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Committee on Legal Affairs

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DRAFT OPINION

of the Committee on Legal Affairs

for the Committee on Economic and Monetary Affairs

on the proposal for a directive of the European Parliament and of the Council
on payment services in the internal market and amending Directives 97/7/EC,
2000/12/EC and 2002/65/EC
(COM(2005)0603 – C6-0411/2005 – 2005(0245)(COD))

Draftsman: Rainer Wieland

PA_Leg

SHORT JUSTIFICATION

The proposal for the Directive on payment services in the internal market is aimed at improving economies of scale and increasing competition, which should support the achievement of the Lisbon objectives. Establishing a common legal framework is supposed to allow the consumers to benefit from better transparency and greater choice in the payment services market, but will also require significant investments from services providers and businesses. In response to the Commission's proposal, there is intensive discussion taking place as to the desirability and potential effects of its provisions. With regard to the scope of Committee on Legal Affairs' competence, this Opinion shall contain amendments related to the scope of the Directive, the most obvious improvements in legislative clarity, as well as certain institutional provisions, such as the one introducing the so-called comitology procedure.

Your draftsman supports the choice of legal base for this proposal, as well as the choice of Directive rather than a Regulation to harmonise the various national provisions on payment services.

Taking the simplification objectives under consideration, your draftsman is nonetheless concerned about the missed opportunity to repeal or amend also the Regulation 2560/2001 on cross-border payments in euro, thus limiting the number of legislative acts that regulate this area of European economy. Although it is possibly an unusual procedure, the Parliament should insist on the Commission to incorporate those provisions of the Regulation 2560/2001 that should remain in force, into an additional Title of the proposed Directive, including a repealing clause. With this in mind, the present Opinion contains two amendments that initiate such an exercise, by modifying a relevant Recital and introducing a new Article, both formulated in such a way, that the will of the Parliament is clearly stated, but not as a final legislative proposal.

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission ¹	Amendments by Parliament
Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on payment services in the internal market	Amendment 1 Title Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on payment services in the internal market,

¹ OJ C ... /Not yet published in OJ.

and amending Directives 97/7/EC, 2000/12/EC and 2002/65/EC

repealing Directive 97/5/EC and amending Directives 97/7/EC, 2000/12/EC and 2002/65/EC

Justification

Reasons of legal clarity.

Amendment 2
Recital 5

(5) That framework should ensure the coordination of national provisions on prudential requirements, the access of new payment service providers to the market, information requirements, and the respective rights and obligations of payment services users. Within that framework, the provisions of Regulation (EC) No 2560/2001, which created a single market for euro payments as far as prices are concerned, **should be maintained.** Those of Directive 97/5/EC and the recommendations made in Recommendations 87/598/EEC, 88/590/EEC and 97/489/EC should be integrated in a single act with binding force.

(5) That framework should ensure the coordination of national provisions on prudential requirements, the access of new payment service providers to the market, information requirements, and the respective rights and obligations of payment services users. Within that framework, the **necessary** provisions of Regulation (EC) No 2560/2001, which created a single market for euro payments as far as prices are concerned, **and those** of Directive 97/5/EC and the recommendations made in Recommendations 87/598/EEC, 88/590/EEC and 97/489/EC should be integrated in a single act with binding force.

Justification

This amendment is proposed together with amendment introducing a new Title IV(a) in order to achieve more legislative simplification.

Amendment 3
Recital 10

(10) It is necessary for the Member States to designate the authorities responsible for granting authorisation to payment institutions, for carrying out on-going controls and for deciding whether to withdraw authorisation. In order to ensure equality of treatment, Member States should not apply any requirements to payment institutions other than those provided for in this Directive. However, all decisions made by the competent authorities should be contestable before the courts. In addition, the

(10) It is necessary for the Member States to designate the authorities responsible for granting authorisation to payment institutions, for carrying out on-going controls and for deciding whether to withdraw authorisation. In order to ensure equality of treatment, Member States should not apply any requirements to payment institutions other than those provided for in this Directive, **with the exception of statistical reporting requirements.** However, all decisions made by the

tasks of the competent authorities should be without prejudice to the oversight of payment systems, which, according to the fourth indent of Article 105(2) of the Treaty, is a task to be carried out by the European System of Central Banks.

competent authorities should be contestable before the courts. In addition, the tasks of the competent authorities should be without prejudice to the oversight of payment systems, which, according to the fourth indent of Article 105(2) of the Treaty, is a task to be carried out by the European System of Central Banks.

Justification

The statistical reporting is a common requirement and is not covered by this proposal.

