



European Economic and Social Committee

INT/301
Payment Services

Brussels, 13 September 2006

OPINION

of the

European Economic and Social Committee

on

Implementing the Community Lisbon programme: 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) 603 final – 2005/0245 (COD)

On 18 January 2006, the Council decided to consult the European Economic and Social Committee, under Article 47(2) and Article 95 of the Treaty establishing the European Community, on:

Implementing the Community Lisbon programme: 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 (603) final – 2005/0245 (COD).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 12 July 2006. The rapporteur was Mr Frank von Fürstenwerth.

At its 429th plenary session, held on 13 and 14 September 2006 (meeting of 13 September), the European Economic and Social Committee adopted the following opinion by 191 votes to one, with three abstentions:

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1. Summary

- 1.1 The European Economic and Social Committee (EESC) agrees with the European Commission that, for the establishment of the internal market, it is essential that all internal frontiers in the Community be dismantled so as to enable the free movement of goods, persons, services and capital. A key element in this process is a properly functioning single market in payment services. Such a market, however, is not yet in place. Following the successful introduction of the euro, the EESC now also supports the establishment of a Single Euro Payments Area (SEPA).
- 1.2 The EESC backs the European Commission's efforts to establish a proper legal framework for a Single Euro Payments Area and feels that the proposal for a directive points the way forward.
- 1.3 The Committee welcomes the action already taken by the European Commission and the European banking industry to establish a Single Euro Payments Area, the (really quite ambitious) aim of which is to make cross-border euro payments within the European single market simple, convenient, safe and cheap.
- 1.4 The Committee notes, however, that, in submitting this proposal for a directive, the European Commission has selected a very broad-based approach to the rules in this area that clearly goes beyond the legal framework required for cross-border payment services. The EESC is thus concerned that, not least given the transposition periods required by the Member States and payment service providers and users, the target of establishing the Single Euro Payments

Area in 2008 could be missed because of an overloaded legal framework that goes beyond what is necessary to achieve the objective at hand. The Committee urges that more consideration be given to self-regulation and co-regulation tools.

- 1.5 All that should be needed to achieve the European Commission's objective of launching the Single Euro Payments Area in 2008 is to establish the legal basis for cross-border direct debits and to rework the requisite legal provisions set out under Title II (Payment service providers) and Title IV (Rights and obligations in relation to the provision and use of payment services) of the proposed directive (in relation, among other things, to the authorisation, revocability and refund of direct debits as set out in Title IV). This would make it possible to meet the 2008 launch date for the Single Euro Payments Area.
- 1.6 Not least in the light of the legal provisions already in place, the EESC feels that the principle of better regulation is only served by focusing on those areas that really do require regulatory action. Hence, in the interests of both providers and users of payment services, the basic premise of the proposed directive should be to promote and facilitate payments, not to hamper them by red tape that ultimately makes the systems more expensive and thus less acceptable to users.
- 1.7 The EESC would point to other issues arising in connection with the establishment of a single market in payment services, which it is not possible to resolve here. These include the security of electronic payments and related factors. The question of access to a current account, without which it is now virtually impossible to take part in economic life, is also becoming an increasingly important issue in the Member States.
- 1.8 The EESC recommends a series of specific changes to the proposal for a directive.

2. **Content of the draft directive**

- 2.1 The proposal for a directive is designed to establish a uniform legal framework for SEPA, the main purpose of which is to facilitate cross-border payments. The proposal seeks to harmonise the different legal provisions in place in the Member States so as to:

- enhance competition between national markets by creating a level playing field;
- increase market transparency for payment service providers and users; and
- standardise the rights and obligations of payment services providers and users.

The main provisions of the proposed directive are as follows:

2.2 *Right to provide payment services to the public (Title II)*

- 2.2.1 The harmonisation of market access requirements of non-credit institution payment service providers is designed to create a level playing field, instil more competition in national

markets and reflect market developments in recent years, triggering market entry of a new generation of providers, i.e. payment institutions.

2.3 *Transparency and information requirements (Title III)*

2.3.1 Clear and consistent rules on transparency for payment services are intended to enhance competition by boosting user choice and protection. The European Commission is proposing information requirements for payment services to replace national rules.

2.4 *Rights and obligations of users and providers of payment services (Title IV)*

2.4.1 The proposal for a directive sets out the core rights and obligations of users and providers of payment services. The provisions are designed to make users more trustful of electronic payment systems and thus to secure the efficiency and acceptance of such systems.

