

# ZENTRALER KREDITAUSSCHUSS

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*Comments of the Zentraler Kreditausschuss on the working document by the European Commission's Internal Market Directorate-General for discussion with PSMG and PSGEG: A New Legal Framework for Payments in the Internal Market – Version 5.0 of 26 November 2004 (European Commission proposal for a directive of the European Parliament and of the Council for payment services in the internal market)*

## A General remarks

This draft of the directive (Version 5.0) is substantially revised compared to Version 4.0 of August 2004 and is a clear improvement on its predecessor in several respects (e.g. definitions in Article 2, option in Article 16 of differentiating between corporate and non-corporate users, new authorisation rules in Article 23). The consultation process with EU member states and affected business sectors kindly initiated by the European Commission's DG Internal Market with publication of the Commission communication of December 2003 has evidently succeeded in enhancing the quality of the future legal framework quite considerably. We also welcome the fact that the new draft has taken up the banking industry's proposal to spell out the motives for the planned legislation in the Recitals and the Explanatory Memorandum.

Nevertheless, many of the envisaged rules are still in need of further revision, either because they are not yet sufficiently appropriate (e.g. the scope, the rules on execution times, liability and evidence rules) or go beyond what is necessary (e.g. the extensive information requirements). Furthermore, the specific features of certain payment instruments are not always adequately taken into account. Moreover, the approach of gearing the rules exclusively to the bilateral relationship between the user and his service provider while excluding interbank relations is not always the correct one. Payment services are governed by the four-party principle, meaning that account needs to be taken of the contractual and operational relations both between two service users and their respective service providers and between the service providers themselves. To ensure legal certainty in the relations between payment service providers, the refund rules in Article 27, the obligation to credit the full amount in Article 29 and the liability rules in Article 32(3) should also cover the

rights to refund and damages in the relations between the service providers involved in executing the payment.

We would like to suggest, in particular, the following revisions:

– *Exclude rules on payment services to and from third countries*

Article 3's envisaged inclusion in the scope of the directive of payments to and from third countries goes beyond the objective of harmonising framework conditions in the internal market and exceeds the authority of EU legislators. Particularly unreasonable, in the absence of corresponding rules in third countries, is the strict liability of the payment service provider of the payer for due execution in a third country, as envisaged in Article 32(3). The scope of the directive must reflect its basic motivation and be confined to transactions within the European Union.

– *Need for clear distinction between the obligations of the payment service providers*

In Articles 2(24), 29, 30 and 32, due execution is linked to the crediting of the funds to the payee's account. This is inappropriate, since it mixes the obligations of the payer's service provider with those of the payee's service provider. It would make the payer's service provider responsible for something over which it has no control and which has up to now been the exclusive responsibility of the payee's service provider. The principle laid down in the EU Credit Transfer Directive and applicable in all member states must be retained whereby the payer's service provider is responsible until the funds reach the service provider of the payee (e.g. point in time at which the credit transfer amount is credited to the account of the payee's service provider), while the payee's service provider is obliged to make available incoming payments to the payee (e.g. crediting of the incoming credit transfer amount to the payee's account).

– *Need for a regulatory level playing field and basis for fair competition*

The authorisation requirements imposed by supervisors on payment institutions (Article 5ff.) should differ from those imposed by banking supervisors on financial institutions only on points where a payment institution is really not comparable with a financial institution holding a full banking licence. Otherwise, this risks causing competitive distortions to the detriment of financial institutions and compromising the smooth functioning of payment systems.

– *Distinction between consumers and corporate users*

Article 16(2)'s envisaged option of limiting the scope of provisions in Title III should apply to all kinds of enterprises. On the basis of the distinction concerning civil law

provisions usually made in EU directives, only consumers require mandatory protection by the rules in Title III.

– *No pre-empting of rules of evidence in cases of fraudulent use*

The rule in Article 25(2), sentence 2, lacks balance because it discriminates against the payer's service provider and call into question the existing situation with regard to evidence concerning PIN-based methods of payment (ATM transaction, POS, online banking). The owner of the payment verification instrument might be encouraged not to exercise due diligence (e.g. with his payment card and PIN). This would ultimately compromise the viability of these widespread payment methods. The directive should refrain from pre-empting the consideration of evidence by the court.

– *No discrimination against the service provider by unfair exemption of the user from liability*

The payment service user's 150 euro liability limit envisaged in Article 26(3) unfairly penalises his service provider. The latter would normally have to bear the vast majority of the losses arising from fraudulent card and online payments alone. The user, given the low liability risk he would be left to bear, would have little motivation to prevent fraud by reporting the loss, theft or misappropriation of his payment verification instrument. Service providers would have to either pass on the additional costs to customers or stop offering certain services in their present form. This exemption from liability should therefore be deleted or at least limited to cases where the user has not violated his obligation to report the loss, theft or misappropriation.

