Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the Council and the European Parliament concerning a new legal framework for payments in the internal market’

(COM(2003) 718 final)

(2004/C 302/03)

1. Content and scope of the proposal

1.1 The European Commission issued on 2 December 2003 a consultative document entitled Communication from the Commission to the Council and the European Parliament concerning a New Legal Framework for Payments in the Internal Market. The Commission’s consultative document is the result of preliminary work carried out over a relatively long period and is intended to lead in 2004 to a legislative initiative.

1.1.1 The European Commission perceives inefficiencies of legal and technical nature in the area of cross-border euro retail payments. According to the European Commission, a reason for these cross-border inefficiencies lies in the inadequate legal framework at European level. A number of legal rules relating to payments have been adopted – including the Regulation 2560/2001/EC (*) which introduces the principle of equal charges for national and cross-border payments in euros, the Directive 97/5/EC (**) concerning the protection of the users of electronic payment instruments – but no coherent legal framework is in place. It is a necessary prerequisite for the proper functioning of the internal market for goods and services to be able to use cheap, efficient and secure payment services. The Commission lists a number of guiding principles, which are deemed particularly relevant in the context of the EU payment legislation. They are as follows: 1) Efficiency as a permanent objective; 2) Security as a ‘condition sine qua non’; 3) Competition: access to markets and level playing field; 4) Customer (***) protection at a high level; 5) Legal provisions need to be technically neutral; 6) Recasting of payment legislation must add value; 7) Nature of a future legal instrument(s). It is intended to lead in 2004 to a legislative initiative.

1.2 The Commission’s consultative document is the result of preliminary work carried out over a relatively long period and is intended to lead in 2004 to a legislative initiative.

1.3 The Commission aspires, through the removal of technical and legal barriers, to achieve efficiency of payment services, competition on equal terms, adequate consumer protection, security of payments as well as legal certainty for all parties involved in a payment process.

1.4 The Commission recognises the efforts undertaken by European banks (**). Indeed the European Payment Council was established in June 2002. It decided on a wide-ranging work programme for the Single Euro Payment Area with suggestions for considerable changes on how to organise payment services in the European Union. These plans include, in particular, the decision to establish, as a priority, a new infrastructure (**) for credit transfers in euro at very low transaction costs and an expedient execution time of three days maximum.

1.5 In the Commission’s view, the liberalisation of capital has facilitated cross-border money transfers within the EU. At the same time, the internal market, especially for retail payments, is still not as efficient as at a national level. Differences also exist between national legislations and conventions with regard to payment services in the internal market. The new legal framework should remove, where necessary, these legal barriers to the single payment area, in particular if they create an obstacle to the proper functioning of EU-wide payment infrastructures and systems as, for instance, the rules relating to the revocation of a payment order differ depending on where the order was placed in the internal market. Interoperability, the use of common technical standards and harmonisation of the essential legal rules are paramount.

1.6 Legal uncertainty is an element hindering payment service providers and users from transacting without reticence or at all. This is, for example, the case for direct debit transactions, which do not yet exist at the EU level (see Annex 16). It is also relevant for regular, recurring payments (e.g. standing order for a foreign newspaper or a public utility for a summer house in another Member State) for which ‘domiciliation’ is not possible. If the users, e.g. consumers and SMEs, should reap the full benefit from the internal market, cross-border payment services have to be as efficient as those at a national level. The new legal framework should therefore close the loopholes and enhance confidence and welfare of consumers in the single payment area in the internal market.

(***) By customer is meant consumers and other persons, such as retailers and SMEs, using payment services.

1.7 In the internal market consumer confidence in payment transactions is in particular relevant since there is often a cross-border dimension and since confidence is essential when using the potential of e-commerce within the EU-market. Article 153 of the Treaty therefore requires a high level of consumer protection, which is a guiding principle for the new legal framework. However, the costs for such protection need to be assessed as they will ultimately be borne by the customer in one or the other way.

1.8 For the benefit of customer protection it is necessary to have coherent and user-friendly information requirements prior and post execution of a payment transaction. Many provisions already exist in the present EU payment legislation in this respect, which need to be reviewed. One of the most difficult tasks is to strike the right balance with regard to the content and volume of information so that the Payment Service User reading it is able to understand and to be aware of these rights and obligations.

1.9 The Commission considers legal safeguards for consumer protection in case of non-, defective- or unauthorised payment transactions also to be very important.

