EUROPEAN CENTRAL BANK

COMMENTS ON THE COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT CONCERNING A NEW LEGAL FRAMEWORK FOR PAYMENTS IN THE INTERNAL MARKET (CONSULTATIVE DOCUMENT)

INTRODUCTION

The Commission's initiative for a New Legal Framework for Payments (NLF) is an important element in further strengthening the legal foundation of the single market for payment services in the European Union. This note reflects the views of the Eurosystem on the consultative document.

The Eurosystem notes that the consultative document refers to a "Single Payment Area". Since this term could be confusing for two reasons, the Eurosystem proposes avoiding it in future communications. First, a Single Payment Area may be misleading in so far as it refers to an area with more than one currency. Certainly, the euro is the single European currency. Since some Member States have a derogation, the EU citizens cannot yet benefit from a truly Single Payment Area. Second, an uninformed reader may easily confuse "Single Payment Area" with "Single Euro Payment Area" (SEPA) which the banking industry has used for some time. Accordingly, in this document the Eurosystem uses instead the term "single market for payment services"[1].

The Eurosystem welcomes, and agrees in principle, with the Commission's comprehensive analysis of today's payment market, raising important questions concerning the further development of EU legislation in this field.

The consultative document discusses questions of relevance for a number of different policy areas: notably general rules for the Single Market, prudential supervision, consumer protection, competition policy and security. The Eurosystem recognises that promotion of the single market for payment services does indeed call for action in all these fields. In this context, the Eurosystem notes that the Treaty (Article 105(2) and Article 22 of the Statute of the ECB and the ESCB) entrust the ECB/Eurosystem with promoting the smooth functioning of payment systems. Article 22 of the Statute provides that the ECB and the national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Community and with other countries.

Hence, as a result of its mandate, the Eurosystem has a vital interest in the success of the Commission's NLF project. Since the establishment of the single market for payment services will call for efforts by all stakeholders and may require action in numerous policy fields, these comments concern all questions. Efficiency and safety of payment systems and instruments, however, underpin the reasoning.

To further enhance the single market for payment services, the Eurosystem emphasises the need to harmonise fundamental concepts and adopt a basic, consistent legal framework. However, over-regulation must be avoided and market forces should be allowed to work without unnecessary hindrance within a conceptually sound and clear framework.

The Eurosystem regards the following elements as necessary:

– first, the NLF should be based on the established EU monetary order in which credit institutions play a fundamental role. They should continue to be the only agents allowed to take deposits which may function as a means of payment i.e. settlement assets. This activity should continue to be subject to licensing and prudential supervision;

1 The distinction between single market for payment services and Single Euro Payments Area even has an institutional dimension. It reflects the different fields of competence of the Community legislator (Single Market) and the ECB/ESCB (the euro), in particular while some Member States have a derogation.

– second, the NLF should ensure a level playing field for all enterprises providing payment services. The same business activities implying the same risks should be subject to the same regulation;

– third, legislation should provide the basic concepts and lay a consistent framework allowing for transparency and market forces to work;

– fourth, the ECB's/Eurosystem's powers in this field must be respected and should be built on. Notably, the NLF should foster the synergies between the Eurosystem's oversight, and the prudential supervision and licensing to be developed. If the licensing were not to be carried out at the national level by the national central bank itself, the competent licensing authority should be obliged to seek the consensus of and co-operate with the national central bank in the licensing process.

The following text provides first a number of general comments. Subsequently, it comments on the 21 Annexes.

GENERAL COMMENTS

THE EUROSYSTEM WELCOMES THE COMMISSION'S INITIATIVE FOR A NEW LEGAL FRAMEWORK FOR PAYMENTS

During the last decade payment systems and instruments have developed extensively, mainly due to the increasing use of the Internet and other electronic means, thus increasing the internationalisation of commerce and communications. The internal market and the introduction of the euro have increased the need for efficient and low-cost cross-border payments. Legislation has not entirely kept up with these developments. Hence EU payment legislation needs to be overhauled, systemised and modernised.

The Eurosystem welcomes the Commission's initiative on a NLF as a major initiative in further realising the single market for payment services for the EU within its field of competence. The Eurosystem supports the Commission's view that national legal barriers should be removed to enhance the single market for payment services and that the prime driver should be customer interest. However, regulation should be restricted to fundamental issues and provide a common basic level of legislation for market participants.