Amendment 4
Recital 18

(18) The information required should be proportionate to the needs of users and communicated in a standard manner. However, the information requirements for a single payment transaction should be different from those for a framework **agreement** which provides for a series of payment transactions.

(18) The information required should be proportionate to the needs of users and communicated in a standard manner. However, the information requirements for a single payment transaction should be different from those for a framework **contract** which provides for a series of payment transactions.

Justification

In order to assure the coherence of the text.

Amendment 5
Recital 28

(28) Given the **differences between the rules governing the operation of payment systems within the Community and those governing payment systems in third countries**, it is appropriate that the provisions on execution for the full amount and execution time be restricted to cases where the payment **service providers both of the payer and of the payee are located in the Community**.

(28) Given the **additional requirements related to currency exchange**, it is appropriate that the provisions on execution for the full amount and execution time be restricted to cases where the payment **is made in euro**.

Justification

This amendment is proposed together with amendment changing Article 2, and restricting the

scope of the whole Directive to payments within the Community and the scope of provisions on execution time (vide also amendment to Article 59(1)) - to the euro zone.

Amendment 6
Article 1

This Directive lays down the rules in accordance with which Member States shall distinguish ***the following*** four categories of payment service ***provider***:

(a) credit institutions within the meaning of Directive 2000/12/EC;

(b) electronic money institutions within the meaning of Directive 2000/46/EC;

(c) post office giro institutions, as referred to in the second indent of Article 2(3) of Directive 2000/12/EC, which are entitled under national or Community law to provide payment services;

(d) other natural or legal persons who have been granted authorisation in accordance with Article 6 of this Directive to provide and execute payment services throughout the Community, hereinafter “payment institutions”.

This Directive also lays down rules concerning transparency conditions, and the respective rights and obligations of users and providers, in relation to the provision of payment services as a regular occupation or business activity.

Central banks acting as monetary authorities and public authorities which provide payment services are not considered to be payment service providers.

This Directive lays down the rules in accordance with which Member States shall distinguish four categories of payment service ***providers, as defined in Article 4.***

This Directive also lays down rules concerning transparency conditions, and the respective rights and obligations of users and providers, in relation to the provision of payment services as a regular occupation or business activity.

Justification

For reasons of legal clarity, it is better that the four categories of payment service providers be covered by a single definition included in Article 4. The exemption of central banks should rather be placed in Article 2(1).

Amendment 7
Article 2, paragraph 1, subparagraph 1

1. This Directive shall apply only to business activities, listed in the Annex, consisting in the execution of payment transactions on behalf of a natural or legal person, hereinafter “payment services”, where **at least one** of the payment service providers **is** located in the Community.

1. This Directive shall apply only to business activities, listed in the Annex, consisting in the execution of payment transactions on behalf of a natural or legal person, hereinafter “payment services”, where **both** of the payment service providers **are** located in the Community. ***This Directive shall not apply to payment services provided by central banks.***

Justification

The inclusion of a third-country dimension is inappropriate: due to a lack of direct relevance for the payment service provider located in such a third country, its compliance with the obligations established by the Directive cannot be guaranteed in the same way as for payments within the European Union. The modified exemption of all activities performed by central banks is moved from Article 1 of the proposal.

Amendment 8
Article 2, paragraph 2

2. ***Save where otherwise provided, this*** Directive shall apply to payment services made in ***any currency.***

2. ***This*** Directive shall apply to payment services made in ***the currencies of the Member States.***

Justification

The scope should be limited to payments in euro and other EU currencies.

Amendment 9
Article 3, title

Negative scope

Exemptions

Amendment 10
Article 4, point (3 a) (new)

(3a) "payment service provider" means
(a) a credit institution within the meaning of Article 1(1) of Directive 2000/12/EC, including electronic money institutions as referred to therein;;
(b) a post office giro institutions, as referred to in the second indent of Article

2(3) of Directive 2000/12/EC, which is entitled under national or Community law to provide payment services; and/or (c) without prejudice to Article 21, a payment institution;

Justification

Electronic money institutions are defined in Art. 1 of Dir. 2000/12/EC as amended by Dir. 2000/28/EC (defining credit institutions as (a) undertakings receiving deposits or other repayable funds from the public and granting credit for its own account and (b) electronic money institutions within the meaning of Directive 2000/28/EC). Therefore, the reference in Art. 1(b) to Dir. 2000/46/EC should be replaced by a reference to Dir. 2000/12/EC. Under d) it would be appropriate to include a cross-reference to Art. 21 which provides derogation from the definition of payment institutions.

Amendment 11
Article 4, point 6 a (new)

(6a) "framework contract" means a payment service agreement characterised by the fact that it commits a payment service provider to the future execution of individual or successive payment transactions on the order of the payer;

Justification

Vide amendment on Article 29.