1.10 The essential part of the Communication is represented by the 21 annexes, each raising a specific legal and/or technical issue concerning the efficient functioning of the internal market for payments.

2. General observations

2.1 The objective of the Commission’s initiative of establishing a coherent and comprehensive legal framework for the Single European Payment Area is shared by the Committee. While there are certainly barriers to the internal market for payments, these are a product of differences in national legislation systems. Payments in the internal market today are still very largely governed by national rules and/or conventions. With 98 % of all European retail payments made domestically (1), consumer demand for cross-border payments in the EU is obviously limited.

2.2 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. The improvement of cross-border payment systems should not therefore carry any negative consequences for existing, efficient national payment systems.

2.3 The Commission should remove 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. Indeed, one has to strike the right balance between the self-regulation/co-regulation and the EU legislation.

2.4 According to the EESC (2), self-regulation as well as co-regulation shall be supported. However, strict regulation must be adopted in all areas where self-regulatory or co-regulatory measures proves to be inappropriate, inadequate or incorrectly applied.

2.5 Indeed, the Committee supports the principle of a high, common level of consumer protection on the basis that it is an overriding Treaty objective.

2.6 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.

2.7 The Committee does not think that it would be desirable to exclude cheques from the scope of payments covered by the new instrument, since this means of payment is still used in some Member States.

2.8 It will also be necessary under the new arrangements to ensure, through self-regulation, that credit and debit cards issued or authorised by any financial institution recognised in a Member State are accepted by any ATM in any other Member State.

3. Specific observations

3.1 Right to provide payment service to the public (Annex 1)

The treatment of this issue in a new legal framework for payments is of vital importance to the safety of the financial system. As a payment system is the cornerstone of the entire economy payment services have to be regulated in all Member States. 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. A binding and directly applicable legal instrument (Regulation) to implement the Commission option 2 (special licence for payment services) would ensure a secure legal framework for this activity. It has to be clear that if a payment service provider is allowed to take deposits he has to be subjected to the banking licence (solvency requirements etc.). On a general note, it is understood that any Regulation to be developed in this area will also apply to non-European payment service providers operating within the Union.

(1) Aggregate percentage of various sources (Swift, EBA, Card Schemes) compiled by the Fédération Bancaire Européenne (2003).

(2) EESC 500/2004, rapporteur Mr Retureau.
3.2 Information Requirements (Annex 2)

Credit institutions are obliged to comply with the Directive 97/5/EC on cross-border credit transfers, the Regulation 2560/2001/EC on cross-border payments in euros and the Recommendation 97/489/EC on electronic payment instruments. Some Member States may have their own national legislation and there exist the EU rules that specifically deal with consumer information issues, i.e. the Directive 2002/65/EC concerning the distance marketing of consumer financial services and the Directive 2000/31/EC ('the E-commerce Directive'). These requirements, sufficient in scope and content, are implemented by banks. The Committee fully supports the Commission initiative of consolidating existing legal provisions in order to establish one clear legal text that will cover the whole arena of information requirements. Information requirements have to be so general as to allow them to be applied to payment instruments that do not yet exist today.

3.3 Non-Resident Accounts (Annex 3)

This issue reaches far beyond the area of payments and should thus be considered somewhere else.

3.4 Value dates (Annex 4)

3.4.1 Value dating is not only a payments issue; indeed value dates are often not specifically linked to a payment transaction – it can result from any account operation.

3.4.2 As the Commission admits, value dating is primordially a pricing issue (i.e. a product management or customer relationship). As a product management issue, value dates are independent of bookings, which are used to compute movements on the account.

3.4.3 Value dates may vary by bank, by customers within the same bank, or even by different operations of the same customer within the same bank.

3.4.4 The Committee welcomes the idea of transparency requirements for payment service providers on the use of value date. There should be a moderation of the financial impact of value dating on the consumer. Convergence of the system of value across Europe must also be considered, although since national systems vary considerably between the Member States, convergence must be seen as a medium-term objective.

3.4.5 This convergence process should be guided by the principle that the value date of a payment transaction must be the same as the date at which the money flow of the payment order at the relevant payment service provider takes place.

3.5 Portability of bank account numbers (Annex 5)

3.5.1 The existing Regulation 2560 refers to IBAN (1) and BIC (2) which have been promoted and sponsored by the European Authorities, including the ESCB (European System of Central Banks). The IBAN numbering standard is accepted and well functioning across the EU, proving its success. This coding system does not allow portability. Banks should, as a minimum, guarantee the customer to be able to keep his account number when moving to another branch within the same bank.

