

# EUROPEAN CENTRAL BANK

## OPINION OF THE EUROPEAN CENTRAL BANK

of 26 April 2006

on a proposal for a directive on payment services in the internal market

(ECB/2006/21)

(2006/C 109/05)

### Introduction and legal basis

On 19 January 2006 the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a '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) (hereinafter the 'proposed directive').

The ECB's competence to deliver an opinion is based on the first indent of Article 105(4), in conjunction with the fourth indent of Article 105(2), of the Treaty establishing the European Community, as the proposed directive concerns a basic task of the European System of Central Banks (ESCB), namely to promote the smooth operation of payment systems<sup>(1)</sup>. The ECB's competence is also based on Article 105(5) of the Treaty, pursuant to which the ESCB contributes to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

### General observations

1.1 The proposed directive is a very welcome initiative, as it establishes a comprehensive legal framework for payment services in the EU. Currently, the diversity of national legislation relating to payments makes implementation of the Single Euro Payments Area (SEPA) problematic. Harmonisation of the national legal requirements for payments will therefore assist the banking industry in its efforts to establish the SEPA. Moreover, the introduction of the concept of 'payment institutions' should lead to the harmonisation of access rules to the market for payment services. However, to fully exploit the advantages of harmonised legislation, attention should be paid to aligning the scope of the proposed directive and that of the E-money Directive<sup>(2)</sup>, in particular taking account of the need to differentiate between payment services based on payment accounts and e-money payment services based on centralised accounting. Should the adoption of the proposed directive be delayed, however, the introduction of SEPA-compliant national schemes on 1 January 2008 and the full migration of these by 2010 could be put at risk. In this regard, Titles III and IV of the proposed directive are crucial as they introduce a harmonised set of rules regarding information requirements, authorisation, execution and liability in respect of payment transactions. It appears that the policy and legal issues in these Titles of the proposed directive might be solvable within a relatively short time frame. If negotiations are prolonged, the option of carving out certain parts of the proposed directive by giving priority to adoption of the parts necessary for successful implementation of the SEPA could be considered.

<sup>(1)</sup> In addition, the ECB's competence to deliver an opinion is based on Article 22 of the Statute of the European System of Central Banks and of the European Central Bank concerning the task of the ECB and the national central banks to, *inter alia*, ensure efficient and sound clearing and payment systems within the Community and with other countries.

<sup>(2)</sup> Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions (OJ L 275, 27.10.2000, p. 39).

- 1.2 However, certain aspects of the proposed directive raise a number of concerns which are set out in more detail below.

### Specific observations

#### 2 *Payment institutions' activity*

- 2.1 The introduction of a new concept of 'payment institutions' is a step towards harmonising the current diversity of approaches under national law to the regulation of entities that provide payment services without being a credit institution, an e-money institution or a post office giro institution. However, the proposed directive is not clear concerning the kinds of activities that such payment institutions may perform. Under the proposed directive, payment institutions may receive funds from the public for the provision of payment services. These funds should not, however, be deposits or other repayable funds within the meaning of Article 3 of the Consolidated Banking Directive<sup>(3)</sup>, or e-money as defined in Article 1(3)(a) of the E-money Directive (see Article 10(1) of the proposed directive).

- 2.2 In this respect, the wording of the proposed directive does not make it clear whether payment institutions may hold funds having similar economic and legal characteristics to deposits or e-money. The ability of payment institutions to provide payment accounts implies that payment institutions could keep funds for a longer period than is necessary to finalise a payment transaction. This is a matter for concern, as Article 65(4) of the proposed directive refers to 'savings accounts' without explaining where these accounts are held and for what purpose. However, recitals 8 and 9 to the proposed directive state that payment institutions may not take deposits. These points are elaborated further below.

- 2.3 It is also noted that under paragraph 4 of the Annex to the proposed directive, payment institutions may execute payment transactions if the funds are covered by a credit line without there being any restrictions on the ability to grant credit in terms of the amount and/or the maturity of the credit.

#### 3 *Deposits or other repayable funds*

- 3.1 With regard to the holding of deposits or other repayable funds, it should be recalled that Article 3 of the Consolidated Banking Directive prohibits undertakings other than credit institutions from carrying on the business of taking deposits or other repayable funds from the public. While the Consolidated Banking Directive does not define deposit-taking, the concept of 'deposits or other repayable funds' under that Directive has been broadly interpreted by the Court of Justice of the European Communities, which has noted that 'the term "other repayable funds" [...] refers not only to financial instruments which possess the intrinsic characteristic of repayability, but also to those which, although not possessing that characteristic, are the subject of a contractual agreement to repay the funds paid'<sup>(4)</sup>. It does not matter whether such funds are received in the form of deposits or in other forms, such as 'the continuing issue of bonds and other comparable securities'<sup>(5)</sup>, as referred to in a forerunner of the Consolidated Banking Directive. Thus, 'all receipts of monies may amount to deposit-taking business (in the broader sense) if they involve repayment of the monies received. It is unimportant in this regard whether the requirement of repayment already exists at the time the funds are received (and forms an "essential" element of that transaction), or whether this obligation only arises as a result of

<sup>(3)</sup> Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ L 126, 26.5.2000, p. 1). Directive as last amended by Commission Directive 2006/29/EC (OJ L 70, 9.3.2006, p. 50).

<sup>(4)</sup> See paragraph 17 of the Judgment of 11 February 1999 in Case 366/97 *Massimo Romanelli* [1999] ECR I-855.

<sup>(5)</sup> Recital 5 to first Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ L 322, 17.12.1977, p. 30). Directive repealed by Directive 2000/12/EC.

the creation of a contractual entitlement' <sup>(6)</sup>. A proper interpretation of deposit-taking 'will have to be guided by the question of the range of the savings to be protected and the interpretation of the characteristics of "credit business" in the light of the risks considered significant in terms of the protection of recovery of deposits. The outcome is a tendency towards a broad interpretation both of deposit-taking business and credit' <sup>(7)</sup>.

- 3.2 In view of the above, it would appear that payment institutions will in fact receive deposits from their customers. If this is the case, then, as a general matter, if the payment institution became insolvent, any funds it held at the moment of insolvency would form part of its estate, and would thus be available to meet the claims of all of its creditors. The activity of receiving deposits or other repayable funds is at the heart of the concept of banking itself, as is made clear in the definition of 'credit institution' laid down in Article 1(1)(a) of the Consolidated Banking Directive <sup>(8)</sup>. Altering the fundamental concept of banking requires careful consideration from the perspectives of monetary policy, the soundness and safety of payment systems, financial stability and statistics, all of which are matters in relation to which the ESCB has extensive competences. The activities of payment institutions inevitably include holding funds of the public, even if only for a limited period of time. Consumer protection and financial stability issues must therefore be taken into consideration when establishing supervisory requirements and safeguards for such activities.