THE ECB/EUROSYSTEM'S RETAIL PAYMENT POLICY: REGULATION ONLY IF NECESSARY

The general policy of the Eurosystem is to allow market forces to work and to restrict its involvement to facilitating market developments and setting the framework for efficiency and security. The task of the Eurosystem, as defined in the Treaty and in the Statute, is to promote the smooth, i.e. efficient and sound operation of payment systems. To fulfil this task the ECB and the Eurosystem as a whole have several tools: it can act as a catalyst for change, as overseer and as regulator. In its role as a catalyst it assists and encourages the banking industry in establishing new payment services, standards and infrastructures. As an overseer, the Eurosystem ensures that developing and established systems falling under its oversight operate smoothly and efficiently. It takes regulatory measures where necessary to ensure the smooth operation of payment systems if the market fails to deliver basic services in an efficient and sound manner. The Eurosystem has recently adopted a general oversight line in relation to retail payments[2]. In addition, it has adopted security objectives for electronic money schemes[3]. It is currently studying the further development of retail payment instruments.

The Eurosystem would consider it helpful for the Commission to take a similar policy line and expects these developments to be reflected in the NLF.

2 Oversight standards for euro retail payments, June 2003.
3 Electronic money system security objectives according to common criteria methodology, May 2003.

THE EU IS ONE SINGLE MARKET FOR PAYMENT SERVICES

As regards the proposed scope of payments under the new legal framework for payments, the Eurosystem agrees that it should apply in principle to all national and cross-border retail payments within the EU, except cheques. The overall goal must be one domestic payments market in the EU, and *a fortiori* in the euro area. The concept of one "domestic payment market" would be enhanced if, as a rule, no new distinctions were made between national and cross-border transactions concerning: legislation, oversight by the central bank, market practices, standards and rules between "national" and "cross border" transactions within the EU and euro area. Hence as general policy guidance, no specific legislation on cross-border payments should be introduced, as this would be incompatible with a single market for payment services, with the possible exception of payments to and from third countries.

A LEGAL FRAMEWORK DEFINING BASIC CONCEPTS WILL FURTHER DEVELOP THE SINGLE MARKET FOR PAYMENT SERVICES

The Eurosystem considers that a legislative framework is needed to create a single domestic payment area in the EU. Agreeing, enforcing (where relevant) and promoting unequivocal basic terminology and definitions is indispensable. The legislation should establish clear and consistent definitions of key terms for payments. First, it would ensure clarity. Second, such payment legislation would be compatible with the legislative and regulatory order of closely related fields, notably the monetary order. Third, it would serve as a point of reference for market participants to draft comprehensive and transparent contracts. Finally, it would contribute to a harmonisation of national case law in this field.

Fundamental concepts (e.g. payment, payment service provider, payment service user, means of payment, payment instrument, payment transaction, direct debit and revocation) should be clearly and consistently defined in the NLF. This would create a common level of understanding, enhancing transparency and contributing to further integration. The current legislation already contains a number of definitions. These are, however, not yet fully consistent. A number of terms and concepts are also defined in the central banks' oversight documents. The Eurosystem could assist the Commission with the terminology in this area, due to its expertise.

TRANSPARENCY AND CLEAR ALLOCATION OF RESPONSIBILITIES WOULD ALLOW FOR SECURE AND EFFICIENT PAYMENT SYSTEMS

The security as well as efficiency of systems and instruments is of fundamental importance for new developments both by payment service providers and users to be accepted. Other important factors for migrating from an old system to a new one are user-friendliness, accessibility, consumer protection and costs. Successfully providing successful payment services involves a combination of the above mentioned characteristics.

Market participants are aware of the importance of secure payment systems and instruments to the further development of the single market for payment services. The aim of the legal framework should be to provide transparency and clear rules of responsibility with a view to creating legal incentives for payment services providers to implement secure and efficient solutions.

NATURE OF FUTURE LEGAL INSTRUMENTS

As regards the nature of the future legal instruments, the Eurosystem agrees with the Commission that they should guarantee a level-playing field for payment service providers to the extent necessary, ensure the technical neutrality of different payment instruments, avoid unnecessary payment product harmonisation and allow for innovation.

In European Central Bank Opinion CON/2003/9 of 12 June 2003 at the request of the Council of the European Union on a proposal for a Directive of the European Parliament and of the Council on investment services and regulated

markets, and amending Council Directive 85/611/EEC, Council Directive 93/6/EEC and European Parliament and Council Directive 2000/12/EC, (COM (2002) 625 final)[4], the ECB noted in relation to the European securities market that: "the Committee of Wise Men stated, regarding Level 1 'Framework' legislation: "More use should be made of Regulations, rather than Directives... The Committee considers that Regulations should be used whenever possible". The ECB supported the conclusions of the Committee of Wise Men, as indeed did the Stockholm European Council of March 2001 endorsing its Report.