3.6 Customer mobility (Annex 6)

As a general rule a competitive market will provide for a natural drive towards more customer mobility. Banks must facilitate the transfer of accounts as far as possible by forwarding all relevant details to customers. The Committee fully encourages self-regulation aimed at increasing customer mobility. In addition the Committee is in favour of transparency on closing fees. Those fees should be reasonable and geared to the real administrative costs involved in closing and transferring accounts. In addition, they should be communicated before a customer opens an account with a bank.

3.7 The evaluation of the security of payment instruments and components (Annex 7)

Since legislative initiatives would run the risk of enshrining old technological solutions (security components are by essence perpetually adjusted) standardisation should preferably be industry led in the frame of self-regulation that is proposed as a first option by the Commission. The Committee believes that industry-led certification on security should be brought in line with common EU principles to be established, in order to avoid confusion.

(1) International Bank Account Number
(2) Bank Identifier Code
3.8 Information on the originator of a payment (SRVII of FATF) (Annex 8)

The FATF is an inter-governmental body setting standards and developing policies to combat money laundering and terrorist financing on an international level. The Special Recommendation VII in the field of terrorist financing refers to wire transfers and states 'Countries should take measures to require financial institutions, including money remitters, to include accurate and meaningful originator information (name, address and account number) on funds transfers and related messages that are sent, and the information should remain with the transfer or related message through the payment chain. Countries should take measures to ensure that financial institutions, including money remitters, conduct enhanced scrutiny of and monitor for suspicious activity funds transfers which do not contain complete originator information (name, address and account number). The Committee suggests that Special Recommendation VII should be implemented in a fully harmonised way in form of a Regulation throughout the internal market so as to ensure its consistent and uniform application. The respect of privacy requirements is crucial in this context. The countries of the European Economic Area should preferably also be included. On a specific note, the information on the payer should include the name of the account holder, instead of that of the payer, as they might differ, so that the information on the account holder is already stored and easily accessible by the payment service provider.

3.9 Alternative dispute resolution (ADR) (Annex 9)

The Committee in its opinion on the Commission Green Paper on ‘Alternative dispute resolution in civil and commercial law’ (1) supports FIN-NET since its inception by the Commission. It demonstrates that cross-border conciliation schemes can work efficiently and without bureaucracy using existing mechanisms. The efficiency of 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 for the consumer.

3.10 Revocability of a payment order (Annex 10)

3.10.1 To ensure the legal certainty for a customer, a more appropriate approach for this annex would be to discuss the definition and communication of a ‘point of irrevocability’ according to the payment instrument used. The Committee supports that a customer should be informed about irrevocability conditions regarding various payment systems and the payment instrument involved.

3.10.2 It also has to be kept in mind that customers are not only sending but receiving payments. Extensively long revocability periods would then have the reverse effect of being detrimental to customers expecting those payments.

3.10.3 Further, it is important to distinguish between customer revocability and system revocability. For clarity and legal certainty reasons, the settlement of payment orders should, as a general rule, not be revoked once entered into a system as defined by the Settlement Finality Directive.

3.10.4 The Committee is of the opinion that the issue of revocability is complex and that further discussion is necessary. Nevertheless, the payment service provider should inform his customer on demand about the point of irrevocability regarding the individual payment in question.

3.11 The role of the payment service provider in the case of a customer/merchant-dispute in distance commerce (Annex 11)

The Committee considers that a distinction must be made between the basic transaction and the execution of the payment: the payment transaction as such is completely neutral. Neither the originating nor the beneficiary’s banks have any influence on the underlying transaction between the originator (customer of the merchant) and the beneficiary (merchant). The Committee acknowledges that the issue represented by this annex is very complex and needs further discussion.

3.12 Non-execution or defective execution (Annex 12)

3.12.1 The Committee agrees that a payment service provider should be responsible for accurately executing a payment order and for proving that a transaction has been accurately recorded, executed and credited to the beneficiary’s account. He is responsible for the part of the payment system (in a technical sense), that is under his control. At the same time it is clear that a payment service provider cannot be held liable beyond his civil responsibility, and certainly not if he was not negligent, or in case of ‘force majeure’. It is therefore up to the service provider to prove that the payment transaction was accurately recorded, executed and entered into the accounts in the terms in which it was ordered, and this obligation cannot be limited or avoided by contractual means.