#### 4 Supervisory requirements

- 4.1 Overall, the proposed directive would allow payment institutions to operate under a lighter supervisory regime than that applicable under the Consolidated Banking Directive. Besides an authorisation procedure based on some qualitative requirements, payment institutions would have to comply with a regulatory framework, which would: (i) mainly be based on a number of generally drafted disclosure requirements; and (ii) not include capital requirements against quantifiable risks (see Article 5 of the proposed directive). The light supervisory regime raises some concerns, which are accentuated by the fact that the proposed directive prescribes full harmonisation (see Article 78 of the proposed directive) in contrast to the regulatory approach taken in other Community legislation governing the taking up and pursuit of the business of providing financial services.
- 4.2 The ECB is of the view that there is scope for improvement in the regulatory treatment of payment institutions under the proposed directive in three main areas. First, the unclear distinction between payment institutions and other payment service providers makes it extremely difficult to assess risks and the related safeguards. This is the case not only if and insofar as payment institutions may hold funds that are difficult to distinguish from deposits, but also with regard to their ability to grant credit financed by money received from the public (see paragraph 4 of the Annex to the proposed directive). Second, the proposed directive does not address the different categories of risks associated with payment services. In this respect, it is worth recalling that payment services performed by credit institutions will be made subject to specific capital requirements as a result of the operational risk attaching to such services <sup>(9)</sup>. Third, it may also be argued that the authorisation procedure laid down in the proposed directive is based on criteria which leave too much room for different interpretations at national level. Member States may also waive some of the authorisation requirements under certain circumstances <sup>(10)</sup>.
- 4.3 In view of these considerations, there seems to be a mismatch under the proposed directive between the scope of activities of payment institutions and the prudential framework within which such activities are to be carried out. Once the actual scope of payment institutions' activities has been clarified, the imposition of adequate capital requirements and/or other similar safeguards (e.g. initial capital requirements, guarantees) should be considered on the basis of an assessment of the related risks.

<sup>(6)</sup> See Alexander Bornemann, 'Abridged Opinion on the Concept of the Credit Institution in the Directives of the European Community Relating to Bank Regulation and Supervision', p. 11. Available as a PDF file from: <<http://www.money-advice.net/media.php?id=234>>

<sup>(7)</sup> *Ibid.*

<sup>(8)</sup> Article 1(1)(a) states that a 'credit institution shall mean an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account'.

<sup>(9)</sup> See Part 2 of Annex X to a 'Proposal for Directives of the European Parliament and of the Council Re-casting Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions and Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions' (COM(2004) 486 final).

<sup>(10)</sup> The conditions for the relevant derogations to apply are set out in Article 21 of the proposed directive.

- 4.4 The absence of capital requirements for payment institutions could potentially provide scope for supervisory arbitrage. Regardless of whether credit institutions perform their payments business directly or through subsidiaries qualifying as payment institutions, they will be subject to supervision on a consolidated basis for operational risks as well as credit risks. Conversely, stand-alone payment institutions or payment institutions that are not part of a banking group will not be subject to any capital requirements despite carrying on the same business.
- 4.5 Moreover, the proposed directive is generally unclear with regard to the respective responsibilities of the home and host Member States' competent authorities. One example of this is the third paragraph of Article 6 of the proposed directive, which regulates the granting of European passports to payment institutions without making it clear which competent authority of which Member State will be in charge of supervising such payment institutions. It would be worthwhile considering these issues more carefully.
- 4.6 In applying Article 15 of the proposed directive, the competences of the ESCB and of national central banks with respect to the smooth operation of payment systems and, in those Member States where applicable, the competences of national central banks in the field of supervision should be duly respected.
- 4.7 The supervisory powers of the competent authorities under Article 16 of the proposed directive could be made clearer in a number of respects. First, the scope of 'on-site inspections' (Article 16(b)) could be more precisely specified. Second, the exact meaning of the power to impose 'proportionate penalties' (Article 16(d)) could also be clarified. Third, the conditions for suspension and withdrawal of an authorisation (Article 16(e)) could be defined, possibly by means of a separate provision. In order to achieve a sufficient level playing field within the European area and sufficient efficiency in the supervision of institutions benefiting from free establishment and free provision of services, Article 16 of the proposed directive should be amended to ensure that all competent authorities have all the powers provided for by this Article, in particular supervisory and enforcement abilities.
- 4.8 Article 19 of the proposed directive provides for Member States to allow exchanges of information between their competent authorities, central banks, the ESCB and the ECB. While this provision is, in principle, welcome, it is suggested that if the competent authority is an entity other than the central bank, and the latter is also the payment system overseer, it should be complemented by other provisions stipulating that: (i) prior to granting or suspending/withdrawing a licence, the competent authority has to consult the relevant central bank; and (ii) competent authorities are obliged to share information with the relevant central bank. Such provisions would be beneficial, given the overall responsibility of central banks in the field of payments.

## 5 *Banking or e-money licence*

- 5.1 If payment institutions are allowed to hold funds which in both economic and legal terms qualify as deposits, although conceptually not characterised as such under the proposed directive, the level of risk will be equal to that of credit or e-money institutions. Accordingly, the level of safeguards should be the same as that applied to credit and/or e-money institutions. It follows that payment services should preferably be restricted to credit or e-money institutions. This would ensure sufficient protection of customer funds and sound financial activity, and is therefore the ECB's preferred approach.
- 5.2 If the level of safeguards imposed on credit and/or e-money institutions is also established for payment institutions, then Title II of the proposed directive would need to be fundamentally redrafted.

## 6 *Limiting the activities of payment institutions*

- 6.1 If the category of lightly-supervised payment institutions is introduced, as proposed by the Commission, the proposed directive should be amended to make it clear that payment institutions should not be allowed to keep payment service users' funds for longer than the limited time period during which they are being transferred from payer to payee, nor should they be allowed to reinvest such funds. The current wording of Article 10(2) of the proposed directive could otherwise lead to the conclusion that the opening of accounts by payment institutions in their books implies that the funds received could

be reinvested for the benefit of the payment institution. Such a clarification could be achieved, for example, by restricting the payment service activities of payment institutions to those specified in paragraph 7 of the Annex to the proposed directive. The activity specified in paragraph 5 of the Annex could also be ascribed to payment institutions pending, however, clarification that the activity of issuing cards is linked to a requirement for the cardholder's account to be held with a credit institution. Moreover, payment institutions should not be allowed to grant credit in accordance with paragraph 4 of the Annex to the proposed directive.