Additional legislation should address clear market failures or guide and assist the enforcement of market practice. For some areas, regulations would be the most appropriate and flexible instrument, as they are directly applicable in the Member States without any need for transposition. However, regulations should only be used "whenever possible". In the case at hand, the appropriate legislative instrument for the NLF at Community level, if any, needs to be identified on a case-by-case basis.

THE NLF MUST BE BASED ON AND ENDORSE THE CURRENT MONETARY ORDER; SYNERGIES BETWEEN SUPERVISION AND OVERSIGHT SHOULD BE USED WHEREVER POSSIBLE

The key principle that providing deposits remains the responsibility of credit institutions, under prudential supervision, must be respected. Hence, all activities that involve creating liabilities similar to deposits must be supervised by the competent authorities. Such liabilities must be redeemable at par in central bank money. Besides, the discussion on the NLF will have to clarify which other payment services activities would need to be subjected to licensing and prudential supervision. The Eurosystem agrees that heterogeneous national regimes and regulations are incompatible with and principally an obstacle to the single market for payment services.

Besides sharing the Commission's aim of harmonising the regime for the provision of payment services, the Eurosystem has as yet no firm view on the need for and scope of a licensing and supervisory regime. Initially the provision of payment services needs to be analysed and defined. The Treaty[5] empowers the ESCB with the promotion of the smooth operation of payment systems. The public also needs safeguards in relation to payment instruments since the information processed is very sensitive.

Therefore, the Eurosystem strongly recommends that any licensing and regulatory regime for the provision of payment services take into account the central banks' oversight function. In particular, the oversight expertise of the central banks will be useful when granting or withdrawing a license to a payment service provider.

SPECIFIC COMMENTS:

ANNEX I

RIGHT TO PROVIDE PAYMENT SERVICES TO THE PUBLIC

A common oversight and supervisory regime for payment service providers should be introduced to create a level playing field for payment service providers throughout Europe. Activities involving deposit taking (providing "means of payment" or "settlement assets") must be restricted to credit institutions. The need for and scope and content of licensing and regulation for the provision of other payment services (payment services without involving deposit-taking) should be analysed carefully and should meet an adequacy and proportionality check. Regulation should be harmonised in this field to ensure a level playing field. The regulator/licensing authority must co-operate with the oversight function.

4 OJ C 144, 20.6.2003, p. 6.

5 The fourth indent of Article 105(2) of the Treaty and Article 3.1 and Article 22 of the Statute of the ECB and the ESCB.

A definition of "payment service provider" and the scope, content and need for licensing, supervision and oversight is of utmost importance. Currently, there is no common regime in the EU for the provision of payment services. It may require a licence in one country and not in others. The Eurosystem agrees with the Commission on the basic principles for providing payment services to the public: appropriate consumer protection rules, prudential requirements proportionate to the risks involved and respect for a level-playing field.

The Eurosystem attaches utmost importance to payment legislation clearly reflecting the EU monetary order. Deposit taking (providing "deposits" or "means of payment"/"settlement assets") and other payment services to the public that do not involve deposit taking need to be distinguished. Deposits or means of payment are assets, accepted by the beneficiary of a payment as a fulfilment of a payment transaction. The European monetary order recognises two main assets as serving this function: first, banknotes and coins as legal tender and, second, deposits with credit institutions. The latter are linked by the redeemability requirement to the legal tender issued by the central bank. Hence, deposits with credit institutions must be convertible at any time at par into legal tender by the credit institutions. The NLF should not affect this.

In contrast, a "payment instrument" would merely mean the set of rules, procedures and conditions for transferring the means of payment from one agent to another (e.g. a credit transfer, credit card, cheque etc.). The payment instrument as such has no value function and hence its operation and administration, as a rule, is rarely subject to prudential supervision in most legal systems, including EU legislation.

Concerning the possible way forward for regulating payment services, other than those involving deposit taking, the Eurosystem doubts whether option 1 is appropriate. However, the Eurosystem has no preference with respect to option 2 or 3, as long as the regulation is based on, and compatible with, the current monetary order, as stated above. Second, licensing and regulation should be appropriate and proportionate. Finally, a licensing authority, must be obliged to co-operate with the payment system oversight function.

ANNEX 2

INFORMATION REQUIREMENTS

The Eurosystem proposes a review of existing information criteria and harmonisation based on the result of that review.

In general the Eurosystem believes that over-regulation should be avoided. Regulatory measures should only be taken if the market fails to deliver sufficient information to consumers. Considering the complexity of the payment market and the importance of security and efficiency, transparency is required. However, before introducing new information criteria, the existing information criteria and how they affect payment providers should be reviewed.