– *Execution deadline for "pull transactions" demands the impossible of the payee's service provider*

The execution deadline for pull transactions in Article 30(2) ignores the processes involved in direct debits and card payments and would oblige the payee's service provider to make the funds available regardless of whether or not the payment had been honoured by the payer's service provider. The rule should therefore be dropped.

Specific aspects of the 26 November 2004 draft (Version 5.0) are commented on below. These comments are preceded by a table of contents providing an overview of the rules addressed. We would also refer you to our response of 17 September 2004 to Version 4.0 of the draft directive published on 6 August 2004 and our previous comments of February, May and July 2004.

## B Detailed remarks on the draft directive

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## 1 Title I – Definitions and scope

### 1.1 Article 2 – definitions

The following definitions still need to be revised.

#### *1.1.1 Paragraph 2 “payment transaction” – term should be confined to cashless transactions*

In conjunction with the definition of “funds” in Article 2(1), the term as it stands would also cover the deposit or withdrawal of cash. Since these actions are related to operating an account, not to conducting payment transactions, they should not be included in the definition. Furthermore, we do not understand the reason for the inclusion of the second sentence, which points out that the transfer of funds does not depend on the existence of a credit line or a claim against the issuer. This information is irrelevant, in our view.

We would therefore suggest defining “payment transaction” as follows:

*‘payment transaction’ shall mean the ~~deposit, withdrawal or transfer~~ of funds from a payer to the benefit of a payee which is independent of any underlying obligations between the payment service users. ~~A transfer of funds is not depending on the credit he lends or a claim against the issuer but can be met against a credit line.~~ A payment transaction can be initiated by a payer or a payee, which can be one and same person.*

*1.1.2 Paragraph 3 “payment service” – definition should cover payment services in the narrow sense only*

The definition of “payment service” should be confined to payment transactions and make no reference to deposit operations requiring a banking licence within the meaning of the First Banking Co-ordination Directive (2000/12/EC), giro and guarantee operations, or the issue and administration of electronic money (also requiring special authorisation) within the meaning of Directive 2000/46/EC.

The first sentence of Article 2(3) should therefore read as follows:

*‘payment service’ shall mean the execution in the course of business of payment transactions on behalf of payment service users ~~and carrying out related ancillary services.~~ (...)*

*1.1.3 Paragraph 8 “corporate user” – term should be extended to cover all enterprises*

Please see our comments on Article 16.

*1.1.4 Paragraph 10 “payment system” – term should be limited to the definition within the meaning of the EU Finality Directive*

Since the term “payment system” as used in this draft directive is not the same as “payment system” within the meaning of the Finality Directive (1998/26/EC), this difference should be taken into account by using two distinct terms (“payment system” and “payment transaction system”).

Paragraph 10 should therefore read:

*‘payment transaction system’ means a funds transfer system with formal and standardised arrangements and common rules for the automated processing,*

*clearing and settlement of payment transactions including any instruments and procedures related to the system;*

*1.1.5 Paragraph 19 “payment account” – definition should be more precise*

It should be made clear that the decisive point is not whether or not the user actually has access to the account, but whether or not he has a right to access it. Otherwise a payment account would cease to qualify as such if the customer were unable to access it for technical reasons.

The definition should therefore be amended as follows:

*'payment account' shall mean an account out of which or into which there is a transfer of funds and to which the payment service user has a right of access;*

*1.1.6 Paragraph 24 “execution time” – execution time should end with receipt of the funds by the payee’s service provider*

This definition is at odds both with the rules in the EU Credit Transfer Directive and with German credit transfer law. These deem the remitting financial institution’s responsibility for the payment to end when the amount is credited to the account of the payee’s financial institution. The definition in the draft directive, in contrast, states that the transfer terminates when the funds are credited to the account of the payee himself. This would extend the remitting financial institution’s responsibility for the payment further along the processing chain and effectively turn the payee’s financial institution into the remitting financial institution’s vicarious agent. The remitting financial institution’s performance obligation and ensuing liability risk (see Article 32(3) – strict liability) would increase significantly.

Such a rule would have unreasonable implications, particularly in light of Article 3’s envisaged extension of the directive’s scope to payments to third countries (see comments below).