- 6.2 Furthermore, to avoid any diverging interpretation, it might be useful to indicate which services may be offered by which type of institution, regrouping all paragraphs of the Annex to the proposed directive as follows: (i) paragraphs 1-7: credit institutions; (ii) paragraphs 1-3 and 5-7: e-money institutions; and (iii) paragraph 7: payment institutions. In addition, as mentioned above, the activity specified in paragraph 5 of the Annex could possibly also be considered as an activity provided by payment institutions<sup>(11)</sup>. The same may hold true for the activity specified in paragraph 4 of the Annex, if it is ensured that funds received from payment service users to provide payment services cannot be deployed to extend credit to other payment service users.
- 6.3 Other minimum safeguards could be considered to protect payment service users' funds. For example, in the context of certain specific futures-clearing arrangements, cash placed by customers with futures-clearing brokers is construed under the laws of certain Member States (e.g. Germany and the United Kingdom) and of the United States as being the property of the customer rather than as being a cash deposit. This arrangement is often provided for by specific legislation or is confirmed by case-law. Without addressing the proprietary nature of such cash, which might raise difficulties under the laws of some Member States, one option would be to develop the safeguards contained in Article 10(2) of the proposed directive obliging payment institutions to keep the payment service users' funds separate in their books. This could be done by amending the proposed directive to ensure that more explicit obligations are imposed on payment institutions as follows: (i) to earmark funds accepted to specific transactions; (ii) to segregate funds accepted for a payment transaction from other funds accepted for activities other than payment services and record them separately in payment institutions' books; (iii) to keep payment service users' funds under an account name which clearly identifies them as such; (iv) not to commingle payment service users' funds with the funds of the payment service provider or any other payment service user or person; (v) to insulate payment service users' funds from any third-party action against the payment institution; (vi) if a payment institution becomes insolvent, to return payment service users' funds promptly and in priority to all other claims; and (vii) where insufficient funds are available for remittance to payment service users of an insolvent payment institution, to distribute the remaining funds to the payment service users on a pro rata basis in accordance with the principal amount of their respective claims.
- 6.4 Furthermore, the reference in Article 10(1)(b) of the proposed directive to ancillary services such as 'the guaranteeing execution of payment transactions' requires further explanation, to make it clear that such services are only for the benefit of the payment services users taking part in the transaction.
- 6.5 Finally, Article 10(3) of the proposed directive states that the activities of payment institutions are not to be restricted to offering payment services subject to applicable national and Community law. This implies that the range of activities of payment institutions may go beyond those listed in the Annex to the proposed directive, which gives rise to two concerns. First, the proposed directive does not list all types of activities allowed. A full assessment of these activities from the point of view of consumer protection and financial stability can only be made if all possible activities are known. Second, if such activities are based on national law, then the purpose of the proposed directive, namely to ensure full harmonisation, will not be achieved. For these reasons, Article 10(3) of the proposed directive should be deleted.

## 7 Creation of the SEPA

- 7.1 The banking industry is currently working intensively on services that will meet the demands of the SEPA. As early as 1 January 2008, the industry aims to offer pan-European payment instruments to citizens, authorities and commercial enterprises for both national and cross-border payments. Creation of the SEPA could however be problematic within the current Community legal framework, given the

<sup>(11)</sup> It is noted that the regrouping does not take into account the activities of post office giro institutions since the licensing of these, and thus the type of activities they may undertake, is governed by Member States' national laws.

diversity of applicable national legislation. Harmonisation of the legal framework for payments is therefore important, as it will assist the banking industry in its efforts to establish the SEPA. The SEPA-relevant parts of the proposed directive (largely Titles III and IV) appear to be less controversial than Title II. If adoption of the proposed directive is delayed owing to ambiguities described above, the implementation of the SEPA might also be delayed. In order to prevent such a delay, therefore, it would be beneficial to carve Title II out of the proposed directive. However, such a carve-out should be conditional on making payment institutions subject to separate Community legislation in due course. In this respect, the role of payment institutions could logically be discussed in the context of the planned review of the E-money Directive in order to achieve a consistent regulatory and supervisory framework for different categories of payment service providers.

- 7.2 Another possibility might be for the Governing Council of the ECB to adopt an ECB regulation under Article 105(2) of the Treaty and Article 22 of the Statute which would govern the specific SEPA-related provisions of the proposed directive that fall within the ESCB's fields of competence, while recognising, however, that not all provisions facilitating SEPA could be adopted on this basis.
- 7.3 A specific SEPA-related issue concerns the maximum execution time of 'D+1', as provided for in Article 60(1) and Article 61(1) of the proposed directive. It is expected that the majority of payment service providers could fulfil this requirement by 1 January 2010. However, it must be kept in mind that the industry has not been consulted on the consequences of the requirement of 'D+1' and that some banking communities might have difficulties complying in time.

#### 8 *Exemption of central banks*

The last indent of Article 1 of the proposed directive provides that central banks acting as monetary authorities and public authorities which provide payment services are not considered to be payment service providers. In order to remove possible ambiguities regarding the meaning of this provision, it would be helpful to clarify that all activities performed by central banks are exempt from the proposed directive instead of introducing the unclear condition that this exemption should only apply to the provision of payment services by central banks acting as monetary or public authorities. Any such exemption should be without prejudice to the ECB's policy statement of 4 August 2005 regarding central banks' provision of retail payment services in euro to credit institutions<sup>(12)</sup>, which states that in order to avoid competitive distortions or a crowding-out of market initiatives, national central banks which offer retail payment services to credit institutions take due account of the requirements and competitive environment of the market concerned, including cost recovery. As currently drafted, this provision is likely to lead to divergent implementation among Member States, thereby causing unnecessary confusion for both central banks and financial market participants.

#### 9 *Operation of and access to payment systems*

- 9.1 The proposed directive should make it clear that payment system operators will be entitled to differentiate between different types of payment service providers regarding the conditions to be fulfilled before the latter can gain access to payment systems. This should be done on objective grounds, with the aim of managing the risks associated with payment service providers. In addition, the scope of Article 23(1) of the proposed directive should be limited to ensuring non-discriminatory access of payment institutions to payment systems. Article 23(1) of the proposed directive should be amended accordingly.
- 9.2 It is understood that the intention of Article 23(2) of the proposed directive is to exempt systems designated under the Settlement Finality Directive<sup>(13)</sup> from the access conditions under Article 23(1). However, the wording is not sufficiently clear in this respect, and a straightforward exemption is suggested.

<sup>(12)</sup> Available on the ECB's website at [www.ecb.int](http://www.ecb.int).

<sup>(13)</sup> Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45) (SFD).

- 9.3 Furthermore, the proposed directive should make it clear that the provision of clearing and settlement services is subject to oversight standards established by the Eurosystem, in accordance with Article 105(2) of the Treaty. This could be achieved, for example, by amending recital 12 to the proposed directive and Article 23(2) accordingly. In this respect, the Eurosystem will, in connection with its task of promoting the smooth operation of euro area payment systems, consider whether the participation of payment institutions in payment systems is sufficiently safe and does not imply undue risks for the stability of the financial system.
- 9.4 Finally, Article 10(1)(c) of the proposed directive grants payment institutions an explicit right to operate payment systems. As Community legislation currently neither defines the concept of 'payment system operator' nor regulates the legal nature of such operators, there is no need to introduce a right for payment institutions (or any other category of payment service provider governed by the proposed directive) to operate payment systems. In the same vein, the reference to 'operation of payment systems' in the title and first paragraph of Article 23 of the proposed directive should be deleted.