Competition and consumer protection requires transparent and adequate consumer information. At the same time, the quality of the information provided should be promoted, to avoiding overwhelming the consumer. Current EU legislation imposes information requirements in a number of directives e.g. protection of consumers in respect of distance contracts (97/7/EC), information society services, in particular electronic commerce (2000/31/EC), distant marketing of financial services (2002/65/EC). The recommendation on transactions by electronic payment instruments (97/489/EC) also imposes certain information requirements. The requirements are often similar but differ as to who should provide information (supplier, issuer, service provider, established service provider or payment service provider) or who should be provided with information (consumer, recipient of a service, holder,

payment service user or customer). The kind of information that should be provided also differs. In practice, many services fall under more than one EU legislation. Such disparity creates uncertainty as to which law applies. It may impose an excessive burden and thus restrict the development and supply of (new) pan-European payment services.

ANNEX 3

NON-RESIDENT ACCOUNTS

The Eurosystem agrees in general with the principle of equal treatment of resident and non-resident accounts, but considers that the Regulation on cross-border payments fails to provide a legal basis for abolishing different prices.

The Eurosystem agrees with the Commission that euro payments from and to non-residents within the internal market should not be treated differently to those from and to resident payment accounts. However, Regulation (EC) No 2560/2001[6] does not provide a legal basis for abolishing different prices. Price equality for national and cross-border payments is only imposed on payments covering the same type of services. To the extent that payments to and from non-resident accounts cover different services the Regulation does not impose an obligation to harmonise prices. Fiscal and/or statistical factors may also explain different treatment and should also be analysed.

The Eurosystem notes also the difficulties of opening a bank account without being established (employment relationship, registration of place of residence etc.) in some countries. These issues need to be further evaluated.

ANNEX 4

VALUE DATES

The Eurosystem supports harmonised transparency requirements for value dates. The need to regulate the use of value dates should be carefully considered.

The Eurosystem believes that value dates are best regulated contractually by credit institutions (and payment service providers) and their customers. However, to allow comparability and to improve competition, payment conditions – including execution times and value dates – should be transparent.

Value dates are used to calculate interest, mainly on bank accounts. A payment service provider and the institution, which provides the account, may be identical. By regulating value dates in a payments framework, the regulation is limited to payments. Deposits and withdrawals from the account, which are not payments, would not be included, which could give rise to confusion.

Transparency requirements for **the use** of value dates would encourage fully transparent and simple customer information. Since some Member States have introduced statutory provisions on value dates, their experience might prove helpful. In this respect value dates need to be clearly defined.

As a consequence of the above, it is necessary to establish transparency requirements, whereas the need to regulate on the use of value dates should be carefully examined.

ANNEX 5

PORTABILITY OF BANK ACCOUNT NUMBERS

The Eurosystem currently opposes legislative initiatives on the portability of bank account numbers.

6 Regulation (EC) No 2560/2001 of the European Parliament and of the Council of 19 December 2001 on cross-border payments in euro, OJ L 344, 28.12.2001, p. 13.

The Eurosystem welcomes the decision not to introduce any legal measures on the portability of bank account numbers. The practical difficulties related to changing the existing system of accounts, in particular high costs, which in the end would be applied to consumers, do not justify any such legislative initiatives. Therefore, this issue should be dropped from the agenda, enabling the industry to concentrate fully on the rollout of IBAN.

ANNEX 6

CUSTOMER MOBILITY

The industry should improve mobility through self-regulation.

Changing a payment service provider could in some cases be a complex process, depending on the agreement with the payment service provider and the extent of payment relations linked to the service (account). The banking industry is aware of the problem and the Eurosystem agrees with the Commission that the industry should introduce improvements in mobility through self-regulation. The need for fee transparency measures preventing unfair competition by defensive restrictive practices should be balanced against the burden on credit institutions and the resulting costs.

In addition, the Eurosystem strongly supports the standardisation of the customer-bank interface for payment initiation. A single format, e.g. for the electronic payment initiator (ePI) would enhance customer mobility since customers would not need to adapt to new forms and procedures when changing provider. Moreover, offering enhanced facilities for redirecting payment files from one bank to another may also be a competitive element. In this respect the Eurosystem is encouraging the banking industry's efforts in developing and implementing the ePI.

ANNEX 7

THE EVALUATION OF THE SECURITY OF PAYMENT INSTRUMENTS AND COMPONENTS

The Eurosystem welcomes the Commission's proposal to use Common Criteria/Protection Profiles and the encouragement of the use of standards in general.

