefore exposing payment systems as a whole to greater risks of operational disruption. Yet, this concern must not be addressed at the cost of bending the above principle through the creation of several "classes" of payment service providers that would not be subject to the fullest extent to the same rights or obligations, thus further distorting the level playing field. Bank trustworthiness is, rightfully so, a major concern for the EU legislator, who has opted for a strict regime of supervision[1] and regulation. When banking activities are exercised cross-border, with or without the establishment of a branch, supervision tasks are being distributed between home (mostly) and host country authorities. Banks are also bound by consumer protection and money laundering/fraud legislation.

Preferred Legal Instrument

The industry prefers a binding and directly applicable legal instrument i.e. a Regulation, instead of a Directive, to implement Commission option 2 or 3.

On a general note, it is understood that any regulation to be developed in this area will also apply to non-European players operating within the Union.
The scope shall cover all payment instruments including cash (money remittance).

[1] *See e.g.* Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate, Directive 2000/12/EC of the EP and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions. Also see Directive 2001/24/EC of the EP and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions.

ANNEX 02: INFORMATION REQUIREMENTS

Industry Response

Awareness is a crucial element of consumer protection. European banks fully support the promotion of transparency.
Information requirements are implemented by banks and are sufficient, according to the customers themselves, as regards scope and content. Nevertheless, there is a lack of harmonisation of these information requirements.
It would be helpful to regroup all existing national requirements into a unique legislative text in order to make them more coherent and avoid inconsistencies, so as to achieve a level playing field. The industry welcomes early action on the part of the Commission in this respect.
Regarding the scope, it is crucial to point out that this annex is much broader than payments (e.g. incl. information given on current accounts) and that it covers all payment instruments including cash.

Specific comments

The industry welcomes the European Commission's proposal to merge the existing provisions into a single body of legislation provided that:
- Only the essential information needed by the Payment Service Users (PSU) in order to reach a sufficiently high customer protection needs to be provided (i.e. only the existing customer information provisions are codified and clarified). A minimum and a maximum of information have to be clearly indicated. Information overload must not be confused with consumer protection.
- The provisions are sufficiently general in scope to apply to all existing and future payment instruments; legislation per service or per payment instrument (i.e. microfinance, credit remittances) should be avoided. The necessary and sufficient information may vary according to the customer segment concerned, the payment instrument considered (e.g. direct debit or e-purse), and the period in the business cycle of the payment product (e.g. more information needed for new products). Uniformising detailed information requirements by law for all instruments would increase the costs for the industry by imposing some legal obligations on PSPs that are not necessary from a customer convenience perspective. Binding legislation should thus focus on the minimum essential information requirements only, the rest being left to self-regulation by the industry. The requirements shall not impose restrictions regarding the form in which information is provided (other than on a durable medium) or the technologies/methods used to provide this information.
- Consistency of the proposed legal provisions with the rest of the legal framework and in particular with the Directive on unfair terms must be ensured.
- All supplementary national obligations are abolished to eliminate any conflicts in requirements or competitive distortions. Placing an EU-wide maximum threshold on the amount of information requirements, which should not be exceeded by national legislators, helps create a level playing field. Harmonised essential (necessary and sufficient) information requirements would:
    - Facilitate the supply of payment services across the Internal Market by reducing the burden for PSPs to apply diverging national rules.
    - Increase competition among PSPs by enabling customers to compare different offers on the European market.
    - Create legal certainty and transparency.

  In this respect the Commission is invited to produce comparative tables on the existing information requirements at national level. Such comparative tables have been produced

for other annexes to the Communication and would certainly be very useful to determine maximum information requirements at community level.
- Information requirements should not inhibit product innovation, nor be an obstacle to automation (straight-through processing).
- Information should be required once for the first transaction and not for every transaction in order to avoid unnecessary repetition. Excessive information provided on a transaction basis or with a high frequency should be avoided. Customers enter with their bank into an "account" contract; they do not enter into a "payments" contract. Information requirements must be linked to this "account" contract. This applies to paragraphs 1 to 4 of the proposed draft Commission text. As we are dealing with a constantly changing product package and customers tend to hold their accounts over a very long period with their bank, general conditions for an account will change over time and customers will not always use all available facilities or payment products. The legislation should recognise this aspect in such a way, that customers should have the possibility to obtain all necessary information "on request", be it ex ante or ex post. Additionally information should be available to customers in such a manner, that there is a sound balance between expressed need of information and costs to deliver this information. An efficient and low cost way of making information available in banks' premises, on their web sites or upon customer request is in the interest of every customer.
- Information requirements are stable over time, in proportion to the objective sought and quality rather than quantity shall be provided.
- The concepts of 'payment services' and 'payment account' shall be defined more precisely.

The essential principle is that customers must have easy access to the information needed to make choices and decisions, and to accurately instruct the related transactions.
Considering the range of payments instruments, the complexity of channels, and the relentless evolution of technology, this principle will be better met by agreeing on a simple principle: making available essential, high quality information rather than disseminating too much information. Whereas the service-providing bank would have an obligation to redress in case insufficient information caused a prejudice, we are of the opinion that this subject will be better addressed by an industry-wide best practice at European level, which would include the appropriate control and monitoring mechanisms. The dissolution of overlapping information obligations must be taken into account in this context.

Preferred Legal Instrument

A Regulation, limited to necessary and sufficient information requirements would be the preferred legal instrument but it must be clear that it supersedes all other (possibly more constraining) legislation and replaces all former EU legislation.

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Non-exhaustive remarks to the Commission's draft
The text proposed by the Commission needs to be revised as follows:

§ 1: *"in good time"*. To avoid misinterpretations the Commission should clarify this term. It might mean upon the consumers' request or before the PSP accepts the first instruction. For standardized payment products, informational material freely offered in the premises of the credit institution and/or on their website should satisfy this provision.
§ 1: "*shall communicate to the PSU*", § 3 "*any modifications of the conditions shall be provided*". Communication or provision of information even to knowledgeable or disinterested PSUs imposes a costly obligation to banks and a potential information overload (and

displeasure) to their customers. Banks should be obliged to make information available upon request of the individual customer or accessible on their web sites/in their premises.
& 3: Payment services are offered by banks to their customers; a bank's customer is the one that maintains a continuous relationship with it, mainly through a current bank account. It may happen that banks accept to process payment instructions for non-customers. These 'occasional' customers do not have payment 'contracts' but rather send ad hoc payments, increasingly by Internet. It is difficult to see how such a condition could be fulfilled for such customers.
In the first case, the acceptance of the PSP's conditions is linked to the acceptance of the general conditions that are formally signed by a bank customer when he opens an account.
In the second case, the PSP's conditions are de facto approved when the non-customer signs his payment instruction.
& 3: "one month in advance": this is not always possible for all payment instruments and for all conditions. Moreover, due consideration has to be made to the provisions in the Directive on unfair terms.

§ 4b: "*description of reasonable steps that the PSU shall take to keep safe a payment instrument*". This description by banks should not be considered as contract terms, compliance with which acquits the PSU from liability in case of theft or fraud. This requirement could be substituted by a hotline to be used by customers facing problems with their payment instruments (loss, theft, etc.)
§ 4c and 5d: "*the execution time and the value date*". If this provision refers to pre-contractual information (§ 1) a given bank cannot but provide general information on execution time and value date policy as this information depends also of the beneficiary's bank. The transparency obligation should only refer to transaction – and payment related information. That is the reason why §4d third bullet point and 5d should be omitted.
§ 4d: "*all charges payable by the PSU*". Consumers will profit from transparency if the expected cost he incurs is made comparable. It would be advisable to add that the PSP will be paid by the PSU in accordance with the terms of contract. Otherwise, the PSP would be obliged to state charges not payable to him and not controlled by him (tax, judicial expenses, etc.), and could incur liability in case these sums meanwhile changed or were not correctly calculated.
§ 4d: third bullet point *"any interest rate which may be applied"* should be omitted as interest rate information is attached to an account and not to a specific payment related transaction.
§ 4f: "*all practical instructions for exercising a claim*". Obliging a bank to provide concrete instructions on how claims against it are to be exercised is a case of conflict of interest. The word "instructions" implies a detailed description of procedural steps towards compensation: which is what lawyers usually do. Banks can provide information of the PSUs options: existing ADR schemes or the availability of legal advice but not provide specific instructions to be followed.
& 4f: *"... contested [revoked, rejected]".* Those three concepts are mixed up in this sentence: the second one (revoked) is related to a PSU initiative, the third one (rejected) to an ordering, intermediary or beneficiary bank or even to a clearing system, the first one (contested) may concern any intervening part in the payment process; the text should here reduce its scope to PSU's initiatives.
§ 4e: "*the reference exchange rate used for converting foreign currency transactions"* and § 5d "*the exchange rate used for converting foreign currency transactions*". It should be made clear that the rates to be communicated are only the reference exchange rate and the exchange rate applied to the customer by his/her own credit institution.
§ 5a: this provision cannot apply to e-purse or pre-paid card transactions, it should only apply where relevant.

ANNEX 03: NON-RESIDENT ACCOUNTS

Industry Response

The European banking industry would like to highlight that this topic is much broader than payments. It therefore suggests refraining from covering this topic in a payments legal framework.