## 10 *Payments Committee*

Under Article 76 of the proposed directive, the Commission may amend the list of payment services in the Annex, assisted pursuant to Article 77 by a Payments Committee composed of representatives of the Member States and chaired by a representative of the Commission. Considering the importance of the list, and the influence an amendment could have on the payment market, the Payments Committee's mandate should be unambiguous, avoiding any conflict with the Eurosystem's competences as established under the Treaty and the Statute. In view of the ECB's specific competences in this field, the ECB should be represented as an observer on the Payments Committee.

## 11 *Negative scope of application of the proposed directive*

- 11.1 The scope of the proposed directive, as set out in Articles 2 and 3, may result in some differences of interpretation. Under Article 2, the proposed directive applies to an exhaustive list of business activities defined as payment services and listed in the Annex to the proposed directive. Under Article 3, it also contains what seems to be an exhaustive list of exemptions from the proposed directive, although it could be useful to clarify this point. In order to make the relationship between Articles 2 and 3 of the proposed directive clearer, the ECB suggests replacing the current heading of Article 3 with the term 'exemptions'.
- 11.2 In addition, some of the items governed by Article 3 are problematic. First, the proposed directive does not seem to be technologically neutral, as it discriminates between physical and electronic forms of payment. It may therefore create an unwarranted bias towards paper-based payment services. Depending on existing national legislation, payment service providers that currently offer paper-based services might find it more costly to introduce more efficient electronic versions of their products, as they would then fall under the proposed directive, which might therefore delay the generally desirable introduction of electronic payment services.
- 11.3 Second, the waiver for certain payment services provided by providers of telecommunications, IT systems or networks, as outlined in Article 3(j) of the proposed directive, may be prone to different interpretations. The provision is not technologically neutral and may be interpreted either too narrowly or too widely (e.g. payments on online trading platforms such as eBay might be excluded, although they are not materially different from services that would fall under the proposed directive). As a result the proposed directive could be implemented unevenly. Moreover, the relationship between the waiver and paragraphs 8 and 9 of the Annex to the proposed directive is not fully clear. As a result the ECB suggests that Article 3(j) of the proposed directive and paragraphs 8 and 9 of the Annex thereto should be deleted altogether.
- 11.4 To the extent that paper-based promissory notes are referred to in Article 3(f) of the proposed directive, a general reference should also be made to bills of exchange, including both bills of exchange covered by the 1930 Geneva Convention<sup>(14)</sup> and bills of exchange that are not.

<sup>(14)</sup> Convention providing a uniform law for bills of exchange and promissory notes (Geneva, 7 June 1930).

## 12 Definitions

- 12.1 The proposed directive follows two different approaches when laying down definitions. In some cases definitions are established by means of specific provisions in Article 4, while in other cases definitions are dispersed throughout different parts of the proposed directive (e.g. in Article 1 ('credit institutions', 'electronic money institutions', 'post office giro institutions' and 'payment institutions'), Article 2 ('payment services' and 'payment transaction'), Article 29 ('framework contracts'), and Article 51 ('micro enterprises')). It is suggested that all definitions could be contained in a single definitions article of the proposed directive, which could be the first article. This would be similar to the approach taken in the Consolidated Banking Directive.
- 12.2 At the same time, there is an issue of consistency with definitions and concepts used in existing Community law, e.g. the SFD. For instance, this is the case for the definition of 'payment system' in Article 4(3) of the proposed directive, which should be made compatible with the concept of a 'system' as used in the SFD, given the potential interaction between systems designated under the SFD and other payment systems. Further consistency could be achieved by introducing into the proposed directive the definitions of 'payer' and 'payee' contained in Article 3 of the proposed regulation on information on the payer accompanying transfers of funds <sup>(15)</sup>.
- 12.3 The concept of 'payment institution' should be amended to exclude the possibility that natural persons may act as payment institutions, since this would give rise to the risk that the funds of the payment institution could be commingled with those of the natural person concerned.
- 12.4 The concept of 'payment account' contained in Article 4(7) of the proposed directive is unclear. This should be remedied, as it is key to interpreting the concept of payment services and the scope of payment institutions' activity. As currently drafted, it is not clear if all categories of payment service providers may provide payment accounts. If payment institutions are to be permitted to provide payment accounts, the differences between 'conventional' bank accounts and payment accounts have to be clarified. Furthermore, the characteristics of such accounts need to be clearly defined. The questions that arise in this context relate to who is entitled to provide such accounts, who may hold them and what their legal nature and effects are.
- 12.5 Another issue that needs clarification is what is meant by the reference in the definition of payment account to the account being 'used exclusively for payment transactions'. Does this, for example, exclude the possibility of interest-bearing accounts or keeping funds for a longer time than is strictly necessary for the transaction? It must also be ensured that payment institutions may not pay interest or provide other incentives to the account holder.
- 12.6 The definition of 'funds' contained in Article 4(8) of the proposed directive should be redrafted by, *inter alia*, replacing the word 'cash' with a reference to banknotes and coins.
- 12.7 In relation to the definition of 'unique identifier' contained in Article 4(15) of the proposed directive, it is recalled that ECB Opinion CON/2005/56 of 15 December 2005 on a proposal for an EC regulation on information on the payer accompanying transfers of funds <sup>(16)</sup> proposes specific wording for the definition of 'unique identifier', which now appears to be reflected in the current version of the proposed regulation. It is suggested that the definition of 'unique identifier' in both the proposed regulation and the proposed directive should be harmonised.
- 12.8 The concept of 'execution time' is used in various recitals to the proposed directive and in Articles 26(1)(a)(ii) and 31(1)(b)(ii), Article 35 and Section 2 of Chapter 2 of Title IV, without being defined. Defining the execution time as a specific time-span (which could be measured, for instance, in working days or operating hours) would be beneficial as it would enable the maximum execution time to be defined. Moreover, there are many transactions that are effected without the use of a payment account (e.g. money remittances to non-banking customers). The definition of execution time in the proposed directive should also cover such cases.

<sup>(15)</sup> 'Proposal for a Regulation of the European Parliament and of the Council on information on the payer accompanying transfers of funds' (COM(2005) 343 final).

<sup>(16)</sup> OJ C 336, 31.12.2005, p. 109.