3. **General comments**

3.1 The European Economic and Social Committee supports the objective of the draft directive to establish a Single Euro Payments Area, particularly for cross-border payment services. The establishment of a single market in payment services is long overdue and should, as planned, be launched in 2008.

3.2 The European Commission has selected a very broad-based approach to the rules in this area. Indeed, some of the rules go beyond the legal framework required for a Single Euro Payments Area. This is particularly true since harmonised legal provisions are already in place for credit transfers (Directive 97/5/EC on cross-border credit transfers, Directive 2002/65/EC concerning the distance marketing of consumer financial services, and the E-money directive (2000/46/EC)).

3.3 Maintaining established, cost-effective and efficient procedures is no barrier to a Single Euro Payments Area. On the contrary, such procedures can be built upon as a conduit to standardisation, thereby safeguarding the level of security and efficiency that has already been achieved while at the same time making a high-calibre Single Euro Payments Area a reality through intelligent interface management. Guided by the principle of better regulation, the EESC advocates keeping the proposed provisions to the minimum required to improve payments within the European single market and urges that more consideration be given to self-regulation and co-regulation tools.

3.4 The EESC considers the Single Euro Payments Area to be a key prerequisite for transparent product development across Europe, with payment service providers free to compete with each other in a way that also benefits clients. Moreover, the EESC considers it important that consumers retain the existing freedom to use the payment instruments of their choice so that due account can be taken of customer preference.

- 3.5 One difficulty is access to payment systems by payment institutions that do not hold a banking licence. In the interests of fair competition, this requires a uniform level of prudential supervision. The fear otherwise is that competition will be distorted and that the operability and safety both of payment transactions and of payment service providers (e.g. bankruptcy) will be compromised.
- 3.6 The Committee recommends confining the proposed directive to the provisions – set out in Title II (Payment service providers) and Title IV (Rights and obligations in relation to the provision and use of payment services) – that are needed for any future European direct-debit scheme (in relation, among other things, to the authorisation, revocability and refund of direct debits). This should still make it possible both to adopt the directive and to transpose it into national law within the prescribed time frame so that the 2008 launch date for SEPA (including uniform conditions for payment service providers and SEPA Direct Debit) can be met.
- 3.7 The Committee very much welcomes the provisions of Article 79 of the proposal, under which, no later than two years after the directive is adopted, the Commission is to present an implementation report to the European Parliament, the Council and the European Economic and Social Committee.

4. **Specific comments**

- 4.1 The Committee would make the following specific comments about the proposal for a directive:

4.2 *Article 2(1) – Third-country transactions should not be included*

- 4.2.1 Article 2(1) includes within the geographical scope of the directive payments to and from countries outside the European Union and the European Economic Area (third countries). This goes considerably beyond the objective of establishing a uniform legal framework within the European single market. Moreover, this provision may well lie outside the EU's legislative remit and also raises difficulties in that the European legislator is in no position to ensure that corresponding provisions are adopted in third countries. It is therefore wholly inappropriate to impose (as Article 67 does) strict liability for the execution of the transaction in a third country on the payment service provider of the payer without corresponding rules being in place in the third country.

- 4.2.2 The Committee recommends that the scope of the directive be confined to payment services within the European single market.

4.3 *Articles 5 et seq. - A uniform level of prudential supervision is an essential element of fair competition*

4.3.1 The prudential requirements that apply to the market access of payment institutions that do not hold a banking licence (Articles 5 et seq.) should diverge from those that apply to the banking sector only insofar as a payment institute is not comparable with a fully licensed bank. The fear otherwise is that competition will be distorted to the detriment of banks and that the operability of payment systems will be severely compromised. Moreover, if payment institutes that do not hold a banking licence do not meet the same conditions as banks in terms of risk-based equity, managerial competence and reliability, business plans, and the organisation and ongoing supervision of business operations, including any necessary sanctions, then the imposition of a rule granting such institutes access to payment systems could also undermine the integrity and operability of the European direct-debit scheme currently in the pipeline. Above all, however, consumer confidence in SEPA would be perennially compromised without an appropriate level of prudential supervision. This also includes the question of bankruptcy protection and the necessary arrangements for holding client funds separately.

4.3.2 The EESC therefore feels it is essential that all payment institutions should be subject to the same prudential supervision requirements in relation to the risks and dangers of payment transactions and that appropriate supervisory bodies should be equipped with the requisite powers.