The oversight of payment systems and instruments security is an ECB/Eurosystem task. They are already taking initiatives in this area. The evaluation of products and components (chip cards, terminals etc.) falls to certification bodies and should be distinguished from the evaluation/assessment of the transaction process/system, which is conducted by central banks. When carrying out their statutory responsibility central banks may rely on certification bodies' assessments to assist them. In that context the Eurosystem agrees with the Commission that mutual recognition of evaluation and certification by national certification bodies is needed, and welcomes the Commission's support for Common Criteria/ Protection Profiles and standards in general.

However, the Common Criteria/Protection Profiles methodology is already used by participants in the European payment industry. Any further regulatory intervention, besides oversight to facilitate its introduction, should therefore be considered carefully. With regard to the need for mutual recognition of evaluations and certifications within the EU, the Eurosystem is willing to co-operate with the Commission to accomplish this.

ANNEX 8

INFORMATION ON THE ORIGINATOR OF A PAYMENT BASED ON THE FINANCIAL ACTION TASK FORCE'S (FATF) SPECIAL RECOMMENDATIONS (SR)

SRVII should be transposed by EU legislation, as proposed by the Commission, although payment system operators and payment

systems as such should not be considered as payment service providers.

The Eurosystem comments as follows on the questions under "what is the issue/problem".

1) SRVII should indeed be transposed by EU legislation, as proposed by the European Commission, in order to ensure that the transposition takes place in a harmonised manner throughout the EU.

2) Throughout Annex 8, and in particular also in the proposal for transposing SRVII into EU legislation, the term "credit transfer" is used to describe "any electronic means with a view to making an amount of money available" from an originator to a beneficiary. It should be noted that "credit transfer" is one specific payment instrument and should therefore not be used to describe all electronic payment instruments. "Payment instrument", which comprises notably credit transfers, direct debits, cheques, card payments and e-money payments (excluding cheques), should be used instead.

3) Within the EU, the minimum information regime, as described in paragraph one of the draft transposition, should be sufficient. At present the national data protection laws in some Member States prohibit including the account number in a payment message. This needs to be addressed.

4) Batch transfers should, in principle, be treated in the same manner as other payments in order to ensure uniform message standards throughout the EU.

5) The Eurosystem does not recommend introducing a "de minimis threshold" since payments would be artificially divided into two groups that in the end could produce a need for additional checks to avoid circumvention. Eventually this might increase the burden for credit institutions.

It is necessary to clarify that the term "payment service providers" used in Annex 8 and in the draft transposition of SRVII does not include payment system **operators** or **payment systems** as such. Footnote 48 already appears to indicate that "payment service provider" only means those financial institutions that have a direct relationship with the originator and the beneficiary of payment, respectively. It does not include intermediary service providers (i.e. payment systems operators such as, for example, the operator of a large-value system or messaging services, such as, for example, SWIFT) that are used by the originator's "payment service provider" to transfer a payment to the beneficiary's "payment service provider". Clarity could, however, be enhanced by specifying that the planned EU legislation will only apply to banks and non-bank financial institutions and other entities which receive payment instructions directly from entities, other than licensed financial institutions, and submit them to payment systems. Payment systems and payment systems operators should not be understood as banks or non-bank financial institutions for the purposes of SRVII.

Finally, a regulation might be particularly appropriate in order to reduce compliance cost and to enhance effectiveness in this area.

ANNEX 9

ALTERNATIVE DISPUTE RESOLUTION

The Eurosystem welcomes the proposal to extend ADR mechanisms to all categories of payments.

The Eurosystem welcomes the proposal to extend the current access to alternative dispute resolution (ADR) for cross-border payments to all kinds of payments since it is in line with the principles for the single market for payment services provisions on and conditions for cross-border payments and domestic payments. As mentioned in the consultative document,

ADR mechanisms will be without prejudice to the right of the parties to use existing judicial procedures thereby recognising that any such mechanism will only be voluntary and cannot be legally imposed on the parties.

However, the scope of Directive 97/5/EC[7] only covers cross border payments. Either the scope of the application should be extended to national payments, or another legal instrument should be adopted.

ANNEX 10

REVOCABILITY OF A PAYMENT ORDER

The Eurosystem supports harmonised revocability rules for retail credit transfers.

The Eurosystem understands that the Commission does not intend to take any measures concerning revocation of large value payments as they are already sufficiently covered by the Settlement Finality Directive (SFD). If this were not the case, the Eurosystem would have strong objections. Likewise, if the Commission intended introducing irrevocability for credit transfers settled in payment systems which are not notified under the SFD[8], the scope of application would need to be defined, i.e. the systems and payment orders would need to be clearly defined.

In any case, the Eurosystem suggests that any initiative concerning payments initiated by the payee e.g. direct debit, should await the outcome of the Commission's further studies on direct debit and the work currently undertaken by the European Payments Council (EPC).