Furthermore, Regulation 2001/2560 ensures that intra-EU payments to-and-from non-resident accounts based in the EU are priced like corresponding domestic payments.

Specific comments

The status of non-resident should have no impact on the pricing of a payment transaction as long as no special payment related reporting exists.

The banking industry would like to suggest the abolishment of all existing obstacles to managing non-resident accounts (like resident accounts) in order to achieve efficiency, transparency and a level-playing field.

The existing reporting requirements (statistical, fiscal, balance of payments) are all too burdensome and represent additional operational costs in the management of non-resident accounts.

European banks believe that continuing to label account holders permanently resident in another EU Member State as “non-residents” is inconsistent with the objectives of the Single Euro Payments Area. Distinctions made by national laws and the associated requirements to report statistical data should therefore be abolished. At most, micro or macro census figures could be collected if necessary for statistical purposes.
The industry urges the Commission to address this issue to the Member States.

More generally, it is necessary to have a clear definition of a resident from an internal market point of view. The logic of a single domestic market implies a new kind of resident: the “SEPA resident”.

Some general principles could be adopted:

- Banks should benefit of total freedom to adopt tariffs in accordance with their own policy in the field of "account opening" fees, "account running" fees and "payments" fees from and to accounts for <u>Non European</u> Non Residents.

- There should be no difference regarding payment of fees from and to accounts between Residents and European Non Residents, when the level of service is the same.

- There could be differences in account running fees for European Non Residents in all cases where national or European reporting requirements imply a burden for banks.

Preferred Legal Instrument

None

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ANNEX 04: VALUE DATES

Industry Response

The European banking industry agrees with Option 1, which states: to 'maintain a system of self-regulation but at least regulate transparency in the use of value dates for payments', if it is changed to: 'maintain a system of self-regulation by applying transparency in the use of value dates for payments'.
The industry fully supports the obligation of transparency attached to value dating practices, as customers should always be informed in a timely and efficient manner on the debit/credit date as well as on the reference date for calculating interest.
Value dates are not obstacles to intra-community trade and do not in themselves adversely affect the single payments area since they only affect the relationship between the customer who originates the transaction or whose account is credited, and that customer's bank. Value dating is not preventing legal certainty about the finality of the payment.
Regarding the scope of this annex, European banks would like to highlight that value dating is a far wider issue than payments. Indeed value dates are often not specifically linked with a payment transaction – they can result from any account operation.
All payment instruments are affected in different ways, reflecting the various natures and ways of handling these instruments.

Specific comments

The value-date is the reference date used by the payment service provider for his customer in the calculation of positive or negative interest.
The value date does not determine the effective availability of the funds. These are two different concepts that should not be *de facto* linked. Execution time is defined in terms of booking date/availability of funds.
Value dating is part of each banks commercial policy (i.e. a product management or customer relationship issue), and as such a competitive factor. Value dates are used as part of contractual agreements on terms of payment. They are a basic component of customer account terms and conditions. As a product management issue, value dates are independent of bookings, which are used to compute movements on the account.
Value dates vary by bank, by customers within the same bank, and even by different operations of the same customer within the same bank. In their commercial relationship PSUs and PSPs specify the form (instrument) and timing (value date) of payment, credit terms, interest and penalties on delayed payments plus other details like who bears the transaction bank costs and modalities of advising the creditor, etc.
The customer, who has been informed about the bank's value-dating policy, as stipulated in the EU Directive on credit transfers, is able to compare services and prices in line with the principles of market economy and select his preferred product. The same reference time cannot be taken for collection procedures (payment by cheque, credit card or direct debit) as for credit transfers, since these transactions take up different lengths of time.

The important information on value-dates are:
1) the payer should know the value date the transaction will be debited to his account when he initiates the transaction.
2) the payee is advised of value date and other information as soon as the bank has confirmed the payment (remittance advice or credit advises could be used, sent by the payer or by the bank, depending on agreements)
3) both PSUs should be able to check the proper execution of the transaction, i.e. that the transaction was executed within standard times

Payer (order /confirmation date/ booking/value date of debit)
Payee (order/confirmation date / booking / value date of credit)

For the reasons stated above, option 2 is rejected, in particular the article on the use of value-dates (which would result in an actual prohibition of value-dates). Regulating value dating would create a significant market distortion by directly affecting a key commercial parameter of banks.
There exist various laws and regulations across the EU regarding value dates, the choice of interest bearing current accounts, price transactions, etc. so that any regulation on value dates only would lead to a more heterogeneous playing field rather than enhancing transparency. Value dating is not limited to the SEPA context and should therefore not be regulated in the NLF.

However, if value dating is regulated in some national legal systems, it may be in the interest of EU-wide consistency and of a level playing field to repeal such laws and to clarify that value dating is an element of commercial policy.

Preferred Legal Instrument

Self-Regulation

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ANNEX 05: PORTABILITY OF BANK ACCOUNT NUMBERS

Industry Response

The European banking industry welcomes the European Commission's understanding and agrees with the Commission's intent not to introduce legal measures aiming at creating portability of banking account numbers. The subject of account number portability goes well beyond the subject of payments only. Account numbers are underlying almost any contractual relationship between a bank and its customer and are at the core of banks business.
The Commission is perfectly right when recognizing that the introduction of legal measures to achieve portability of account numbers would create disproportionably high costs compared to the benefits. It is therefore a subject that should remain outside a New Legal Framework on payments.

Specific comments

The Commission should clearly resist any tentative measure taken by Member States to impose unilaterally on its banking industry such measures, which would go against the establishment of a Single Euro Payment Area.

If the objective is to address perceived obstacles to customer mobility, then alternative measures of a non re-engineering kind can be envisaged (see below response to Annex 6).

Concerning the Commission's advise to launch studies aimed at creating a more simplified numbering system for credit transfers, the industry would like to highlight that the IBAN structure was successfully introduced in order to be able to maintain the existing account numbering in each of the 15 (soon 25) EU countries, therefore not disrupting the more than one billion existing numbers used by 500 million consumers and companies every day, without mentioning the thousands of corporate, bank and infrastructure IT applications based on these existing account numbers. Touching the account numbering system means touching the very core of the whole banking system and should thus be restrained from. Instead, further promotion of IBAN usage by all stakeholders, i.e. corporates, governments, consumer organisations, will definitively help to enhance efficiency of payment transactions.

Portability of account numbers would be as cumbersome as trying to implement portability of postal addresses.

Furthermore, the existing Regulation 2560 refers to IBAN and BIC which have been promoted and sponsored by the European Authorities, including the ESCB. The IBAN numbering standard is accepted and well functioning across the EU, proving its success.

The introduction of 'simplified numbers' (where 'simplified' is already debatable) would lead to disproportionate costs for private individuals and businesses. Creating a more simplified number account system for payments will not help to make customer mobility easier and won't increase competition either. It is important to understand that customer accounts are not only used for payments but include many additional services. A single account number without the portability of value added services will be of no use to the customer.

The portability and the structure of account numbers are two totally different issues. Having a specific numbering system for credit transfers only, distinct from the account numbering system would be unrealistic, cumbersome and complex for the users and the banks with a very high cost of implementation.

Preferred Legal Instrument

No action required.

ANNEX 06: CUSTOMER MOBILITY

Industry Response

The European banking industry agrees to the European Commission's proposal to leave improvements in mobility to a market driven approach to progress on the administrative side of the issue (e.g. the sending of information on clients' standing orders to a new bank). A competitive market will provide for a natural drive towards more customer mobility. The industry considers that the issue tackled here is much wider than payments and thus should be treated outside the scope of a New Legal Framework.

Specific comments

(1) Administrative issues (e.g. sending of information on the PSU's standing orders to the new bank)

The banking industry fully supports the Commission's proposal to leave improvements in mobility to a competitive market approach where banks could assist in migrating standing payment orders to the new PSP. This could be a value added service for the new bank.
European banks would like to underline that the decision taken by a PSU to change his PSP is rarely directly linked to payments but is more of a bank account management issue. However, as correctly stated in the communication paper, some national banking communities have already put in place various forms of support (effective systems or codes) so as to allow a PSU to swiftly and quickly transfer his account.

(2) Account closing fees

The European banking industry supports the idea that the customer should be provided with full transparency on closing fees already at the time of opening an account, with the understanding that closing fees may change during the life of an account.

On the contrary, the banking industry strongly disapproves that closing fees are disallowed or that an upper limit for such fees is fixed as this could be considered as a price regulation. Closing an account entails costs for a bank. The costs a bank incurs when closing accounts of commercial clients can be significant. Banks should therefore remain allowed to set a fee to this service, provided it remains reasonable in light of the real costs involved.

Preferred Legal Instrument

None
The industry favours market approach.

ANNEX 07: THE EVALUATION OF THE SECURITY OF PAYMENT INSTRUMENTS AND COMPONENTS

Industry Response

The European banking industry recognises that, as the security of payment instruments and components is an essential corner stone of consumer confidence, the scope of this annex should actually cover all payment instruments, in order to preserve and enhance the level playing field between them. It is however understood from this annex that the European Commission is considering the security of card-based systems as well as mobile and electronic payments, and cash related components (e.g. ATMs). It is furthermore assumed, that the scope of this annex covers payment instruments denominated in Euro as well as in non-Euro currencies.