3.12.2 The Committee believes that payment service providers could offer to be liable for claims relating to matters outside their control in the form of a value added service. This would be beneficial for a consumer and would lead to increased competition.

(1) OJ C 85, 8.4.2003.
3.13 Obligations and liabilities of the contractual parties related to unauthorised transactions (Annex 13)

3.13.1 With respect to card payments, credit institutions have already to comply with the provisions of the Recommendation 97/489/CE, particularly regarding:

— the limitation of the card holder's pecuniary liability (unless he or she commits a serious fault) to 150 euros for transactions carried out with lost or stolen cards prior to stop payment notification; and

— the reimbursement of debits that are disputed in good faith (and of all associated bank expenses for involved debits) resulting from fraudulent transactions effected at a distance, without physical use of the card, or from transactions with a counterfeit card.

3.13.2 Organised crime also stands behind fraudulent transactions. The 150 euro threshold has the potential of encouraging fraud. Therefore, the Committee believes that a risk-based threshold should be introduced. The cardholder's liability in the above mentioned case should be a percentage of the total credit limit of his card to which he agrees in his contract. Such a fair approach would reflect the true risk and cost, while at the same time more efficiently discouraging fraud, thus reducing the common cost.

3.13.3 A limited update of the Recommendation 97/489/EC in accordance with the New Legal Framework is a positive way forward. The Committee is of the opinion that this annex should be read in connection with the opportunities to use an electronic signature in relation to the Directive on e-signatures.

3.13.4 It is unclear whether a payment service provider can prove conclusively – if at all – whether or not the customer was the initiator of the transaction effected with the technically secure electronic payment instrument. Especially in the case of online banking transactions it seems that payment service providers have difficulty providing such evidence since these transactions can be conducted on private PCs which are beyond the payment service provider's sphere of control.

3.14 Use of ‘our’, ‘ben’ and ‘share’ (Annex 14)

3.14.1 The principle of transferring the full amount to the beneficiary is central to this annex. This principle is now well established following the Regulation 2560/2001 for payments that can be processed in a full STP manner (Straight-Through-Processing) as long as the corresponding domestic payments are paid in full without deduction on the beneficiary side.

3.14.2 In addition, self-regulation exists in the form of the ICP (Interbank Convention on Payments) (1) 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.

3.14.3 Any legal framework should move away from technical terms used within specific message formats and systems (such as SHARE, BEN, OUR), which in many cases are inappropriate in a domestic context. The Committee is of the opinion that no additional provisions should therefore be created to replace the Directive 97/5/EC. The current charging options exist to give customers a choice, which is part of terms and conditions negotiated between a customer and a 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 instruments and are necessary to support the various payment types as well as distance commerce. The Committee would like the industry to increase transparency on the charging option applied.

3.14.4 The Committee encourages the Commission to remove the discrepancy between the default ‘OUR’ option of the Directive, a charging mechanism that does not exist in most of the Member States, and the ‘SHA’ option, favoured by the Regulation.

3.15 Execution times for credit transfers (Annex 15)

3.15.1 The Committee recalls that European banks within the European Payments Council agreed to the default credit transfer execution time of 3 banking working days (after the acceptance date) via self-regulation under the CREDEURO Convention. In fact, the 3 days are default times which can be further improved by individual banks. As the execution time is a core service element, it should be left to competitive forces to enhance services.

3.15.2 A further need for legislation should only be considered if the sector’s initiative fails.

(1) ‘our’, ‘beneficiary’ and ‘share’ are three charging options for credit transfers.

(2) Interbank Convention on payments for basic credit transfers falling under the Regulation 2560/2001.
3.16 Direct debiting (Annex 16)

3.16.1 Legislation to be passed and/or legal barriers to be lifted will be precisely identified by the European Payments Council (EPC) and communicated to the Commission once the Pan-European Direct Debit scheme has been approved formally by the EPC. The legal framework needed to support the Pan-European Direct Debit scheme will very much depend on the model chosen. Therefore, the Committee is convinced that a close cooperation of the industry and the legislator (EC) should be envisaged.

3.17 Removing barriers to professional cash circulation (Annex 17)

3.17.1 This annex is not related to the question of payments and thus outside the scope of the New Legal Framework for Payments.

3.17.2 There should be no discrimination between cash and non-cash payments regulation. A number of regulatory and technical barriers prevent the development of cross-border cash transportation in the euro zone, in particular between national central banks’ branches in one country and financial institutions’ branches in another country.