However, the intention seems to be to clarify the revocation of retail consumer/customer payments in the relation between the originator, beneficiary and the payment service provider.

Hence, the Eurosystem supports the Commission initiative but believes that particular attention should be given to the possible concerns of payment systems operators and payment service providers in this respect.

As rightly noted in the Commission's Communication in the introductory paragraph to Annex 10, a distinction needs to be made between "revocation" and objection to debit. Indeed, concepts need to be distinguished. The Eurosystem understands "revocation" to mean the instruction of the originator of a payment to the payment service provider not to execute an instruction that they have given. Since the originator may be either the payer (e.g. in a credit transfer) or the beneficiary (e.g. certain direct debit instructions), an instruction may be revoked in different settings of payment processing (often referred to as credit push or debit pull). The revocation must not be confused with the beneficiary's right of objection to the debiting of their account under certain direct debit schemes. It is understood that the proposals only cover the revocation of instructions initiated by the payer (the credit push situation); see footnote 6.

As a rule, because of the complexity of current payment systems, and the number of participants (especially in cross-border payments), it may be difficult for the payment service provider and the other participants to accept and process a revocation at a certain moment in the transaction chain. A payment transaction today is mainly handled electronically (ideally in a straight through processing manner) and real time payments are developing. To perform a revocation in the middle of such a process would be technically difficult. Regarding the five possible options suggested by the Commission, the first option (revocation until the originator's account has been debited) is the one that might work in the case of a "credit push" instruction. The three subsequent options can be discussed in relation

7 Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, OJ L 43, 14.2.1997, p. 25.

8 The concept of "revocation" is also applied, at least in everyday language, to direct debit transactions. Hence, the ECB addresses revocation as regards such transactions also in its comments on Annex 10.

to both credit push and debit pull instructions. For the first of these it is unclear what is meant by "initiated". For the second it is unclear what is meant by "executed". These concepts would need to be defined further. The fourth option ("until the amount to transfer has been credited to the beneficiary's account") may be a workable solution. However, the appropriate relationship between finality and irrevocability should be further investigated.

Indeed, the fifth option of providing for irrevocability of the order immediately after the order has been given to the payment service provider does not seem feasible and/or desirable as it would considerably diminish the flexibility of the initiator of the order and thereby restrict their liquidity management.

Finally, for the future debate on the governance of (ir)revocability of payment orders originated by the beneficiary, such as in the case of direct debit, the Eurosystem does not support making such payment irrevocable from the moment the payment order is "given" (a concept that would also need to be further defined - i.e. a which point in time is an order being "given"). To ensure legal certainty and clarity, the settlement of payment orders should, as a general rule, not be revoked once entered into a system as defined by the SFD. In the case of direct debit, however, the legal systems of certain Member States require a certain period of revocability

ANNEX 11

THE ROLE OF THE PAYMENT SERVICE PROVIDER IN THE CASE OF A CUSTOMER/MERCHANT – DISPUTE IN DISTANCE COMMERCE

The Eurosystem considers that the (joint) liability of a payment service provider and a merchant in such a dispute should definitely be avoided since this may lead to inefficiencies in and extra costs for the execution of payments.

Buying on distance from unknown merchants could, as the Commission rightly points out, imply a certain risk for consumers. However, this issue concerns solely the relationship between merchant and purchaser and should be handled in view of their relationship. The Eurosystem is of the opinion that the (joint) liability of a payment service provider and a merchant in case of such a dispute should definitely be avoided since it could put unnecessary restraints on the development of smoothly functioning payment services. The payment service provider is not a party to the relationship between the merchant and the customer but is only involved in the execution of the payment transaction initiated by the customer. Therefore, a payment service provider is a third party to the dispute between a customer and a merchant and should not be involved in settling such a dispute. Specifically in distance commerce, payment service providers are not in a position to check whether the disputed transaction involves distance selling, and hence the Commission's guiding principle that any solution should be proportionate to the problem could not be fulfilled. Therefore, the payment service provider settles with finality a payment order made under a distance commerce transaction. It seems also not possible to consider a certain period for the revocability of payments initiated under e-commerce, because they cannot be distinguished. Any dispute of the transaction is irrelevant to the system and should, thus, be dealt with outside the system.

ANNEX 12

NON-EXECUTION OR DEFECTIVE EXECUTION

The Eurosystem supports harmonised rules covering the responsibility of a payment service provider for accurately executing a payment order.