4.4 *Articles 30 et seq. – Information requirements must not be too formalised*

4.4.1 The EESC agrees with the Commission that clear and consistent transparency rules are of key importance for consumers – and for the acceptance of SEPA. The information must be clear and easily understandable and must be presented in a readable form. Too varied and too frequent information may be counterproductive, however, and may make the situation less rather than more transparent. Moreover, private SEPA users need different information from commercial ones. The Commission also sows confusion – and generates extra costs – when it imposes different transparency requirements on similar cases. The Committee would draw particular attention in this regard to the distance marketing directive.

4.4.2 The selected approach to harmonisation – full harmonisation and mutual recognition – may well pose problems for consumers and consumer protection. The possibility cannot be discounted, for instance, that consumer protection standards will be lower than those already in place in individual Member States.

4.4.3 The provisions relating to the method of providing information under Article 30 should also be simplified. Particularly in cases where users are to be informed about changes in contractual conditions (Article 33) and about executed payments (Article 36) and received payments (Article 37), it should be possible, where this is the agreed custom, to retain the current practice – which is inexpensive for users – of making the information available via

account statements or via online banking. It should also be possible to meet the information requirements using price tables or by posting the data on the internet. It should be stated in more explicit terms (Articles 31 und 37) that the prices of the various service elements covered by an aggregate fee need only be indicated separately to the client in cases where individual service elements involve separate and/or different product constellations.

4.4.4 For incoming and outgoing payments, it is important, from a user perspective, not only that a clear indication is given of both payer and payee, but also that the full payment reference data are included in the transfer details. This is the only way to secure fully automated referral for outstanding items and sums due.

4.5 *Article 41, second sentence – All kinds of authorisation must be permitted*

4.5.1 The EESC agrees with the Commission's approach whereby a payment transaction is to be considered as authorised only if the payer has consented to the payment order addressed to the payment service provider. Under the second sentence of Article 41, payers are required to give their consent by means of "explicit" authorisation of "a payment transaction or a series of transactions". The wording here is unclear. To require an explicit authorisation for each and every direct debit within a contractual relationship would impose serious constraints on any efficient and cost-effective direct-debit scheme.

4.5.2 To ensure the continued use of what consumers too perceive to be tried-and-trusted, cost-effective procedures such as direct debits, the directive should be geared towards minimum coordination rather than any full harmonisation that brooks no exceptions.

4.6 *Article 48(2) and (3) – The burden of proof in cases of disputed payment transactions is not properly balance*

4.6.1 Consumers will not accept SEPA if, in cases of disputed authorisation, they are faced with insurmountable difficulties relating to evidence. The EESC backs the Commission's efforts to facilitate matters for users on this front.

4.6.2 That said, such an approach must not result in the payment service provider being blocked from producing any counterevidence in the case of gross abuse. Yet, Article 48(2) makes it impossible for, the payment service provider to bring forward evidence of gross negligence or even intent on the user's part. If, however, it is no longer possible to bring forward evidence that a payment service user did in fact act with gross negligence or even intent, then this too is nothing short of an invitation to disregard any normal safekeeping requirements and to abuse the system. A rule of this kind also very much limits the scope to offer certain electronic payment methods.

4.6.3 The EESC would advocate fair burden-sharing. The onus is thereby on the payment service provider to furnish evidence that the holder of the payment verification instrument did in fact order the payment. If, however, the payment was made using special security features

incorporating recognised safeguards against improper use, then the *prima facie* evidence should stand, i.e. that the payment service user either authorised the payment himself or herself or has at least acted in a grossly negligent manner. Moreover, no undue limits should be placed on national courts' scope to consider the evidence, especially since Member States' civil procedure laws are not harmonised.

4.7 *Article 49 – Legal certainty must be established in the case of unauthorised payment transactions by introducing uniform cut-off periods for refunds*

4.7.1 In the explanatory memorandum to the proposal for a directive, the European Commission makes the point that payment systems are used in some 231 billion transactions within the Community each year. This fact alone makes clear the need, at a certain point, for legal certainty as to whether a transaction was authorised or not. In order to establish an appropriate degree of legal certainty, the refund claim by the payment service user in the case of unauthorised payment transactions should be time-limited. The time limit should be fair. The EESC considers a time limit of one year to be appropriate.

4.7.2 Under Article 45, payment service users are, rightly, required to check their account transactions regularly and to raise any objections against unauthorised payment transactions without undue delay. It is therefore a consistent and balanced move to limit the refund claims of payment service users in respect of unauthorised payments to one year. This would give both payment service providers and payment service users the requisite legal certainty that, on expiry of that period, the payment is considered final. A one-year period would also tie in with the record-keeping requirement under Article 44.