- 12.9 There is no common calendar of 'working days' in the EU, and, although the term is also applied throughout Section 2 of Chapter 2 of Title IV of the proposed directive, it is not defined. For processing and operating purposes, and to ensure that the scope of obligations is clear, it would be useful to insert such a definition into the proposed directive (in the definitions article).
- 12.10 The term 'scriptural money' is used in the proposed directive without being defined, e.g. in Article 3(b), Article 4(8) of the proposed directive and paragraph 7 of the Annex to the proposed directive. It is suggested that a definition of scriptural money should be established (in the definitions article), bearing in mind that only central banks and credit institutions (which include e-money institutions) may hold such funds.
- 12.11 In the same vein, the term 'branch' is used in Article 4(2) and Article 20 of the proposed directive without being defined. It is suggested that a definition of 'branch' should be introduced in line with the definition in Article 1(3) of the Consolidated Banking Directive.
- 12.12 The definition of 'framework contract' should be moved from Article 29 to the definitions article. Moreover, for reasons of consistency, the term 'framework contract' should be used throughout the proposed directive, replacing the alternative term 'framework agreement' used in recital 18 to the proposed directive and in Articles 32 and 33.

### 13 *Additional legal and technical comments*

- 13.1 It needs to be clarified whether host Member States may, for statistical reporting purposes, require that all payment institutions having branches within their territories report on their activities to the competent statistical authorities of the host Member State, *inter alia*, the national central bank and/or the national statistical agency.
- 13.2 It could be explicitly clarified that the reference to 'any currency' in Article 2 of the proposed directive is intended to apply to the currencies of countries outside the Community.
- 13.3 Article 1 of the proposed directive is entitled 'Subject matter' and should accordingly be restricted to a basic presentation of the proposed directive's subject matter. It would seem more appropriate for the four categories of payment service providers to come under a single definition of 'payment service provider' to be included in the definitions article, especially given that the definitions article also defines the concept of a payment service user.
- 13.4 Article 11(2) of the proposed directive concerning the use of tied agents, outsources or subsidiaries refers to outsourcing of 'all operations'. This is problematic, as it would allow the creation of shell companies that formally comply with the proposed directive, while the actual operations are performed by a third party that is not subject to its requirements. The ECB therefore suggests amending Article 11 to avoid such implications.
- 13.5 Article 12(1) of the proposed directive refers to 'operational risk' without defining this concept. The necessary precision could be provided by applying the definition of 'operational risk' contained in Article 4(22) of the proposed Capital Adequacy Directive <sup>(17)</sup>.
- 13.6 The record-keeping rules contained in Articles 13 and 44 of the proposed directive might imply that a payment institution's record-keeping obligations do not extend for longer than one year. These obligations should be brought more explicitly in line with other Community legislation, such as Article 30 of the Third Money Laundering Directive <sup>(18)</sup>, which lays down a minimum record-keeping obligation of five years.

<sup>(17)</sup> See footnote 9 for full reference.

<sup>(18)</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).

- 13.7 The concept of 'consent' contained in Article 41 of the proposed directive is not precise enough. Reference to withdrawal of consent and a definition thereof are necessary in this context.
- 13.8 The wording of Article 52 of the proposed directive concerning refunds is ambiguous, for example referring to entitlement to a refund where the amount of the transaction executed is not an amount 'that a reasonable payer would expect if he were in the payer's position'. This wording leaves wide room for interpretation, which increases uncertainty in the payments field, and could lead to an increase in disputes and leave consumers unprotected. In order to minimise the risk of future litigation, further consideration should therefore be given to clarifying the wording of Article 52.
- 13.9 Finality of a payment is crucial for the payee, and therefore the concept of 'being informed' contained in Article 53(1) of the proposed directive is too vague, as the timing could differ significantly where the information becomes accessible via the payer's internet bank or a publicly-available account printer, as opposed to cases where the payer receives a hard-copy account statement by post. A fixed moment in time relating to the transfer itself would therefore be preferable. To allow the payer additional time to react, the permitted time frame could be extended from four to six weeks.
- 13.10 The concepts of 'acceptance' and of 'irrevocability' contained in Article 54 and 56 of the proposed directive, while being clear and helpful, should be compatible with the concepts of 'entry into a system' and 'irrevocability' in the SFD.
- 13.11 Article 54(2) of the proposed directive should be amended to ensure that the time lag between the receipt and acceptance of a payment is not unnecessarily prolonged.
- 13.12 Article 65(1) of the proposed directive concerning availability of funds states that Member States must ensure that payment service providers of the payee make funds available to the payee as soon as these funds are credited to the account of the payee. It would seem obvious that funds are available once credited to the payee's account. Therefore it would seem appropriate to make it clear that funds are to be made available to the payee immediately once the payment service provider has received them.
- 13.13 To enable payment schemes to allow efficient straight-through processing, Article 66(1) of the proposed directive should be amended by inserting a reference to the International Bank Account Number (IBAN) as the preferred unique identifier in all cases, thereby ensuring a harmonised approach in the use of unique identifiers.

#### 14 *Drafting proposals*

In addition to the above advice, drafting proposals are set out in the Annex.

Done at Frankfurt am Main, 26 April 2006.

*The President of the ECB*  
Jean-Claude TRICHET

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## ANNEX

Drafting proposals <sup>(1)</sup>Text proposed by the Commission <sup>(2)</sup>Amendments proposed by the ECB <sup>(3)</sup>

## Amendment 1

## Recital 12

(12) It is essential to the function of a payment service provider that it be able to operate within payment systems or to participate in such systems. In order to ensure equality of treatment throughout the Community as between the different categories of payment service provider, according to the terms of their prudential licence, it is necessary to clarify the rules concerning access to the provision of payment services and participation in payment systems. Provision should be made for the non-discriminatory treatment of payment institutions and credit institutions as regards their operation within payment systems and their access thereto.

(12) It is essential to the function of a payment service provider that it be able to operate within payment systems or to participate in such systems. In order to ensure equality of treatment throughout the Community as between the different categories of payment service provider, according to the terms of their prudential licence, it is necessary to clarify the rules concerning access to the provision of payment services and participation in payment systems. **Under Article 105(2) of the Treaty and Article 3.1 and Article 22 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'), one of the basic tasks to be carried out through the European System of Central Banks (ESCB) is to promote the smooth operation of payment systems. The ECB and the national central banks of the Member States 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. The provisions of this Directive concerning access to the provision of payment services and participation in payment systems are without prejudice to these competences of the ECB and the ESCB, which apply in the Member States that have adopted the euro.** Provisions should be made for the non-discriminatory treatment of payment institutions and credit institutions as regards their operation within payment systems and their access thereto.

*Justification — See paragraph 9.3 of the opinion*

## Amendment 2

## Article 1, Subject matter

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;

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

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.

<sup>(1)</sup> The drafting proposals in the Annex are based on the text of the proposed directive and are limited to amendments made to reflect the ECB's proposals in this opinion.

<sup>(2)</sup> Italics in the body of the text indicate where the ECB proposes deleting text.

<sup>(3)</sup> Bold in the body of the text indicates where the ECB proposes inserting new text.

- (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.*

*Justification — See paragraph 13.3 of the opinion*

#### Amendment 3

Article 2(1), first subparagraph

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.