The industry welcomes the first option proposed by the European Commission, i.e. leaving market participants dealing with standardised security requirements in a self-regulatory mode. The necessary technological neutrality of legal provisions and industry-led character of standardisation are indeed essential guiding principles.

Specific comments

1. Harmonised criteria and standards for security evaluation would prevent the multiplication of certification activities (in every country). However, standardisation should be industry-led (cf. e.g. EMVCo), since legislative initiatives would run the risk of enshrining old technological solutions (security components are by essence perpetually adjusted). For this reason, self-regulation is the preferred industry approach.

2. The Eurosystem and the BIS already published a list of criteria on the matter. The banking industry would therefore welcome a co-ordinated and structured approach of security evaluation, to be developed in close co-operation with the Eurosystem and the payments industry stakeholders.

3. The industry rejects option 2 (*Recommendation from the Council and the European Parliament or from the Eurosystem to use CC/PP methodology*). Due to the heavy technological content of this item, **it is not recommended to have (even non-binding) legal provisions constrain and probably impede future technological developments** and innovation. Moreover, the CC framework is not broadly understood so far. A textual specification of security requirements, based on usual banking vocabulary, may thus prove more efficient. It shall be noted that Common Criteria (CC) are generic and allow the specification of security requirements for almost any device/system. Yet, their implementation is very complex for the evaluation of a system with multiple components. The cost of a CC security evaluation on a complex and evolving system is therefore expected to be significant.

4. Likewise, option 3, **mutual recognition of testing procedures** for the evaluation of the security of payment instruments and components, **is not welcome**, since no (or little) appropriate national legislation exists at this stage and institutions working under stronger security criteria would not wish to be faced with weaker ones. In addition, mutual recognition does not necessarily lead to interoperability. Finally, the comparison with the situation as regards industrial products (global approach to conformity assessment) is an avenue to explore.

5. The industry also recommends that the various national initiatives at supervisory level are co-ordinated in terms of content and timing in order to avoid potential distortion of competition between various industries. Security must not be a competitive issue and minimum standards must be clearly established on a European level. In this context, harmonisation of existing security standards should be encouraged so that all the components of a common European payment system offer the same level of security regardless of where they are used or manufactured. This will make it easier to purchase or use components for payment systems on an intra-EU basis without the extra costs related to certification. In this context the formulation of a joint set of requirements and criteria together with representatives from the banking industry and the Eurosystem could be considered. An effective way forward might be requiring the conformity of payment components used in the EU with a EU standard, possibly in the form of a list of published criteria. Conformity with such a standard might result in the award of a EU 'certificate'.

6. For the security of chip cards and terminals related to debit and credit card services, a standardisation and certification body already exists, EMVCo. This industry-owned and administered body determines the security requirements for competing payment services, and the EPC intends to enhance the influence of the European banking industry on it.

7. With consideration for increasing global interoperability it is not recommended to consider the EU Internal Market in isolation (provided of course that. The key issue here is for Global standards to be established, not just European. The cards business already has EMV, ISO and ITSEC standards and would not benefit from specific European standards.

8. The importance of a balance between the necessary customer confidence and an environment that allows for innovation and product management should translate in the additional principle that security measures have an economic value to the benefit of the customer. They provide safety, stability, trust, and security as a social value for a certain price.

Preferred Legal Instrument

Self-Regulation, meaning that solutions as regards standardised security requirements are to be formulated and implemented by the banking industry itself.

ANNEX 08: INFORMATION ON THE ORIGINATOR OF A PAYMENT (SR VII of FATF)

Industry Response

In order to meet the deadline of 14 February 2005 set by the FATF[2] and to prevent disparities in the transposition of SRVII by Member States and acceding countries, the European banking industry stresses the urgent need for the adoption of a directly binding Regulation ensuring an EU wide transposition of SR VII.
Concerning the implementation of FATF Special Recommendation VII on Wire Transfers ("SR VII") at EU level, the EU should be considered as a single jurisdiction. This annex relates only to a limited number of payment instruments i.e. credit transfers and P-to-P payments made via Cards. Cash is covered as far as pure money remittance transactions are concerned.

Specific comments

The main issues to consider in the context of the transposition at EU level of SR VII are the following:

(1) Should SRVII be transposed by EU legislation or by national legislation?

The banking industry believes that SR VII should be implemented in a fully harmonized way throughout the Internal Market so as to ensure its consistent and uniform application.

The direct transposition of SRVII by national legislation or its transposition by an inappropriate EU legislative instrument (a directive such as the proposal for a third money laundering directive) would entail the risk of delay in the transposition process. More importantly, it would entail the risk of wide disparities between national legislations and therefore be in contradiction with the objective to create a Single Market for Payments in Europe.

The European Commission should be the sole authority to implement SRVII and we warmly welcome the Commission proposal to transpose SR VII into a directly binding legislative instrument, i.e. a Regulation. Such a Regulation should also take due regard, and possibly harmonise, existing rules on data protection (see also annex 18) and duly consider the anti-money laundering legislation already in place, to prevent disparities. Due attention should be paid to extra-EU legislation and the Commission could promote harmonisation in this respect.

It would be extremely welcome that the text of such Regulation be drawn up in close co-operation with the banking industry,

A quite long implementation time (a year between the publication of the Regulation and its entry into force) should be envisaged to allow for the necessary changes in banks' procedures.

(2) Scope: which type of payment transactions should be covered?

The banking industry agrees with the Commission's proposal that any Regulation should cover all:

[2] See Interpretative Note to Special Recommendation VII on Wire Transfers.

- credit transfers,
- money remittance services, and,
- person-to-person (P2P) payments, when executed by other means than traditional credit transfers , i.e. such as those offered by card schemes, in line with the Interpretative Note.

Traditional card transactions, direct debits and cash are excluded.

(3) Which information regime should apply: minimum information or full information?

The banking industry fully supports the Commission's proposal to consider intra-EU transfers as "domestic transfers", which are thus subject to the minimum information regime of SRVII, and to consider transfers between the EU and third countries as "international transfers", thus subject to the full information regime of SR VII.

(4a) Treatment of "batch" transfers (between two jurisdictions)?

To start with, we request[3] that the notion of "batch" be defined as the groupings of payments that arrive at the receiving bank and not those sent by the sending bank as the receiver cannot identify whether a payment was sent in batch by the sender and will therefore not be able to know what rules to apply to the incoming transfer.
As to information regime to be applied to batch transfers from the EU to third countries, the banking industry would support an optional regime, which would allow banks to choose between the full and minimum information regimes. This approach would imply that:

- Banks which do not want to use the exemption could simply ignore it and apply the full information regime.
- Banks that have an advantage in using the minimum information regime would have the possibility to do so.

The reasons for this are as follows:

Some European banks agree with the Commission's proposal to impose a full information regime for international batch transfers, i.e. batch transfers to third countries. A minimum information regime would oblige them to distinguish between ordinary transfers (full information regime) and batch transfers (minimum information regime) to third countries. Such a distinction would oblige banks to put in place two different systems depending on the type of transfer (ordinary or batch).

Other European banks have substantial business of batch transfers (salaries, pensions) and apply *de facto* a minimum information regime. They would therefore require an exemption for batch transfers as envisaged in the FATF Interpretative Note. The information sent with these payments is limited to the number of digits acceptable to the automated clearing house in the recipient country. It is a very cost-effective system by which no costs are borne by the recipient employees or pensioners. If it were necessary to send full originator information with each batch transfer, a major and costly exercise would be necessary in the recipient country; effectively it would be impossible to use the domestic payment system or would result in substantial costs for the transferee. In practice, if no exemption option would be granted to European banks handling such transactions, the business would most likely be taken over by US banks because they benefit from such an exemption as stipulated in SRVII.

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[3] EPC Resolution adopted at the EPC Plenary meeting of 4 June 2003

(4b) Additional requirement: time limit for making available information on the originator of a payment

Although the industry agrees with the proposal of the Commission to have a time-limit of three days for making available full information on the originator of the payment, a distinction should be made depending on the time that has elapsed since the payment was processed.

In accordance with EPC Resolution dated 4 June 2003, the banking industry therefore proposes the following:

- 3 banking business days to make information available for payments processed up to 6 weeks before the request for full information is made and
- 10 banking business days to make information available for payments processed more than 6 weeks before the request for full information is made.

(5) Need for exemptions\thresholds?

The banking industry believes that an optional "de minimis" threshold below which any information regime will not apply is the best option: the payment industry should be allowed to freely choose to apply the threshold if this is easier from a system/process point of view.
If a threshold applies, an amount of 3.000€ would stick to the maximum allowed by the Interpretative Note.

According to the above considerations, the banking industry would like the Commission to consider carefully the suggested draft article on originator information accompanying credit transfers[4] and transfers sent by money remitters:

(1) "Credit transfers executed within the EU, except those indicated in paragraph 2, shall always be accompanied by the originator's account number or a unique identifier allowing the transaction to be traced back to the originator.