4.8 *Articles 49 and 50 – Liability allocation requires further consideration*

4.8.1 The EESC feels that liability must be allocated in an appropriate way between service provider and user. Only then will consumers use the payment service concerned and only then will payment service providers be able to offer the service at reasonable prices.

4.8.2 The strict liability of the payment service provider for unauthorised payments proposed under Article 49 makes sense, in the EESC's view, provided users handle their payment verification instrument with the requisite care and in compliance with the contractual requirements.

4.8.3 The EESC feels that, as provided for under Article 50, it is appropriate to limit to EUR 150 the liability of users who, despite having taken the requisite care, fail to notice the loss of the payment verification instrument but duly notify the loss the moment it comes to their attention. However, users who fail to notify the loss without undue delay, even though they are obliged to do so under Article 46, thereby also depriving the payment service provider of the opportunity to avert or limit any damage, should be given no special treatment, in terms of the liability they bear, to the detriment of those users who do exercise the requisite care.

4.9 *Article 53 – The refund period must be clearly fixed*

4.9.1 The period during which a refund may be claimed is a key feature of the European direct-debit scheme. It is essential that all those involved in the payment procedure are able to determine when, precisely, the period ends during which a refund may be claimed on authorised payments. There is no guarantee of this, however, as the first sentence of Article 53(1) states that the period begins once information has been provided to the payer, yet neither the payee nor his or her payment service provider knows when the payment service provider of the payer actually informed the payer of the payment transaction on his or her account.

4.9.2 The reason is that, in practice, the interval for providing bank account statements varies widely. Sometimes, statements are provided only every quarter, sometimes every week, and sometimes even on a daily basis. This is a question of user preference and cost. Depending on the frequency of the information provided, therefore, the refund period may, to take these examples, be three months plus four weeks, one week plus four weeks, or even one day plus four weeks. It is thus more or less impossible to determine when the payment becomes final. This would pose a virtually insoluble problem for – and seriously jeopardise – the European direct-debit scheme currently in the pipeline.

4.9.3 The EESC therefore proposes that, in line with Article 53(1), a four-week period should start when the customer is informed, but should end at all events eight weeks after the entry on the payer's account.

4.10 *Articles 60, 61 and 67 – A clear distinction must be made between the obligations of the payment service providers involved in executing the payment*

4.10.1 Articles 60, 61 and 67 indicate that the payment is deemed to have been executed once the amount is credited to the payee's account. This represents a break, for no apparent reason, with existing European law on credit transfers. It lumps together the contractual obligations of the payment service provider of the payer on the one hand, and the payment service provider of the payee on the other. The payment service provider of the payer would thus be subject to a requirement which is incumbent only on the payment service provider of the payee and which cannot be verified by the payment service provider of the payer.

4.10.2 The EESC therefore proposes retaining the principle governing payment rules currently enshrined under the European directive on credit transfers and applicable in a uniform manner across all the EU Member States. Under this principle, the payment service provider of the payer is responsible for the transaction until it reaches the payment service provider of the payee), while the payment service provider of the payee is responsible until the amount is credited to the payee's account.

4.11 *Articles 60, 61 and 67 – The execution periods must be practicable*

4.11.1 The EESC considers it essential that the execution periods be such that they represent a clear improvement on the present position, but that the technical implementation does not involve unreasonably high costs which would then make payments more expensive.

4.11.2 The execution periods of one banking business day provided for under Articles 60 and 61 (day on which the payment order is accepted plus one banking business day) could, under present circumstances, be too ambitious. Under the current European directive on cross-border credit transfers, the standard period is six banking business days (day on which the order is accepted plus five banking business days, plus one day for the funds to be credited = five days for the payment service provider of the payer to credit the payment service provider of the payee, plus one day for the payment service provider of the payee to credit the payee), although some deviation from these rules is possible. A number of regional and smaller payment service providers are indicating that they will be unable to meet this requirement. The planned (maximum) execution period (one day for the payment service provider of the payer to credit the payee) would be one sixth of the time frame permitted at the moment. According to payment service providers, the technical implementation of this rule would also involve unreasonably high costs, thus inevitably making payments more expensive. The European banking sector has entered into a voluntary commitment under the Credeuro Convention for a maximum execution period of three banking business days for euro payments, and a standard execution period of three banking business days for payments in other European currencies.

4.11.3 In the event that competitive disadvantages are suffered by regional and smaller payment service providers, the EESC recommends that an execution period of three days be set for an appropriate transitional period. This is not, however, to affect provision being made for shorter execution periods for purely national payment transactions (Article 64).

Brussels, 13 September 2006.

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