This Directive shall apply only to **payment services**.

*Justification — See paragraph 12.1 of the opinion*

#### Amendment 4

Article 1, exemption of central banks — to be added to Article 2(1), second subparagraph

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

This Directive shall not apply to payment services provided by central banks.

*Justification — See paragraph 8 of the opinion*

#### Amendment 5

Article 3, title

Negative scope

Exemptions

*Justification — See paragraph 11.1 of the opinion*

#### Amendment 6

Article 3(j)

- (j) payment transactions executed by means of a mobile telephone or any other digital or IT device, where all the following conditions are met: [Deletion]

- (i) the service provider operating the telecommunication or IT system or network is closely involved in the development of the digital goods or electronic communication services provided;
- (ii) the goods and services cannot be delivered in the absence of the service provider;
- (iii) there is no alternative option for remuneration.

*Justification — See paragraph 11.3 of the opinion*

## Amendment 7

## Article 4(3)

'payment system' means a funds transfer system with formal and standardised arrangements and common rules for the processing, clearing and/or settlement of payment transactions;

'payment system' means a funds transfer system with formal and standardised arrangements and common rules for the processing, clearing and/or settlement of payment transactions, **including without limitation systems designated and notified to the Commission as payment systems in accordance with Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems** <sup>(FN)</sup>;

*Justification — See paragraph 12.2 of the opinion*

## Amendment 8

## Article 4(8)

'funds' means cash, scriptural money and electronic money as referred to in Directive 2000/46/EC;

'funds' means **banknotes and coins and** scriptural money;

*Justification — See paragraph 12.6 of the opinion*

## Amendment 9

## Definitions article

*Article 1*

## Subject matter

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

[..]

- (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'.

'payment institution' means any legal person other than: (a) a credit institution within the meaning of Article 1(1) of Directive 2000/12/EC; (b) an electronic money institution as defined in Article 1(3)(a) of Directive 2000/46/EC; or (c) a post office giro institution, 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; which has been granted authorisation in accordance with Article 6 to provide and execute payment services throughout the Community;

*Justification — See paragraphs 12.1 and 12.3 of the opinion*

## Amendment 10

## Definitions article

[Insertion]

'payment service' means a business activity listed in the Annex, consisting of the execution of payment transactions on behalf of a natural or legal person, where at least one of the payment service providers is located in the Community;

*Justification — See paragraph 12.1 of the opinion*

<sup>(FN)</sup> OJ L 166, 11.6.1998, p. 45.

Amendment 11  
Definitions article

Article 1

Subject matter

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'.

'payment service provider' means: (a) a credit institution within the meaning of Article 1(1) of Directive 2000/12/EC; (b) an electronic money institution as defined in Article 1(3)(a) of Directive 2000/46/EC; (c) a post office giro institution, 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; or (d) without prejudice to Article 21, a payment institution;

*Justification — See paragraph 12.1 of the opinion*

Amendment 12  
Definitions article

[Insertion]

'payment transaction' means the act, initiated by the payer or by the payee, of depositing, withdrawing or transferring funds from the payer to the payee, irrespective of any underlying obligations between the payment service users;

*Justification — See paragraph 12.1 of the opinion*

Amendment 13  
Definitions article

[Insertion]

'execution time' means the time between the acceptance of a payment order by a payment service provider and the point in time when the amount to be paid pursuant to the payment order is made available to the payee;

*Justification — See paragraph 12.8 of the opinion*

Amendment 14  
Definitions article

[Insertion]

'scriptural money' means deposit balances held on an account at a credit institution or a central bank, or electronic money as defined in Article 1(3)(b) of Directive 2000/46/EC;

*Justification — See paragraph 12.10 of the opinion*

Amendment 15  
Definitions article

[Insertion]

'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 — See paragraph 12.12 of the opinion*

Amendment 16  
New Article 6, Consultation of central banks

[Insertion]

The competent authorities of the home Member State shall consult the relevant central bank before accepting or rejecting an application for authorisation or suspending or withdrawing an authorisation.

*Justification — See paragraph 4.8 of the opinion*

Amendment 17  
Article 10(1) and (2)

1. Payment institutions shall be entitled to engage in the following activities:

- (a) the provision of payment services;
- (b) the provision of operational and related ancillary services such as the guaranteeing execution of payment transactions, foreign exchange services, safekeeping activities, and storage and processing of data;
- (c) the accessing *and operation* of payment systems for the purposes of transferring, clearing and settling funds, including any instruments and procedures relating to the systems.

*In the context of point (a), funds received by payment institutions from payment service users with a view to the provision of payment services shall not constitute a deposit or other repayable funds within the meaning of Article 3 of Directive 2000/12/EC, or electronic money within the meaning of Directive 2000/46/EC.*

2. Funds received from payment service users and specifically accepted in connection with a payment service shall not be used by payment institutions to support other business activities other than payment services. *The payment institution shall keep separately in its books the payment service users funds, accepted for a payment transaction, from other funds accepted for activities other than payment services.*

1. Payment institutions shall be entitled to engage **exclusively** in the following activities:

- (a) the provision of **permitted** payment services **as set out in the Annex**;
- (b) the provision of operational and related ancillary services such as guaranteeing **the** execution of payment transactions, foreign exchange services, safekeeping activities, and storage and processing of data;
- (c) the accessing of payment systems for the purposes of transferring, clearing and settling funds, including any instruments and procedures relating to the systems, **without prejudice to Article 23.**

2. **When payment institutions engage in the provision of payment services under paragraph (1)(a), funds received by payment institutions from payment service users with a view to the provision of payment services shall not constitute a deposit or other repayable funds within the meaning of Article 3 of Directive 2000/12/EC, or electronic money as defined in Article 1(3)(b) of Directive 2000/46/EC. Funds received by a payment institution shall be transferred to the payee or, if an order is not executed, paid to the payer or other person entitled to the funds within the execution time prescribed in Section 2 of Chapter 2 of Title IV of this Directive.**

3. Funds received from payment service users and specifically accepted in connection with a payment service shall **be earmarked to the specific transaction in respect of which they are provided to the payment institution and may** not be used by payment institutions to support other business activities than **the** payment services requested by the payment service user.

4. Member States shall ensure that appropriate safeguards are in place to protect payment service users as follows:

- (a) in relation to funds received from payment service users, which have been accepted for a payment transaction, a payment institution shall segregate such funds from other funds accepted for activities other than payment services and account for them separately in its books;
- (b) a payment institution shall keep the funds of a payment service user under an account name which clearly identifies the payment service user;
- (c) no funds of a payment service user may be commingled with the funds of a payment service provider or any other payment service user or any other person other than the payment service user on whose behalf the funds are held;
- (d) the funds of a payment service user shall be insulated from any third-party action against the payment institution;
- (e) in the event that one or more reorganisation measures is adopted or winding-up proceedings are opened against a payment institution, the relevant administrative or judicial authorities, or the relevant administrator or liquidator, as the case may be, shall promptly return the funds of all payment service users to such payment service users in priority to all other claims against that payment institution;
- (f) in the event that one or more reorganisation measures is adopted or winding-up proceedings are opened against a payment institution and insufficient funds are available for remittance of all the funds due to payment service users, the relevant administrative or judicial authorities, or the relevant administrator or liquidator, as the case may be, shall promptly distribute to payment service users the funds of such payment service users on a pro rata basis according to their claims and in priority to all other claims against that payment institution.