If requested, the originator PSP shall make available to the beneficiary PSP [and appropriate authorities], within three business days of receiving the request, full originator information as referred to in paragraph 2, *provided that the payment has been processed within the preceding six weeks. Should this not be the case, the originator PSP shall make available to the beneficiary PSP [and appropriate authorities], within ten business days of receiving the request, full originator information as referred to in paragraph 2*.

(2) All other credit transfers and transfers made by money remitters shall always be accompanied by:
   – the name of the originator,
   – its account number, or in the absence of such a number, a unique identifier allowing the transaction to be traced back to the originator,
   – the address of the originator, or alternatively the date and place of birth, a customer identification number or a national identity number.

(3) The requirements in paragraphs 1 and 2 shall not apply to credit and money remittance transfers, if the amount executed does not exceed *3.000* Euros. Each financial institution decides whether to implement this provision or not.

[4] "Any transaction carried out on behalf of an originator person (both natural and legal) through a payment service provider by electronic means with a view to making an amount of money available to a beneficiary person at another payment service provider".

(4) Credit transfers and transfers sent by money remitters to the EU from third countries having exempted, through their implementation of Special Recommendation VII of FATF, full originator information from accompanying the transfer [batch transfers or transfers below a fixed threshold], are not covered by the present Article.

(5) Where technical limitations at the level of an intermediary PSP prevent the transmission of full originator information from accompanying credit transfers or transfers executed by money remitters from third countries (during the necessary time to adapt payment systems), a record must be kept for five years by the receiving intermediary PSP of all the information received from the ordering PSP.

(6) Beneficiary PSPs should have effective risk-based procedures in place in order to identify any transfers covered by this Article which lack the required originator information. Where appropriate, a beneficiary PSP may consider restricting or terminating its business relationship with a PSP that fails to meet the obligations specified in this Article.

(7) Member States shall ensure that the compliance of PSPs with the rules of this Article is monitored effectively.

(8) Any interpretation of this Article shall be done in accordance with the terms of the Interpretative Note."

Preferred Legal Instrument

Regulation to be implemented by February 2005 at the latest.

ANNEX 09: ALTERNATIVE DISPUTE RESOLUTION (ADR)

Industry Response

The European banking industry favors the second option presented in the Communication as a way forward: leave the practical establishment of ADR bodies at national level to the Member States without excluding a European approach in the future. The industry agrees to include in the scope all payment instruments and cover domestic as well as intra-EU transactions. Nevertheless, the scope of this annex is much broader than payments.

Specific comments

The Commission's proposal for an article on ADR is a positive way forward, **provided that** the scope of the proposed article is limited to:
- disputes rising from payments up to € 50.000 (art 1 of Directive 97/5/EC) and;
- disputes between a PSP and a consumer PSU: ADR has been created to benefit consumers. SMEs and corporate clients benefit from legal counsel and have negotiating leverage with their PSPs.

and provided that this article is included in a new Recommendation proposal.

Furthermore, existing national ADR schemes should always be considered appropriate. Excessive formalisation and bureaucratisation of ADR schemes by introducing additional EU legislation may call into question the efficiency and speed of existing schemes as well as the commitment of their organisers.

The Commission aptly defined[5] ADR as a form of *private* and voluntary procedure, *to be distinguished from*[6] *judicial procedures*. This type of ADR schemes, set up voluntarily by the industry is becoming increasingly attractive and necessary due to the shortcomings of traditional public justice.
ADR being primarily based upon party consent rather than state constraint, it does not and should not be treated in the same way as judicial or quasi-judicial (i.e. arbitration) proceedings. It has to be emphasized in this context that one of the reasons why ADR is so flexible and effective is precisely because it has not, up to now, been burdened by the "quantity, complexity and technical obscurity of legislation"[7], which have obstructed access to traditional justice in the first place. To regulate ADR in a way similar to traditional justice is to condemn it to the same fate. **That is why the industry clearly has to reject option 1.**

The European banking industry has promoted and supported FIN-NET since its inception, demonstrating that cross-border conciliation schemes can work efficiently and without bureaucracy using existing mechanisms. FIN-NET owes its success to the fact that it covered the then novel area of cross-border payment ADR, while building on existing non-cross-border schemes. In the payments area, procedure speed is of particular importance.

Preferred Legal Instrument

Recommendation

[5] *See* EC Green Paper on Alternative Dispute Resolution in Civil and Commercial Law COM(2002)196/19-04-2002.
[6] The *complementary* role of ADR is also stressed by the Council and the Commission in their Joint Declaration concerning articles 15 and 73 of the Brussels I Regulation.
[7] *See e.g.* Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate, Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions. Also see Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions.

EUROPEAN PAYMENTS COUNCIL
Towards our Single Payment Area

ANNEX 10: REVOCABILITY OF A PAYMENT ORDER

Industry Response

The theoretical scope of this annex is all electronic payment instruments (credit transfers, direct debits, cards), irrespective of their currency denomination. However, owing to their current status ("work in progress"), pan-European direct debits are discussed in a separate annex. This broad scope is an obstacle for the formulation of a single approach, as payment instruments obey to varying rules.

This annex focuses on the *revocability* of a payment order. For reasons of legal certainty, a more appropriate approach would be to discuss the definition and communication of a "point of irrevocability" by payment instrument.

The relationship between the payment originator and his bank is the focus of this annex. The European banks welcome transparency for the customer on the point of irrevocability, a point that varies across payment instruments as well as across banks and payment systems. The industry therefore favours a regulation of transparency requirements as regards the point of irrevocability of a payment order, whilst leaving to self-regulation the precise definition of these very points of irrevocability. In this respect, the Payment System Rules may be of considerable use (cf. Settlement Finality Directive).

The industry therefore favours the second option suggested in the Communication, i.e. leaving the issue to self-regulation by PSPs, while imposing specific harmonised legal information requirements with regard to the applicable revocability rules.

Specific comments

1- Where necessary, more information about irrevocability conditions should be provided regarding the various payment systems and for the payment instruments involved. Taking into consideration the difficulty of defining the exact moment when the account is debited, or the actual possibility of the bank to stop the processing/debiting, it is much better not to define this matter by law, and leave banks to revoke a payment on a reasonable effort's basis.

2- Any measure that would intend to harmonize rules on irrevocability (the first option suggested in the Communication) would have to take into account the complexity of the point of irrevocability. In this attempt, it would be necessary to distinguish between credit transfers and card payments, as correctly suggested in the Communication:

1) When harmonizing irrevocability rules for credit transfers, payment irrevocability should be as close as possible to the point of acceptance, and cannot be after the order has been sent (cut-off time) – provided that the payment order was initiated correctly.
2) When harmonizing irrevocability rules for card payments, full irrevocability of the payment order as soon as received by the beneficiary is advisable. The European Commission's proposal of limiting irrevocability for card payments only to the cases where the amount was determined when the order was given, introduces an unacceptable exemption to the principle of payment settlement finality. Finally, the payment process and the basic transaction should be treated as entirely separate issues.

Preferred Legal Instrument

A combination of:

1. **Regulation for transparency requirements** with regard to the point of irrevocability of a payment order (also see Annex 2 in this respect).

2. **Self-regulation by the banking industry with regard to irrevocability rules,** which would enable banks to be flexible and assist their customers in case of need.

ANNEX 11: THE ROLE OF THE PAYMENT SERVICE PROVIDER IN THE CASE OF A CUSTOMER MERCHANT DISPUTE IN DISTANCE COMMERCE

Industry Response

Evidently the European banking industry strongly supports consumer protection in distance commerce. The non-delivery or defective delivery by the merchant is however an issue to be solved within the customer-merchant relationship. Payment services are indeed independent of the underlying business transaction(s): neither the originator's nor the beneficiary's banks have any influence on the underlying transaction between the originator (customer of the merchant) and the beneficiary (merchant), and banks cannot thus lend themselves as a customer/merchant dispute resolution mechanism. Market-led approaches can however be conducive to the emergence of value-added services in this area. In this respect, merchants could provide the solution, and the banking industry help to provide the service. But it has to be left to the PSU to choose whether or not to use these services, instead of having a legislator imposing them unnecessary (socialised) costs.

As regards the scope of this annex, it should in theory cover all electronic payment instruments (credit transfers, direct debits, cards), irrespective of their currency denomination (Euro, and non-Euro currencies). It is however understood that the European Commission wants to limit the scope of this annex to "distance commerce" transactions, which de facto jeopardizes the principle of a level playing field between payment instruments. Indeed, this would come to institute a higher degree of protection for some transactions, thus "degrading" other types of transactions, regardless of their merits for the parties involved.

Specific comments

1. **For the reasons given above, the banking industry strongly rejects the first option suggested in the Communication, i.e. "*the establishment of some sort of joint liability between the PSP and the merchant in case of non* [or defective] *delivery of a product*",** as a matter of principle, but also taking in account the serious implications this would have for payments. Such liability would indeed deter the PSP from supporting distance commerce transactions (or, in the best case, the PSP would only do so after extensive merchant and customer screening, undoubtedly a source of unwarranted additional costs for the bigger number).