3.17.3 The access to cross-border National Central Bank (NCB) services is part of the natural development of the single currency usage within the euro zone.

3.17.4 Competition in the cash transportation sector should be fostered within the Euro zone in order to maximise efficiency, but the Committee expresses the necessity of creating a cross-border cash transportation licence and sufficient controls of its application.

3.18 Data protection issues (Annex 18)

The Commission’s option of including in a Regulation a provision corresponding to the Article 13, letter d of the existing Data Protection Directive 95/46/EC (1) is the best chance to harmonise in the short run the possibilities of exchange of information for fraud prevention purposes in payment systems (between operators and the authorities, and among the operators themselves, by the way of an exception to the Data Protection Directive: e.g. a database of fraudulent merchants as regards card transactions).

(1) Particular attention should be paid to the accuracy of the translations. In Italian, for example, the heading should rather be Rimozione delle barriere al trasporto di fondi, which is closer to the meaning of the original version.

3.19 Digital signatures (Annex 19)

The Committee suggests that the Commission should first of all submit their report on the implementation of the Directive 1999/93/EC (2) on Electronic Signatures. Commission proposals for new measures are welcome. On a general note the Committee would like to highlight that digital certification is a product management area where the principles of technical neutrality and competition apply.

3.20 Security of the networks (Annex 20)

The Committee welcomes 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 employment of dissuasive sanctions to punish unauthorised access to automatic data processing systems with the aim of fraud, the destruction or modification of data and the alteration of system functioning is positive. 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 in order to commit fraud. A distinction must therefore be made between the criminalisation of fraudulent activities on payment networks for which further EU harmonisation through legislation would be welcome and the preventative measures to secure the payment networks which should be left to the industry in order to encompass all technological developments.

3.21 Breakdown of a payment network (Annex 21)

3.21.1 It seems to the Committee that the question referred to in the Annex 21 is a sub-issue of the Annex 12 (non-execution or defective execution). Indeed, it has to be recognised that:

- payment network breakdowns are not a habitual phenomenon;
- payment network breakdowns can affect systems and appliances that are not in the direct control of the credit institution (network externalities);
- credit institutions have to comply with resilience and business continuity obligations imposed to them by the competent regulatory authorities.

3.21.2 No liability should be imposed on payment service providers for payments not entered into the system at the time of the breakdown. The payment service provider has limited liability according to his civil responsibility and should prove that he has taken all necessary measures to prevent the breakdown.


3.21.3 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 a provider, due to the direct email contact between an attacker and a customer. Payment service providers should inform their customers, if possible, before they close down the system for security reasons. The Committee considers it inappropriate to penalise a provider for taking measures to protect its customers in this manner. Further, the Committee encourages payment service providers to be pro-active in the prevention of such types of fraud.

4. Conclusion

4.1 The New Legal Framework should be consistent with the European Consumer Policy Strategy, which sets the achievement of a high, common level of consumer protection as a key objective.

4.1.1 The Committee supports the European Commission’s aim to increase consumer confidence, legal certainty and market efficiency for payments in the internal market. It further welcomes the fact that self-regulation and co-regulation are considered as a possible way forward in several of the areas mentioned in the 21 annexes.

4.2 Priority should be given to the legislative measures covering Annexes 1, 2, 8, 12, 13, 18 and 19. In particular, the annexes on Consumer Information Requirements (2), Information on the Originator of a Payment (8) and the Data Protection Issues (18) urgently require attention.

4.3 Increased cooperation between the Commission and the banking industry should be envisaged concerning the establishment of the European Direct Debit Scheme (Annex 16), the determination of who has the right to provide payment services (Annex 01) as well as in the area of security certification of payment instruments and components (Annex 07).

4.4 Regarding the other annexes it seems to the Committee that self-regulation or co-regulation would be a more appropriate way to achieve the Commission’s aim of an efficient internal market for payments. It is clear that if self-regulatory measures do not prove successful, a European Regulation should be envisaged.

4.5 In the same vein, the Committee suggests that the overall framework should concentrate on providing transparency to consumers and try to build as much as possible on existing practices 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.

4.6 The scope of the Communication is often much broader than just payments and the Commission has to highlight in a more explicit manner the difference between commercial services and payment systems. Any legislative measure related to payments should exclude issues relating to the fulfilment of undertakings other than the payments themselves.


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of the European Economic and Social Committee
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