Note: it is suggested that the above provision should be accompanied by the introduction of the following definitions into the definitions article in the proposed directive, all taken directly from Article 2 of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions <sup>(FN)</sup>:

- (1) 'administrator' means any person or body appointed by the administrative or judicial authorities whose task is to administer reorganisation measures;
- (2) 'administrative or judicial authorities' means such administrative or judicial authorities of the Member States as are competent for the purposes of reorganisation measures or winding-up proceedings;

<sup>(FN)</sup> OJ L 125, 5.5.2001, p. 15.



- (3) 'reorganisation measures' mean measures which are intended to preserve or restore the financial situation of a payment institution and which could affect third parties' pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims;
- (4) 'liquidator' means any person or body appointed by the administrative or judicial authorities whose task is to administer winding-up proceedings;
- (5) '**winding-up proceedings**' mean **collective proceedings opened and monitored by the administrative or judicial authorities of a Member State with the aim of realising assets under the supervision of those authorities, including where the proceedings are terminated by a composition or other, similar measure.**

*Justification — See paragraphs 6.3, 6.4 and 9.4 of the opinion*

Amendment 18

Article 10(3)

3. *The business activities of authorised payment institutions shall be non-exclusive and shall not be restricted to payment services, having regard to the applicable national and Community law.* [Deletion]

*Justification — See paragraph 6.5 of the opinion*

Amendment 19

Article 11(2)

2. Where a payment institution intends to outsource some or all of its operations, it shall inform the competent authority accordingly.

2. Where a payment institution intends to outsource some of its operations, it shall inform the competent authority **of its home Member State** accordingly. **Such outsourcing shall be without prejudice to the application of this Directive to the entity to which some of the operations have been outsourced, to the extent that such entity qualifies as a payment service provider in its own right.**

*Justification — See paragraph 13.4 of the opinion*

Amendment 20

Article 16

Member States shall ensure that the controls exercised by the competent authorities for checking continued compliance with this Title are proportionate, adequate and responsive to the risks to which payment institutions are exposed.

Member States shall ensure that the controls exercised by the competent authorities for checking continued compliance with this Title are proportionate, adequate and responsive to the risks to which payment institutions are exposed.

In order to check compliance with this Title, the competent authorities *may take only* the following steps:

In order to check compliance with this Title, the competent authorities **shall have the ability to** take the following steps:

(a) to require the payment institution to provide any information needed to monitor compliance;

(a) to require the payment institution to provide any information needed to monitor compliance;

- |  |  |
|--|--|
| (b) to carry out on-site inspections with the payment institution, an outsourced entity, a tied agent or a subsidiary under the responsibility of the payment institution; | (b) to carry out on-site inspections with the payment institution, an outsourced entity, a tied agent or a subsidiary under the responsibility of the payment institution; |
| (c) to issue recommendations and guidelines;   | (c) to issue recommendations and guidelines;   |
| (d) to issue warnings and impose proportionate penalties in cases of non-compliance;   | (d) to issue warnings and impose proportionate penalties in cases of non-compliance;   |
| (e) to suspend or withdraw authorisation in cases, where the conditions for authorisation in accordance with Article 5 are no longer fulfilled.                            | (e) to suspend or withdraw authorisation in cases, where the conditions for authorisation in accordance with Article 5 are no longer fulfilled.                            |

*Justification — See paragraph 4.7 of the opinion*

#### Amendment 21

##### Article 19, first paragraph

The competent authorities of the different Member States shall cooperate and, in particular, exchange information in order to ensure proper application of this Directive.

The competent authorities of the different Member States shall cooperate and, in particular, exchange information in order to ensure proper application of this Directive, **both among themselves and with the central banks of the ESCB.**

*Justification — See paragraph 4.8 of the opinion*

#### Amendment 22

##### Article 19, second paragraph, point (b)

(b) central banks, *the European System of Central Banks and the European Central Bank, in their capacity as monetary authorities*, and, where appropriate, other public authorities responsible for overseeing payment and settlement systems;

central banks **in third countries** and, where appropriate, other public authorities responsible for overseeing payment and settlement systems;

*Justification — See paragraph 4.8 of the opinion*

#### Amendment 23

##### Article 23(1)

##### Access to *and operation of* payment systems

1. Member States shall ensure that *rules on access to and operation of payment systems shall be objective and proportionate and shall not inhibit access more than is necessary to safeguard against specific risks and to protect the financial safety of the payment system.*

Payment systems may not impose any of the following requirements:

- (a) a ban on participation in other payment systems;
- (b) a rule which discriminates between authorised payment service providers in relation to the rights, obligations and entitlements of participants;
- (c) *any restriction* on the basis of institutional status.

##### Access to payment systems

1. Member States shall ensure that **a payment institution's access to a payment system shall not be:**

- (a) restricted on a discriminatory basis, provided that the financial and operational safety of the payment system is ensured; and
- (b) **restricted** on the basis of institutional status.

*Justification — See paragraphs 9.1 and 9.4 of the opinion*

## Amendment 24

## Article 23(2)

2. Paragraph 1 shall be without prejudice to requirements imposed on participants in a payment and securities settlement system by Community legislation and in particular by Directive 98/26/EC of the European Parliament and of the Council<sup>(4)</sup>.

2. Paragraph 1 shall **not apply to systems designated under Directive 98/26/EC and shall be without prejudice to the competences of the ECB and the ESCB as laid down in Article 105(2) of the Treaty and Article 3.1 and Article 22 of the Statute of the ESCB, concerning access to payment systems and the provision of payment systems.**

*Justification — See paragraphs 9.2 and 9.3 of the opinion*

## Amendment 25

## Article 41

Member States shall ensure that a payment transaction is considered to be authorised only if the payer has consented to the respective payment order addressed to the payment service provider.

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

In the absence of such consent, a payment transaction shall be considered to be unauthorised.

A payment transaction may be authorised by the payer prior or subsequent to the execution of the payment transaction.

Member States shall ensure that a payment transaction is considered to be authorised only if the payer has consented to the respective payment order addressed to the payment service provider.

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

Consent may be withdrawn in accordance with the contractual conditions agreed between the payment service provider and the payer, but no later than the point in time of acceptance of a payment order or the point in time when a payment order becomes irrevocable under Articles 54 or 56.