2. Distance commerce is as old as international trade and does not equal Internet or e-commerce. One of the ways of facilitating distance commerce has always been a strict segregation between the conclusion of a contract, the performance of a contract and the payment for that performance. The introduction of a specific obligation by law for the PSP linked to the correct execution of the underlying contract would have exactly the opposite result, creating an enormous burden and bureaucracy. The European Commission more than once indicated that payment execution and processing is distinct from other commercial services, the proposed option 1 contradicts this principle.

3. Of course financial institutions should at all times ensure that the PSUs understand the range of services and the limitations of each instrument, in particular as regards the intervention of the PSP in customer/merchant disputes. This is fully consistent with the information requirements further developed under the response to Annex 2.

4. The second option suggested in the Communication, i.e. "*specific revocability rules for payments made in e-commerce*", does not solve the issue of non-conformity of a delivered product. Also, the reimbursement of a payment should not be assimilated to the revocation of a payment order. The described options as well as the present practices indicated by the European Commission are clearly linked to various forms of payments and the related offers to consumers /businesses. These forms are diversified reflecting different degrees of complexity, hence different value propositions ranging from guarantees, insurances, and conditional payments to conditional delivery etc. Limiting this diversified offer to a specific legal rule/article would hinder competition and limit the effective offer.

5. As PSPs are not and should not be involved in customer/merchant disputes, proposals for solutions are not required from the banking industry but from the merchant. Merchants could define and promote a European "quality label" that would ensure consumer protection, e.g. through voluntary membership in a financial guarantee scheme, or alternatively propose to their consumers an optional refund insurance in case of non-delivery. If there is a customer demand in this field, the banking industry could assist in developing such a scheme (in compliance with competition laws). Consumer organizations have also a role to play in informing the public of the quality of services offered in distance commerce.

<u>Preferred Legal Instrument</u>

Whilst the banking industry fully supports the necessity for the customer to be fully informed about its rights as regards the payment instruction he/she is given as the result of a distance commerce transaction, the banking industry cannot support any attempt to regulate what is so clearly beyond the scope of PSPs. Doing otherwise would certainly promote a carefree approach from some distance buyers, where resulting damage would have to be borne by the whole community of users.

ANNEX 12: NON-EXECUTION OR DEFECTIVE EXECUTION

Industry Response

The European banking industry fully acknowledges the principle that the PSP becomes liable to its customer when the PSP negligently fails to execute or wrongly executes the payment order regardless of the selected payment instrument. The PSP can however not be held liable if not negligent, or in case of "force majeure". Since this principle of negligent liability doubtless applies in all Member States, there is however no need for EU Regulation. Liability without fault is the absolute exception in civil law (in the continental European sense).

It is understood that this annex concerns instructions given via credit transfers, direct debits, or cards, regardless whether in Euro or non-Euro currencies. Furthermore, as the objective of the present consultation is "the Internal Market for payments", any discussion about notions such as "consequential" or "indirect" damage are deemed completely outside the scope, as they pertain to issues that have their roots far beyond payments, and are by no means an obstacle, nor an enabler, to the ambitioned "Internal Market for payments".

Specific comments

1- The PSPs should be liable for non- or defective execution of a payment order, yet cannot be held liable if not negligent, and a fortiori cannot be held liable for customer terminals that are beyond their direct or exclusive control (e.g. PCs for accessing banks' online services).

2- Furthermore, not all banks in the clearing chain act as an agent of the ordering bank (in this respect, Directive 97/5/EC is thus already going too far: the money-back guarantee for cross-border credit transfers up to 12,500 euros provided for under the Credit Transfer Directive already violates this principle of liability limited to negligence and should on no account be increased). The scope of liability should thus be limited. For example, banks cannot be held liable if they do not execute a payment order because of lack of sufficient funds in the originator's account. Furthermore "defective execution" should be clearly defined in any legislative text.

3- Regarding paragraph 5, the PSP, in principle, is indeed required to provide evidence that the payment order has been duly executed, as far as this lies within his sphere of responsibility. Thus a credit institution should not be obliged to prove the fault of another link in the payment chain over which it exercises no actual direct or exclusive control.

4- A 'force majeure' clause should indeed be included (as in Directive 97/5/EC) and reasonably widely defined. It should cover issues such as network or payment system failure, error attributed to the intermediary institution selected by the originator, participant insolvency, etc. A clause on third party fault should also be added.

5- It is acknowledged that PSPs may not contractually exclude or limit their basic obligations and liabilities. Nevertheless, banks should keep their freedom to define their services as they wish (unnecessary product harmonisation should be avoided).

6- Banks would have to offset any further increase in liability risks in this area by introducing precautionary measures, whose costs would be ultimately reflected in the price of payment services or in a reduction of offer.

7- Finally, in the interest of achieving maximum efficiency, precedence should be given to account number over name as the identifier of the destination of a payment transaction. This might help avoiding defective execution of a payment.

Preferred Legal Instrument

No requirement for legislation or regulation can be evidenced to support the ambitioned scope of the present Consultation.

ANNEX 13: OBLIGATIONS AND LIABILITIES OF THE CONTRACTUAL PARTIES RELATED TO UNAUTHORIZED TRANSACTIONS

Industry Response

The banking industry recommends a revision of Recommendation 97/489. Although this instrument is not binding, banks and market participants have largely used the provisions of the Recommendation when defining the liabilities and obligations of the parties with regard to card payments in particular through incorporation in the card scheme rule books, which have a clear focus on consumer protection.
The industry understands that the scope of this annex is limited to cards, internet- and mobile initiated payments (irrespective of their currency denominations).
The Directive on Unfair Contract Terms already properly regulates the terms banks may impose to their customers regarding evidence and burden of proof. Moreover, this annex should be read in connection with opportunities to use an electronic signature in relation to the Directive on e-signatures.

Specific comments

The banking industry deems appropriate to take into consideration both the channels and the payment instruments used when establishing the PSPs and PSUs obligations and responsibilities, and to keep the scope of application as such. Only the part of the payment chain under the effective and continued control of the PSP should be taken into consideration. Because of their different nature, no general rule can equally apply to all payment instruments: situations where the customer holds "secrets", such as a PIN code are more complex than others. Moreover, a clear distinction must be made between means of access to a payment method (e.g. internet banking) and the payment itself. A distinction based on the value of the payment does not seem appropriate to the banking industry as this would encourage customers to behave in a carefree manner, hence creating a bigger incentive to commit fraud, deception or to encourage theft. It would also increase operational risks and costs. Direct debits should clearly be out of the scope as they always initially incorporate a clear and precise mandate.

No need for a threshold of 150€

If the PSU's liability becomes extensively limited, the PSU will be less motivated to notify the PSP of the loss, theft or misappropriation of his/her payment instrument. He will be less motivated to protect the payment instrument from any other of the latter events. The potential damages and risks for the bank will increase significantly.

The banking community therefore does not support limiting the PSU's liability to 150 euro so as to:

- Keep the number of speculative disputes and frauds as low as possible.
- Keep the liability threshold aligned with the actual size of the transaction (transactions of more than 1000 euros are possible in online banking and especially in remote data transmission transactions).
- Keep the PSU fully aware of the risks linked to the use of electronic instruments and of her/his responsibilities in contributing to prevent fraudulent usage or theft.

As a consequence the banking industry's position is that the PSP shall not bear any liability if the PSU acted with negligence or fraudulently; the latter remaining fully liable for all transactions executed in this context. Furthermore, the PSU shall bear all responsibility for the use of a payment instrument until the PSU notified the PSP of the loss, theft or misappropriation of the payment instrument. Moreover, the European banking industry would like to emphasize that offering payment services including e.g. special guarantee features that alleviate the customer's responsibilities, is a product management matter and as such outside the scope of the New Legal Framework.

Burden of proof

Whereas the PSP should always use his best efforts to provide evidence/proof of misuse as necessary, it is obvious that such evidence has to be limited to the elements under the control of the PSP (such as the system or the infrastructure). Ability to provide evidence/proof should not be confused with liability.
It should be borne in mind that banks are unable to disprove an untrue assertion that the PSU did not execute the transaction. Should this become an obligation, the costs of supplying electronic payment instruments, or making them available only when controllable (thus in very limited circumstances) will increase. An equitable solution proposed by the banking industry is the *prima facie* evidence for card payments: based on the security of the system (records) and on PSU duty to due diligence there could be a presumption that a transaction was executed by the authorized owner (which may be rebutted). Statements made by the PSU to police authorities or bank services may confirm or rebut this *prima facie* evidence.

Liability of the PSP

As the present debate is referring to a legal framework for payments, the scope of liability of a PSP must remain within the boundaries of the discussions. Therefore, any reference to "consequential damage" or to "indirect damages" must be avoided. Subsequently, the PSP should only refund the PSU with the amount of litigious payment concerned and should not bear the duty to restore the account to the position it was before that payment was unduly executed from the account.
In this respect, the banking industry shares the Commission's view that (see § 4 of the article on liabilities between the contractual parties) any financial compensation, thus including consequential or indirect damages, shall be determined in accordance with the tort law applicable to the contract concluded between the PSP and the PSU. Attempts to harmonize tort law go well beyond the context of a legal framework for payments.

Concerning the proposed text of the Commission, the banking industry would like to emphasize that the PSU should be held liable in case of *negligence*, not only in case of *gross negligence*. Only the PSU can exercise due diligence when using PIN or access codes, once safely delivered to him/her. Thus, the conditions under which the PSU could be held liable should be in balance with the means given to the PSU.