The Eurosystem agrees that a payment service provider should be responsible for accurately executing a payment order and for proving that the transaction has been accurately recorded, executed and credited to the receiver's account. Articles 17 and 18 of the UNCITRAL model law on international credit transfers provides

that credit institutions' liability for damages in case of non- or late execution of a payment is effectively limited to interest (unless caused wilfully or by gross negligence), **excluding** any claim for consequential damages. As these rules correspond to market practice and are already in line with legislation in some Member States, the possibility of EU legislation based on this principle should be further analysed. The consequences for the consumers in this context should also be further considered. Carefully drafted provisions concerning the non-execution in the case of *force majeure* are also necessary. In these situations, the payment service provider should as a rule not be liable.

The Eurosystem has further specific comments on the draft articles suggested by the Commission. In particular: (i) Article 2 seems to impose liability for intermediaries, which does not seem to be appropriate; and (ii) any provision stating that contractual exclusion or limitation of liabilities laid down by law is unnecessary, since this principle will apply even if not specifically stated anywhere.

ANNEX 13

OBLIGATIONS AND LIABILITIES OF THE CONTRACTUAL PARTIES RELATED TO UNAUTHORISED TRANSACTIONS

The payment service provider is clearly responsible for security and organisational aspects under its control. However the responsibility of the payment service user for protecting security devices under their control should also be emphasised, in the interests of a fair balance between market participants.

As mentioned above, the Eurosystem agrees that, as a rule, the payment service provider is in a privileged situation to provide evidence of a transaction, since the payment service provider retains its details. However, the importance of keeping security devices safe (such as key devices needed to use a payment instrument or a personal code) as part of authorisation must be made clear to the payment service user. As soon as the payment service user has received a security device they have a responsibility for protecting this. The user's responsibility must be clearly stated and communicated. By diluting the responsibility for security devices, there are no incentives for the payment service user to protect those devices or to act in a secure manner. The Eurosystem therefore suggests emphasising the responsibility of the payment service user for security devices. It should also be clearly stated that the payment system provider is responsible for all relevant security and organisational aspects that are under their control.

ANNEX 14

THE USE OF "OUR", "BEN", "SHARE"

The Eurosystem supports self-regulation such as the EPC initiative on a convention on interbank charging practices.

Article 3(2) of Regulation 2560/2001 provides that charges for cross-border credit transfers must be the same as charges for domestic transfers (up to EUR 12 500) from 1 July 2003 and imposes transparency requirements on intermediaries. The Regulation must be complied with simultaneously to the obligations resulting from the implementation of Directive 97/5/EC. As a consequence, in particular after the entry into force of the Regulation (i.e. on 1 July 2003), there is a legitimate need to establish a common standard for all credit transfers (domestic and cross-border) in charging practices by industry convention. Such an industry convention would enable payment service providers to comply with the necessary transparency rules vis-à-vis their customers on the charges to be expected.

The European Payments Council (EPC) has issued a convention on Interbank Charging Practices (ICP) for basic credit transfers falling under Regulation 2560/2001. The ICP will guarantee that the full amount transferred by the originator will be credited to the beneficiary's account, leaving both the originator's and the beneficiary's bank accountable for charging

their own customer (the so-called "SHA" charging option). Hence there is no need to legislate further to the payment sector's self-regulation. However, in order to further enhance transparency, the banking industry should also be asked to properly inform customer on the charging option applied.

The Directive should be brought in line with the Regulation in this respect. All references to charging options for cross-border credit transfers within the euro area should be deleted as soon as possible in order to achieve the required legal certainty for all stakeholders.

Furthermore, the Directive is already implemented in national law. Hence national legislation should be examined and pragmatic solutions sought in order to respond to possible references, if any, to the OUR option as the default option.

ANNEX 15

EXECUTION TIMES FOR CREDIT TRANSFERS

The banking industry (CREDEURO) already addresses this through self-regulation.

The execution time is a core service element. As such it should be left to competitive forces to enhance services. In the Eurosystem's view there is little need to legislate further on this issue, as this could undermine the credibility of the industry's efforts, and limit the potential for further positive developments. A regulated delivery time may well become a fixed threshold. The EPC's convention on CREDEURO offers by way of self-regulation a guaranteed maximum execution time of three days for credit transfers. A further need for legislation should only be considered if the sector's initiative fails.

ANNEX 16

DIRECT DEBITING

The Eurosystem supports the establishment of a pan-European direct debit scheme as part of the SEPA and an analysis by the Commission of national legislation.

Developing a pan-European direct debit scheme is part of the EPC's SEPA project. The Commission is currently co-operating in developing this payment instrument. The Eurosystem supports this work and is already investigating the security requirements for such a scheme. It is of utmost importance for such a scheme to find and establish a sound balance between efficiency and security. Otherwise the incentives to move from established national schemes to the pan-European scheme will be insufficient. The Eurosystem firmly believes that owing to the scale and scope of economies provided by the SEPA, it could achieve this progress.