In the absence of such consent, **or if such consent is validly withdrawn**, a payment transaction shall be considered to be unauthorised.

A payment transaction may be authorised by the payer prior or subsequent to the execution of the payment transaction.

*Justification — See paragraph 13.7 and 13.10 of the opinion*

## Amendment 26

## Article 53(1)

1. Member States shall ensure that the payer shall request the refund, at the latest within *four weeks of being informed of the payment transaction in question by the payment service provider*. [...]

1. Member States shall ensure that the payer shall request the refund, at the latest within **six weeks from the date on which the funds are debited**. [...]

*Justification — See paragraph 13.9 of the opinion*

## Amendment 27

## Article 54(2)

2. In the case of electronically initiated transactions, the payment service provider shall inform the payment service user of acceptance of the order for execution. He shall do so without undue delay and, in any case, before the end of the next working day after the point in time of acceptance under paragraph 1.

2. In the case of electronically initiated transactions, the payment service provider shall inform the payment service user of acceptance of the order for execution. He shall do so without undue delay **following receipt of the payment order** and, in any case, before the end of the next working day after the point in time of acceptance under paragraph 1.

*Justification — See paragraph 13.11 of the opinion*

<sup>(4)</sup> OJ L 166, 11.6.1998, p. 45.

## Amendment 28

## Article 65(1), first subparagraph

1. Member States shall ensure that the payment service provider of the payee makes funds available to the payee *as soon as those funds are credited to the payee's payment account.*

1. Member States shall ensure that the payment service provider of the payee makes funds available to the payee **immediately once it has received them.**

*Justification — See paragraph 13.12 of the opinion*

## Amendment 29

## Article 66(1)

[...]Where the IBAN was specified as the unique identifier, it *should* take precedence over the name of the payee, *if it is provided additionally.* However, the payment service provider should, where possible, verify the consistency of the *former with the latter.*

[...]Where the IBAN **is** specified as the unique identifier, it **shall** take precedence over **any other unique identifier, including** the name of the payee, **if such other identifier is provided in addition to the IBAN.** However, the payment service provider should, where possible, verify the consistency of the **unique identifiers provided.**

*Justification — See paragraph 13.13 of the opinion*

## Amendment 30

## Article 77(1)

The Commission shall be assisted by a Payments Committee, hereinafter 'the Committee', composed of representatives of the Member States and chaired by a representative of the Commission.

The Commission shall be assisted by a Payments Committee, hereinafter 'the Committee', composed of representatives of the Member States **and observers from the ECB**, and chaired by a representative of the Commission.

*Justification — See paragraph 10 of the opinion*

## Amendment 31

## Annex

## ANNEX

## 'PAYMENT SERVICES' UNDER ARTICLE 2(1)

- (1) Cash deposits on a payment account held either by the user's payment service provider or by another payment service provider as well as all the operations required for operating a payment account.
- (2) Cash withdrawals from a payment account held either by the user's payment service provider or by another payment service provider, as well as all the operations required for operating a payment account.
- (3) Execution of payment transactions, including transfer of funds, where the funds are held on deposit in a payment account with the user's payment service provider or with another payment service provider:
  - execution of direct debits, including one-off direct debits;
  - execution of payment transactions through a payment card or a similar device;
  - execution of credit transfers, including standing orders.

## ANNEX

## PAYMENT SERVICES UNDER ARTICLE 4

1. Credit institutions within the meaning of Article 1(1) of Directive 2000/12/EC, including electronic money institutions as defined in Article 1(3)(a) of Directive 2000/46/EC, may provide the following payment services:
  - (i) Cash deposits on a payment account held either by the user's payment service provider or by another payment service provider as well as all the operations required for operating a payment account.
  - (ii) Cash withdrawals from a payment account held either by the user's payment service provider or by another payment service provider, as well as all the operations required for operating a payment account.
  - (iii) Execution of payment transactions, including transfer of funds, where the funds are held on deposit in a payment account with the user's payment service provider or with another payment service provider:
    - execution of direct debits, including one-off direct debits;

- (4) Execution of payment transactions where the funds are covered by a credit line for a payment service user provided in accordance with *Directive 98/7/EC of the European Parliament and of the Council amending Directive 87/102/EEC* for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit and other applicable Community legislation:
- execution of direct debits, including one-off direct debits;
  - execution of payment transactions through a payment card or a similar device;
  - execution of credit transfers, including standing orders.
- (5) Issuing of payment cards which allow the payment service user to transfer funds.
- (6) Execution of payment transactions, including transfer of funds, where the electronic money *within the meaning of Directive 2000/46/EC* is issued by the payment service provider.
- (7) Money remittance services where the *cash*, scriptural money or electronic-money is accepted by the payment service provider from the payment service user for the sole purpose of making a payment transaction and transferring the funds to the payee.
- (8) Execution of payment transactions by any means of communication at a distance such as mobile telephones or other digital or IT devices where the service provider operating the telecommunication or IT system or network is facilitating the payment of goods or services that are not digital goods or electronic communication services and so are not provided through the device itself.
- (9) Execution of payment transactions by any means of communication at a distance such as mobile telephones or other digital or IT devices where the service provider operating the telecommunication or IT system or network simply arranges a transfer of funds for the payment of digital goods or electronic communication services provided through the device, without any other intervention in the service provided.
- execution of payment transactions through a payment card or a similar device;
  - execution of credit transfers, including standing orders.
- (iv) Execution of payment transactions, including transfer of funds, where the electronic money **as defined in Article 1(3)(b) of Directive 2000/46/EC** is issued by the payment service provider.
2. Credit institutions within the meaning of Article 1(1) of Directive 2000/12/EC, with the exception of electronic money institutions as defined in Article 1(3)(a) of Directive 2000/46/EC, may provide the following payment services:
- (i) Execution of payment transactions where the funds are covered by a credit line for a payment service user provided in accordance with **Council Directive 87/102/EEC of 22 December 1986** for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit <sup>(FN)</sup> and other applicable Community legislation:
- execution of direct debits, including one-off direct debits;
  - execution of payment transactions through a payment card or a similar device;
  - execution of credit transfers, including standing orders.
3. Credit institutions within the meaning of Article 1(1) of Directive 2000/12/EC, including electronic money institutions as defined in Article 1(3)(a) of Directive 2000/46/EC, and payment institutions may provide the following payment services:
- (i) Issuing of payment cards which allow the payment service user to transfer funds **where the cardholder's account is with a credit institution;**
- (ii) Money remittance services where **banknotes and coins**, scriptural money or electronic money are accepted by the payment service provider from the payment service user for the sole purpose of making a payment transaction and transferring the funds to the payee.

*Justification — See paragraphs 6.2 and 11.3 of the opinion*

<sup>(FN)</sup> OJ L 42, 12.2.1987, p. 48. Directive as last amended by Directive 98/7/EC of the European Parliament and of the Council (OJ L 101, 1.4.1998, p. 17).