Clarification of the notions and terms

The banking community encourages greater clarity in the wording proposed by the Commission in order to move towards desirable legal certainty.
Therefore, the following definitions are proposed:

Negligence: The failure to use reasonable care, i.e. doing something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do under like circumstances.

In accordance with the above considerations, the banking industry would ask the Commission to reconsider carefully the draft article on obligations and liabilities of the contractual parties related to unauthorized transactions as per the following suggestions:

Article on the obligations of the contractual parties

1. The Payment Service User shall

(a) use the payment instrument in accordance with the terms governing the issuing and use of the instrument; in particular the PSU shall take all reasonable steps to keep the safe the payment instrument and any means, such as a personal identification number or other code, which enables it to be used;

(b) notify the PSP (or the entity specified by the latter) immediately after becoming aware of:

- loss, theft or misappropriation of the payment instrument and/or the means of identification which enable it to be used
- the recording on his account of any unauthorized transaction and any error or other irregularity in the maintaining of his account

2. The Payment Service Provider shall

(a) not disclose a PSUs personal identification number or other code, except to the PSU

(b) not dispatch an unsolicited payment instrument, except where it is a replacement for a payment instrument already held by the PSU

(c) keep for a sufficient period of time, internal records to enable the transactions to be traced and errors to be rectified

d) ensure that appropriate means are available to enable the PSU to make the notification required under paragraph 1. Where notification is made at a distance, the PSP (or the entity specified by the latter) shall provide the PSU with the means of proof that he has made such a notification. The PSU shall confirm in a written form his notification to the PSP (or the entity specified by the latter)

3. A payment is presumed prima facie authorized by the PSU. The PSU or PSP may provide factual information or elements to support or rebut this presumption.

4. The element of evidence referred to in paragraph 3 shall be without prejudice to evidence to the contrary produced by the PSU or PSP. In particular, official claims made before police authorities by the PSU can be taken into account

Article on liabilities between the contractual parties

1. The PSP shall be liable for transactions executed without the PSUs' authorization.

2. The PSP shall not be liable if the PSU acted negligently or fraudulently. In determining the PSUs' negligence, account shall be taken of all factual circumstances.

3. When held liable, the PSP shall refund no later than 30 days after being held liable to the PSU the sum of the payment in question/litigious payment.

4. Further, financial compensation shall be determined in accordance with the law applicable to the contract concluded between the PSP and the PSU. One of the parties may decide to use any ADR facilities provided by the PSP.

5. The PSU shall bear the financial consequences resulting from the loss, theft or misappropriation of the payment instruments, if s/he has not fulfilled her/his obligation to notify the PSP as required.

6. After the PSU has notified the PSP, s/he shall not be liable for the financial consequences of the loss, theft or misappropriation of the payment instrument, except where she/he acted fraudulently or with negligence.

7. If the PSP did not fulfill the obligation to provide adequate means for the notification of lost/stolen/misappropriated instruments as, the PSU shall not be liable for the financial consequences resulting from the loss, theft or misappropriation of the payment instrument, except where he/she acted fraudulently or with negligence.

Preferred Legal Instrument

Recommendation
A limited update of the Recommendation 97/489 as described above would be welcome. However, it has to be to the explicit exclusion of any limitation of the potential liability of the PSU.

ANNEX 14: USE OF 'OUR', 'BEN' AND 'SHA'

Industry Response

The European banking industry would like to underline that this annex is limited to credit transfers only. In order to remain coherent with Regulation 2560/2001 and the different industry initiatives that have been taken to realise the Single Euro Payments Area, the initial focus of the discussion on this issue should be on payments in euro up to Euro 12.500.

The principle of transferring the full amount to the beneficiary is central to this annex. This principle is now well established following Regulation 2560/2001 for payments that can be processed in a full STP manner (Straight-Through-Processing) and as long as the corresponding domestic payments are paid in full with no deduction on the beneficiary side.

Specific comments

The banking industry supports the principle of transferring the full amount, as instructed by the ordering customer, without prejudice to explicit agreements enabling the PSP to charge fees to the PSU's account for services rendered, but would like to stress, that due to customer demand, the need remains to be able to offer all three charging options. A wider customer choice can only be achieved via self-regulation.

Therefore, European banks opt for self-regulation in the form of the ICP (Interbank Convention on Payments)[8], which today limits the scope to credit transfers in Euro. The ICP promotes the abolishment of the possibility for intermediary banks, when used, to deduct fees from the transferred amount.
The industry further recommends that any legal framework should move away from technical terms used within specific message formats and systems (such as SHA, BEN, OUR), which in many cases are inappropriate in a domestic context.
Sufficient industry initiatives are in place or under development to ensure the "full amount principle". No additional provisions should therefore be created to replace Directive 97/5/C.
The current charging options exist to give customers a choice, which is part of terms and conditions negotiated between customer and bank. The risk of an over simplification and limitation of choice has to be avoided as those charging options are the response to market needs which go beyond the basic intra-EU credit transfer instrument(s) and are necessary to support the various payment types as well as distance commerce. The internal market should respect worldwide practices and the freedom of each PSU to pay all, part or none of the costs of a payment transaction depending on his choice.

Members of the European Payment Council (EPC) have ratified the use of the SHARE ('SHA') option as the standard charging practice through the ICP convention and the format rules for basic cross-border credit transfers denominated in Euro.

Full contractual liberty should apply to cross-border credit transfers that are not covered by the Regulation because they have no equivalent in the domestic environment. This is true for non-euro and non-SEK payments for which "corresponding" domestic transactions do not exist.

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[8] Interbank Convention for payments for basic credit transfers falling under Regulation 2560/2001.

The banking industry is taking the appropriate steps to extend the principle of transfer of the full amount to other payments falling under the Regulation through the application of a soon to be approved market practice on credit transfers.

The Commission is invited to remove the discrepancy between the default ‘OUR’ option of the Directive, a charging mechanism that does not exist in most member states, and the ‘SHA’ option, favoured by the Regulation. This obviously in a non-legal text (e.g. interpretation note, press release) could be useful to foster a widespread use of the SHA option, to the benefit of consumers.

Preferred Legal Instrument

Self-Regulation

ANNEX 15: EXECUTION TIMES FOR CREDIT TRANSFERS

Industry Response

The European banking industry favours self-regulation in form of the existing CREDEURO convention.

Specific comments

The European banking industry would like to highlight that current average execution times for credit transfers across EU countries have exceeded the requirements set out in Directive 97/5. The average execution time of a credit transfer - having been measured at 2.97 days – lies well below the present default execution time of 5+1 days. Hence, specific legislation is of no necessity.

The European banking industry, represented by the European Payments Council (EPC), agreed to a default credit transfer execution time of 3 banking working days (after the acceptance date) via self-regulation under the CREDEURO Convention. The 3 days are default times which are often improved by individual banks.

This shows that the banking industry is willing to implement shorter execution times than the current provisions in the Directive 97/5 on cross-border credit transfers.

As of 31 December 2003, European banks representing approximately 80 % of the volume of cross-border credit transfers in Euro have adhered to the Credeuro convention and their number is growing steadily.

Due to the proven success of self-regulation in this area (as confirmed by the Commission's survey) the banking industry sees no need for further regulation and no need to amend this Directive in this respect. The solution proposed does not seem proportionate to the problem. There would only be a very marginal increase of benefit to consumers while the execution time is presently continuing to decrease without the assistance of a binding legal provision.

Self-regulation will encourage banks not meeting the default execution time of the Credeuro convention to improve their service offering to remain competitive.

Preferred Legal Instrument

Self-Regulation

ANNEX 16: DIRECT DEBITING

Industry Response

The European banking industry is keen to pursue with the European Commission the excellent cooperation established up to now with respect to direct debits and welcomes the Commission's approach to abstain from taking any legislative initiative until the PEDD scheme mentioned below is defined in order to ensure the best possible correlation between the new PEDD and EU legislation. A definition of the respective rights and obligations of creditors and debtors under a pan-European direct debit scheme will be soon proposed by the industry.

Specific comments

The European banking industry (through the European Payments Council) is currently finalizing the definition of business requirements and drawing up the outlines for a pan-European direct debit scheme (PEDD), enabling a uniform procedure for direct debits in euro in the internal market. This scheme will be a new pan-European scheme, not an adjustment of existing domestic schemes. The philosophy underlying the SEPA calls for developing a new scheme that would, as its end-goal, process both national and intra-area direct debits. The study sponsored by the Commission itself ("the Landwell report") has confirmed that an efficient pan-European direct debit scheme will not result from the interconnection of existing national schemes. Significant legal differences exist between national direct debit schemes.

As such, and for reasons of legal certainty for all participants, PEDD may require implementation of specific EU-wide legislation in order to support industry recommendations and lift any legal barrier at national and/or EU level which would prevent the implementation of industry recommendations paving the way for a level playing field across Europe, both for creditors and debtors.
The new scheme will require the cooperation of all stakeholders, amongst which the national governments as creditors, and may involve innovative features.

The Commission should ensure support to the EPC outcome in terms of the new PEDD.