Amendment 12
Article 29

This Chapter applies to payment transactions covered by **a payment service agreement characterised by the fact that it commits a payment service provider to execute in the future successive payment transactions or individual payment transactions on the order of the payer if the agreed conditions are met. That agreement, hereinafter "framework contract"**, may contain the obligations and conditions for setting up a payment account;

This Chapter applies to payment transactions covered by **a framework contract, which** may contain the obligations and conditions for setting up a payment account.

Justification

The definition of 'framework contract' should be moved from Article 29 to the definitions article and used consistently throughout the proposed directive, replacing the concept of 'framework agreement' contained in recital 18 and Articles 32-33.

Amendment 13

Article 41, paragraph 2

Consent shall consist in an **explicit** authorisation for the payment service provider to effect a payment transaction or a series of transactions.

Consent shall consist in an authorisation for the payment service provider to effect a payment transaction or a series of transactions.

Justification

The 'explicit' consent would be an excessive restriction, as already under general principles pertaining to civil law, such consent may also be given in a tacit or implicit form or it may be granted by means of previously agreed authorisation fiction.

Amendment 14

Article 48, paragraph 3

3. For the purposes of rebutting the presumption referred to in paragraph 2, the use of a payment verification instrument recorded by the payment service provider **shall not, of itself, be** sufficient to establish either that the payment was authorised by the payment service user or that the payment service user acted fraudulently or with gross negligence with regard to his obligations under Article 46.

3. For the purposes of rebutting the presumption referred to in paragraph 2, **an assessment shall be carried out to determine whether or not** the use of a payment verification instrument recorded by the payment service provider **is** sufficient to establish either that the payment was authorised by the payment service user or that the payment service user acted fraudulently or with gross negligence with regard to his obligations under Article 46.

Justification

A legal evaluation if a payment transaction was authorised by the payment service user, with regard to the circumstances of the individual case, would not be possible. The banks do not have any other evidence to prove the authorisation of a card based payment than the payment verification instrument. The shift of liability to the disadvantages of credit institutions is not justified.

Amendment 15

Article 59, paragraph 1

This Section shall apply only if the payment service providers of both the payer and the payee are located in the Community.

This Section shall apply only if the payment is made in euro.

Justification

This amendment is proposed together with the amendment to Article 2, restricting the scope of the whole Directive to payments within the Community, and the scope of provisions on execution time (vide also amendment to Recital 28) - to the euro zone.

Amendment 16
Article 68

In cases where the payment service provider of the payee is not located in a Member State, the payment service provider of the payer shall be liable for the execution of the payment transactions only until the funds reach the payee's payment service provider. ***deleted***

Justification

Following the amendment to Article 2(1) the scope of this Directive is limited to EU.

Amendment 17
Title IV a (new)

TITLE IVa
Cross-border payments in euro

Justification

This amendment is proposed together with amendment modifying Recital 5, in order to achieve more legislative simplification.

Amendment 18
Article 75 a (new)

Article 75a

Regulation (EC) No 2560/2001 shall be repealed with effect from the date specified in the first paragraph of Article 85(1), save as regards those provisions thereof which the Commission proposes should be maintained. In deciding which provisions

should be maintained, the Commission shall pay special attention to the fact that the provisions in question are to apply equally to both payments sent and payments received.

Justification

This amendment is proposed together with amendment modifying Recital 5, in order to achieve more legislative simplification.

Amendment 19
Article 76

In order to take account of **technological and** market developments in payment services **and to ensure the uniform application of this Directive**, the Commission may, **in accordance with the procedure referred to in Article 77(2), amend the list of activities in the Annex to this Directive, in accordance with Articles 2 to 4.**

It may, in accordance with the procedure referred to in Article 77(2), update the amounts specified in Articles 2(1), 21(1)(a), 38 and 50(1) **in order to take account of inflation and significant market developments.**

In order to take account of **inflation and significant** market developments in payments services, the Commission may, in accordance with the procedure referred to in Article 77(2), update the amounts specified in Articles 2(1), 21(1)(a), 38 and 50(1).

Justification

List of activities specified in the Annex to the proposed Directive is an essential part of this legislative act. Deleting the possibility of amending it through the comitology procedure will in consequence require a normal legislative procedure (based on Article 251 TEC) to be used.

Amendment 20
Article 78, title

Full harmonisation, mutual recognition **and mandatory nature of the Directive**

Full harmonisation **and** mutual recognition

Justification

The legal effect of the Directive is obvious on the basis of the Treaties and ECJ jurisprudence.