The pan-European direct debit scheme will need to determine the legal requirements for direct debit schemes. The development of a pan-European scheme will certainly benefit from an analysis of national legislation building on experience and identifying potential legal obstacles to implement the scheme. The Commission's *Study on the harmonisation of the legal framework for cross-border direct debit systems in the 15 Member States of the European Union* of 12 August 2003 (Contract No ETD/2002/B5-3001/C/58) already describes national schemes and compares them. A further analysis of the impact of national law underpinning these schemes is needed to identify possible existing legal obstacles to the implementation of a pan-European scheme.

ANNEX 17

REMOVING BARRIERS TO CASH CIRCULATION

The Eurosystem agrees with the Commission that an internal market approach needs to be implemented and the relevant national rules harmonised.

The Eurosystem has a substantial interest in removing and minimising any obstacles to cash circulation across borders. The Eurosystem

supports the Commission's conclusion that existing national rules relating to the professional activity of cash-in-transit (CIT) companies constitutes an obstacle to the development of cross-border CIT services. An internal market approach needs to be implemented and the relevant national rules harmonised. The EPC Cash Working Group is also working on this, in line with the internal market approach. On 10 December 2003, the European Payments Council adopted a resolution (Doc EPC-0374/03) which recommends the development of specific licences and rules for cross-border banknote transportation.

ANNEX 18

DATA PROTECTION ISSUES

The Eurosystem considers that any new legislation should be limited to clear cases of lacunae in existing initiatives i.e. remove obstacles for an efficient exchange of information to prevent fraud.

The Eurosystem welcomes a clarification of the legal situation and where needed, the removal of obstacles for an efficient exchange of information for the purposes of combating fraudulent transactions. The legal framework for combating fraud effectively, particularly in the area of new and electronic payment instruments and means, should be considered only where clearly necessary and if existing initiatives do not address the issues. One of the main obstacles to combating fraud via payment instruments is the lack of information sharing on fraud owing to the disincentive to share information with competitors. The collection and examination (e.g. by a trusted third party) of personal information to prevent fraud should be permitted. From an oversight perspective central banks have a vital interest in obtaining at least information on types of fraud and the failures of safety features. Central banks are willing to act as a trusted third party for systematic generic information on how fraud is committed. In addition, there are also legal obstacles in some national legislation (e.g. competition policies) which need to be addressed. Hence legal harmonisation at EU level could be beneficial.

ANNEX 19

DIGITAL SIGNATURES

The Eurosystem supports revising existing legislation, taking into consideration the outcome of the Commission's report on the implementation of the Directive on electronic signatures.

The Eurosystem welcomes a revision of the existing legislation to remove obstacles to the mutual recognition of digital signatures in the internal market. However, the outcome of the Commission's report on the implementation of the Directive on electronic signatures[9], due by the end of 2003, should be awaited before initiating any further concrete measures on digital certification. The Eurosystem considers that there are different understandings of electronic signatures at national level. A revision of Directive 1999/93/EC should take into account the danger that a more detailed specification of technical requirements for electronic signatures could hamper development in this area and related services. Any further revision should take into account the present unsolved problems, namely interoperability, security of end-users' devices and accreditation schemes. The work undertaken by EESSI should also be taken into account.

ANNEX 20

SECURITY OF THE NETWORKS

The Eurosystem will only consider alternatives if market initiatives fail to address the issue.

The Eurosystem have an interest in the security of payment networks due to their oversight

9 Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ L 13, 19.1.2000, p. 12.

competence. Currently there are already many initiatives underway in this field. Only if market initiatives fail to address the issue will the Eurosystem consider alternatives. The Eurosystem welcomes work and co-operation in this field.

ANNEX 21

BREAKDOWN OF A PAYMENT NETWORK

The Eurosystem considers that no liability should be imposed on the payment systems provider for force majeure or for other payments that are not entered into the system at the time of the breakdown.

The Eurosystem agrees that payment service providers should be liable to their participants for the accurate execution of a payment order and bear the burden of proof that the transaction was accurately recorded, executed and credited to the receiver's account. However liability has different aspects. Serious breakdowns and *force majeure* (such as "9/11 situations") should be distinguished. No liability should be imposed on the payment system provider in the event of *force majeure*. Breakdown of a payment system could on the contrary be the responsibility of the payment system provider. However, in the case of a breakdown of a payment network and unavailability of payment facilities such as Internet banking websites or card networks, it is difficult, if not impossible, for the customers, participants and merchants to prove that they could not apply alternative payment facilities and/or their potential loss as a consequence of the breakdown. Therefore, the Eurosystem believes that no liability should be imposed on payment service providers for payments not entered into the system at the time of the breakdown.

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