The necessity of lifting legal barriers and/or a legal framework will be precisely identified by the EPC and communicated to the Commission once the PEDD scheme has been formally approved by the EPC. Indeed the legal framework needed to support the PEDD scheme will very much depend on the model chosen.
The most important framework conditions, which will guarantee its smooth functioning and reliability and thus require uniform rules, include: defining the initial authorization given by the debtor allowing the creditor to initiate a direct debit transaction, determining the conditions under which a direct debit can be revoked and establishing the applicable law.

It goes without saying that future legislation at EU level should not interfere with the efficient operation of the existing domestic schemes.
The banking industry will complement the legislative framework with the necessary agreements ensuring consumer protection rights by setting the scheme rules in a way that makes the scheme safe from a consumer's point of view.

Whatever model chosen, the PEDD must be attractive, simple, transparent, fair and secure for all parties with the right balance between security and cost-effectiveness.

The scheme will provide debtor protection as for example:

- Full consumer protection that includes high level protection against unauthorised debits and attempts of fraud
- Fast and simple money back procedure; fast and simple complaints procedure
- Advance notice of the timing and amount of DD payments

The rules to ensure irrevocability proposed in Annex 10 above should not apply to Direct Debits. Precise rules for revocation will be defined within the PEDD scheme itself.

Preferred Legal Instrument

None for the time being

ANNEX 17: REMOVING BARRIERS TO PROFESSIONAL CASH CIRCULATION

Industry Response

This annex focuses on the handling of Euro cash between professionals. In this respect, the European banking industry calls for the swift adoption of a Directive creating an intra-EU cross-border cash transportation license.

Specific comments

1- As the cost of cash for EU economies can be estimated at EUR 50 billion per year, of which EUR 32 billion is borne by the banking industry and EUR 2.4 billion are related to transport costs, the European banking industry welcomes the creation by the European Commission of a working group with banks and the cash transport industry to look for solutions for Cash-In-Transit (CIT) activities.

2- For credit institutions it is presently not feasible (or only with difficulty) to deliver or source cash from one Member State to another. This is a genuine barrier to payments in the internal market!

The banking industry considers that:

- A number of regulatory and technical barriers prevent the existence and the development of cross-border cash transportation in the euro zone, in particular between national central banks' (NCB) branches in one country and financial institutions' branches in another country.
- The access to cross-border NCB services is part of the natural development of the single currency usage within the euro zone.
- Competition in the cash transportation sector should be fostered within the euro zone in order to maximise efficiency.
- A contingency plan ("minimum cash transport service") should also be developed in order to ensure continuity of service at the appropriate security levels in case of extraordinary circumstances.
- The main objective of a legislative initiative should be to reduce the costs of using cash

Though harmonisation of national laws and regulations may be a lengthy process, a specific "cross-border cash transportation" licence and harmonised rules, notably regarding uniform security standards (guards, containers and vaults), should be defined without delay, provided they do not generate undue costs compared to prevailing national conditions, and that they are as far as possible compatible with national laws and regulations (which may need to be adjusted). This is a priority for the banking industry.

The EPC, with the adoption of its Resolution on facilitating cross-border cash transportation (Doc EPC-0374/03) has already committed to define harmonised rules for the acceptance and use of "smart boxes", and to foster cooperation between all the key players in this field (ECB, banks, manufacturers, cash transport industry, law enforcement authorities…).

3- A common definition of what should be the national central banks' core functions as regards cash is under discussion between the EPC and the ECB.

4- The harmonisation of euro coins' authentication methods should also be explored by the European Commission.

5- Another topic of paramount importance for the banking industry is cash recycling by banks at branch and cash centre levels (including for ATM replenishment). The banking industry very much promotes common rules on cash recycling (authenticity and quality control policy) at Eurosystem level.

   Banks' obligations should be proportional and must not have as indirect consequence that branch recycling is not permitted. Indeed, rules should not result in the requirement for banks to use performing and costly equipment that could not be used at the level of their branches. Furthermore, if banks understand that, as professional, they have to take the responsibility of controlling the authenticity of banknotes and that, in this matter, common harmonised rules could be adopted, they see less reason why rules need also to be adopted for quality control.

   Banks' recycling in branches is also a way to reduce cash transportation thus decreasing the risks linked to such transportation. Security and safety are among the main purposes of bank branch-level recycling.

   Finally, bank branch-level recycling contributes to the general objective of reducing the disproportionate costs for banks in cash handling.

Preferred Legal Instrument

Whilst the banking industry has undertaken to work actively with all relevant stakeholders in order to create a genuine "Euro cash zone", it is looking to the European Commission for a Directive with early implementation instituting a "cross-border cash transportation" licence.

ANNEX 18: DATA PROTECTION ISSUES

Industry Response

The European banking industry favours the fourth option as presented by the European Commission, i.e. to include in a Regulation (possibly within the framework of information requirements) a provision corresponding to Article 13, letter d of the existing Data Protection Directive. This Regulation should be adopted as soon as possible: it is a priority for the banking industry.

This option is indeed the best chance to harmonise in the short run, through a binding and directly applicable provision, the possibilities of exchange of information for fraud prevention purposes in payment systems, between operators and the authorities, and between the operators themselves (by way of an exception to the Data Protection Directive): e.g. a database of fraudulent merchants as regards card transactions.

As regards the scope, this annex primarily pertains to card transactions (and pan-European direct debits in the future). The transactions concerned can be denominated in Euro, or in non-Euro currencies. Considering the very broad nature of data protection, and the many issues related to privacy protection, the baking industry would understand that the present annex deals with enabling the exchange between professionals of - at a very minimum - "negative merchant data" (i.e. data on merchants who have defrauded any third party).

Specific comments

1- The European banking industry believes that the underlying issue is primarily a fraud prevention issue, and not a data protection issue. The annex title is thus misleading.

2- The fight against the rapid expansion of cross-border card fraud in the EU is very much constrained by Data Protection legislation**.** The European Commission and the private sector should thus work closely on a regime (including reasonable safeguards) that would strike the right balance between the individuals' right to privacy and the need to combat fraud. It is indeed vital to share negative merchant data (at a very minimum) as a means of customer protection in order to curb cross-border card fraud.

3- The first option suggested in the Communication, i.e. to ask the Article 29 Working Party to prepare guidelines, is not satisfactory as the Article 29 Working Party has not yet made real progress and its members are not necessarily experts in the cards business, which makes it difficult to convey the key messages regarding the impact of data protection legislation on card fraud prevention. This option presents some limitations and would not be sufficient to achieve the intended outcome, as it would not bind national data protection authorities.

4- The second option, i.e. to invite Member States to amend the relevant national rules, is neither practical nor sufficient, as the industry would have no guarantee that the Member States would actually follow the "invitation" of the EC since they already did not transpose and implement Directive 95/46/EC. Furthermore, as regards the non-uniform implementation of the Directive across Member States, it is believed that the EC should begin possible proceedings as soon as possible with the European Court of Justice.

5- The third option, i.e. a revision of Directive 95/46/EU on Data Protection, may not be feasible in the short term, as a proper assessment of the Directive cannot yet be made due to the late implementation in some Member States (cf. European Commission Report published in October 2002).

6- Card fraud (and in particular cross-border fraud) is rising and is costly for the European banking industry as well as society as a whole. A Regulation is therefore absolutely urgent and necessary.

7- From the point of view of combating fraud in relation to payments, including cards, it is important that any legislation meets the following prime requirements:

   a. Clarity on exactly which legislation/regulation takes priority.

   b. Legal protection from possible infringement of Data Protection legislation when observing legislation designed to prevent fraud: the banking industry recognises that there may be a need to exclude reckless or grossly negligent behaviour but this would no doubt emerge in the detailed drafting. The banking industry has no overriding view on how such legal protection should be achieved, but believe it is important this is done in order to facilitate effective fraud prevention activities.

<u>Preferred Legal Instrument</u>

A Regulation as defined above is recommended.

ANNEX 19: DIGITAL SIGNATURES

Industry Response

The European banking industry strongly advocates a swift completion of the analysis of the report on the implementation of Directive 1999/93 on Electronic Signatures.
The industry urges the Commission to work on this revision as a priority and to propose new measures if appropriate.

Digital certification is fundamentally a product management area, which encompasses a much broader area than pure payments and where principles regarding technical neutrality and competition fully apply. No 'loophole' exists at first sight, yet a full inventory should be undertaken.

Specific comments

Community law should place greater emphasis on the need for harmonization of the different national supervisory systems. It should also be clarified what procedures may be permitted for recognition of certificates issued by internationally active banks.

At the same time it is of vital importance to safeguard and preserve the banks' existing right to decide independently which technical procedure they use to ensure the necessary confidentiality, integrity and authenticity of payment instructions.

The Commission could usefully favour consistency in the Member States and work in co-operation with the Eurosystem regarding the role of trusted entities such as banks acting as Certification Authorities (CAs) for digital signatures. Sometimes there is more clarity about the possibility for non-banks to operate as CAs than for banks to operate in this field. Nevertheless digital signatures are very important to certify the contractual obligations and the identity/existence of the counterpart. Banks should not be granted a more restrictive operational area in the field of electronic signatures and in the relevant role of CAs, just because this type of role was not originally considered for banks, as banks are historical providers of trust.

The objective here should be to create a level playing field for any willing provider, and user, across the Internal Market. In this respect several problems arise from the existing Electronic Signature Directive:

a) PKI signatures are treated as a distinct class of electronic signature (although they only use a different process).
b) The objective of digital signatures is to achieve legal certainty (like with a handwritten signature), but very often they are used to secure data exchange (i.e. to achieve authentication and ensure data integrity).
c) Most Members States allow such "equivalent signatures" to be made only by natural persons (and not by legal persons, or organizations). However the Advanced Electronic Signature concept does not distinguish between equivalent signatures and security signatures. As a consequence in most Members States legal persons are prevented from signing i.e. securing electronic invoices.

At this stage this issue should be underlined and the objective clarified. However one should refrain from legal provisioning before a better and wider understanding of the issues at stake is achieved.

On a more specific note, digital signatures are widely used in closed user groups whose members stand in a pre-existing legal relationship to each other, usually based on contract law (e.g. credit card systems, banking systems, corporate intranets). For such closed systems, the present Directive recognises that there is no need for regulation of digital signatures, since all the rights and obligations of the parties are defined by agreement. Because closed systems are not open to the general public, the need for safeguards against a party improperly binding itself through an electronic signature is significantly lower. Thus, **any revision of the Digital Signatures Directive should maintain the *status quo* for closed user groups.**

Preferred Legal Instrument

None

ANNEX 20: SECURITY OF THE NETWORKS

Industry Response

The European banking industry favours the second option suggested by the European Commission, i.e. to refrain from further legislation and to ensure that the European Network and Information Security Agency (EUNISA) plays an important role in providing advice for financial institutions.

As regards the scope, the industry understands that this annex pertains to all electronic payment instruments, independent of their currency denomination.

Specific comments

1- European regulators should refrain from laying down excessively detailed security rules that would prove to be inadequate due to the rapid evolution of fraudulent practices. Indeed, since the various types of computer-based attacks may change very rapidly, self-regulation by the banking industry is certainly the most effective means of quickly adapting to each specific new threat, in light of a regulatory environment that is sufficiently general to ensure sustainability. For this purpose the EUNISA could provide an excellent forum and assist the banking industry in formulating security standards for the protection of payment transactions in open networks. The European banking industry should thus be represented in the EUNISA Management Board as well as in its Expert Advisory Board. Finally, hacking, identity theft and intrusion/data retention are among the main crimes the agency should seek to combat.

2- The first option suggested by the European Commission, i.e. "*to introduce in the New Legal Framework for Payments additional provisions complementing those of existing EU legislation*", is not acceptable. Such legal provisions would not solve the problem at its roots (combating cyber crime) and would put the burden of the prevention of cyber crime only on PSPs and merchants. Furthermore, creating a legal obligation to protect the network, derived from laws on data protection, would single out certain security measures and have a detrimental effect on the entire security of the outsourcing system (SWIFT, Card schemes).

3- As regards the proposal to "*concretise the general obligations of result contained in the Article of the Data Protection Directive*" with a view to:

   a. "*Ensure that the possible financial consequences resulting from the security breach are not met by the customer*": this option is not acceptable. Such provision would indeed not add any value, as this is already the case.

   b. "*Ensure that the customers are informed in case security breaches allow unauthorised access to such data by 3rd parties through information networks*": this provision is not acceptable either; for safety reasons, possible threats and the protective measures are often not declared in public. Introducing a legal obligation to inform PSUs of possible violations could lead to an undesired loss in confidence.

4- Credit institutions have already stated that they welcome actions and initiatives that make cyber-crime a more serious offence and that look at harmonisation in this respect across the EU in cooperation with other jurisdictions (e.g. the United States). The most important advance will be the definition of cyber crime at EU level in order to pursue and severely punish offenders across borders. The industry believes that there must be dissuasive sanctions to punish unauthorised access to automatic data processing systems, the destruction or modification of data and the alteration of system functioning. It is also necessary to sanction parties who make available: data, programs, hardware or information specifically designed or adapted to enable unauthorised access to an automatic data processing system.

A distinction must therefore be made between the criminalisation of fraudulent activities on payment networks for which further EU harmonization through legislation would be welcome by the industry and the preventive measures to secure the payment networks which should be left to the industry in order to encompass all technological developments.

5- In general, security rules must be in proportion to risks and must not go beyond legitimate security requirements. Therefore European government authorities must not lay down excessively detailed security rules that would prove to be inadequate due to the rapid evolution of fraudulent practices and would lack flexibility and the capacity to respond rapidly to new forms of cyber crime.

6- Rather than additional EU legislation, co-ordination among the various supervisory measures at national level is needed. In particular co-operation between the Eurosystem and the European Commission to avoid conflicting measures and a right balance between the necessary customer confidence and an environment that allows for innovation and product management (e.g. measures for supporting competition and new payment means versus security measures only).

Preferred Legal Instrument

Through self-regulation the banking industry has and will continue to undertake its utmost to ensure the security of networks for the part that is directly under its control.
However, the banking industry welcomes a more pro-active approach from legislators in making cyber crime a very serious criminal offence.

ANNEX 21: BREAKDOWN OF A PAYMENT NETWORK

Industry Response

The banking industry opposes the concept of strict liability for failed payments in case of breakdown of a payment network.

Specific comments

The security and robustness of the payment infrastructure is the responsibility of all service providers which are already get incentives to keep payment networks operational in order to retain customers and produce revenue. This issue is best left to the market under the control of Central Banks as overseers of payment systems (e.g. BIS Core Principles or ECB e-money requirements).

Banks are accustomed to offer highly secure systems and to live up to their responsibilities in case of breach or breakdown. Secure and cost-efficient payment systems that are in place today should not be burdened by additional security requirements. This is an area where self-regulation by the banking industry is preferred. Credit institutions comply with resilience and business continuity obligations imposed to them by competent regulatory authorities.

Rather than additional EU legislation, co-ordination among the various authorities at EU and national level is needed, in particular co-operation among the ESCB and the Commission, in order to avoid conflicting measures and to achieve a right balance between necessary customer confidence and an environment that allows for innovation and product management (e.g. measures for supporting competition and new payment means versus security measures only).

A payment network breakdown is a market issue, to be resolved though contractual clauses. Whilst liability for loss can arise upon the failure to provide a contracted for service, it would be a general rule in banking or payment related service contracts (like in many other services to the public at large) to have standard terms and conditions excluding and limiting liability, particularly liability for any consequential loss.

Why should a PSP be strictly liable for both direct and indirect loss when other service providers, such as large utilities, would not be subjected to a similar rule?

Moreover, there is not one single payment channel, but a number of competing/parallel payment channels, thereby providing system resilience. If one payment network breaks down, it is always possible to use another network (e.g. paying by cash or direct debit instead of by card, using telephone banking, self service machines or the branch network in case of breakdown of the online banking channel, etc.).

Legal responsibility in case of breakdown of a payment network

The legal responsibility in case of breakdown of a payment network is a matter subject to contractual law. The payment systems and networks have their own rules, which, amongst others, establish the service levels and the degree of compensation in case of breakdown. Furthermore, these systems are monitored and controlled by the appropriate overseers, the Central Banks. There is no room for additional legal measures.

Pursuant to tort law provisions in all Member States, credit institutions have the obligation to indemnify their customers, provided that there are damages and liability of the credit institution *(breach of resilience and business continuity obligations).*
The existence and extent of damages should be a matter of the national law applicable. Quantification and proof of damages have to be treated on a case-by-case basis and cannot be cast into general legal provisions.
The practical possibility to use other means of payments to complete a transaction should create a presumption against liability of the credit institution.

If, despite the industry's' opinion to the contrary, the European Commission eventually opts to impose strict liability to credit institutions, this regime should also apply vis-à-vis the institutions' service providers, i.e. telecommunications and electricity companies, which usually waive in the outsourcing contract any liability arising from network breakdowns. In this way, the damage is ultimately attributed to the entity most closely connected to it.

The case of force majeure should be taken into account, and the PSP cannot be held liable for situations on which it has no effective control. Results of European Financial Market Lawyers Force Majeure working group should be reviewed by the Commission.

If it is felt by some Member States that payment services include a public service dimension in which the continuity of service must be ensured. Public authorities (and not PSPs) would thus have a role to play (contingency measures, public guarantee fund…).

Any notion of consequential damage would raise a number of practical difficulties, in proving the damage and determining the amount to be refunded, etc. It would therefore be unreasonable to include a legal provision in this field.

For example in the recent case of email "phishing" attacks against UK banks, one online provider saw the taking down of the online service as a key response to the attack. Such attacks are beyond the direct control of the provider, due to the direct email contact between attacker and customer. The industry considers it inappropriate to penalise a provider for taking measures to protect its customers in this manner.

This being said, the banking industry welcomes actions and initiatives that make cyber-crime a more serious offence and that look at harmonization in this respect across the European Union in co-operation with other jurisdictions (e.g. United States). The measures taken by the Commission so far are welcomed (see comments to Annex 20).

The question referred to in Annex 21 is a sub-issue of Annex 12 (non-execution or defective execution).

Preferred Legal Instrument

Self-Regulation