Furthermore, the definition ignores the inherent distinction which must, given the different legal relationships in the “four-party model”, be made between a payment transaction (forwarding a payment to the payee’s service provider) and operating an account (crediting an incoming payment to the payee’s account). The payer’s service provider has no influence on the legal relationship between the payee’s service provider and the payee and is thus unable to guarantee that the amount will be credited to the payee’s account. This

can only be ensured by the payee's service provider, which, moreover, is obliged to make the funds available under Article 31.

The definition of "execution time" should therefore refer to receipt of the payment by the payee's service provider:

*'execution time' shall mean the period starting with the day, following the day, including the point in time of acceptance of the payment order and ending on the day when the funds are made available to the payment service provider of the payee as a consequence of a payment transaction;*

*1.1.7 Paragraph 25 "banking business day" – calculations should take account of all service providers involved in the execution of the payment*

The definition does not take account of the fact that at least two service providers are involved in the execution of a payment and that the execution time (Article 30) consequently depends on the activities of all service providers involved. This is particularly important if the definition of "execution time" under paragraph 24 has to be taken into account.

The definition should therefore be amended as follows:

*'banking business day' shall mean a day on which ~~a~~the payment service providers involved in the execution of a payment transaction ~~is~~are open for business;*

1.2 Article 3 – scope and exclusions

The envisaged scope is too broad. Contrary to the approach correctly pursued in the December 2003 Commission communication – namely an alignment of the framework conditions for payments within the European Union, the draft directive now intends to cover also payments to and from third countries, payments in third-country currencies and payments exceeding 50,000 euros.

*1.2.1 Paragraph 2 – payments to and from third countries must be excluded*

The blanket inclusion of payments to or from third countries is not persuasive for conceptual reasons alone because the rule-making powers of EU legislators and the effect of such rules are limited to the European Union. The directive should cover only payments within the EU internal market with the aim of overcoming the existing distinction between

domestic and EU payments and establishing the Single Euro Payments Area (SEPA). This does not require the harmonisation of payments with a third-country dimension. What is more, EU legislators acting in isolation have no influence on the rules applicable in third countries.

The inclusion of payments to and from third countries is especially inappropriate in the context of Title III's civil law provisions. The fulfilment of obligations in a third country cannot be ensured to the same degree as is the case with payments within the EU. The draft already quite rightly recognises this problem by excluding third-country elements from the scope of the rules on ensuring that the full amount is transferred and on execution times (see Article 29(3) and Article 30(6) respectively). A similar exemption must be included for the liability rules in Article 32. These would otherwise have totally unreasonable consequences in connection with the strict liability of the payer's service provider for due execution (Article 32(3)), particularly in view of the fact that, under Article 2(24), this would even include ensuring the funds are made available to the payee in the third country. A service provider located in the European Union cannot possibly assume such indemnity liability if the inevitably involved intermediary service providers outside the European Union and the payee's service provider in the third country are not subject to the same stringent legal regime that the directive intends to establish. This kind of indemnity liability and excessive extension of responsibility for correct execution will be unfamiliar in most third countries. No service provider in a third country, given this excessive liability, will thus be prepared to allow the payer's service provider in the European Union to seek redress against it if it was responsible for the payment's failure to reach its destination. In consequence, the payer's service provider in the European Union will be burdened with a liability risk for errors by service providers in third countries which it will be unable to pass on to them. The fact is also overlooked that it is not the payer's service provider, but the payer himself who selects the payee's service provider in the third country. The payer's service provider thus has no opportunity to previously seek out reliable service providers in the third country whose involvement could ensure correct completion of the execution process. To sum up, the strict liability for correct execution in third countries would impose an uncontrollable liability risk on the payer's service provider. This would ultimately result in payments no longer being offered to certain third countries or in all customers bearing the service provider's additional liability risk in the form of significantly higher prices.

It also makes little economic sense to establish a principle requiring European service providers to bear risks for payments to third countries irrespective of negligence on their

part. In practice, the uncontrollable risks in third countries borne by European service providers would benefit the third-country service providers and users. The payer would refrain from lodging any claim against them in the event of their being responsible for non-execution because of his claim to be indemnified by his own service provider. Preferential treatment of the service provider in the third country also results from the fact that this service provider would not itself be subject to such a strict liability regime when executing payments on the paying side.

Furthermore, the possibility cannot be excluded that, due to the inclusion in the scope of a third-party dimension, payment service users in third countries might be able to derive rights vis-à-vis service providers in the European Union. This would doubtless also be at odds with the original objective of the directive.

Article 3(2) should therefore read as follows:

*This directive shall apply to payment services where ~~either~~ the payer's ~~or~~ and the payee's payment service provider ~~is~~ are both located in the European Union, unless stated otherwise.*

#### *1.2.2 Paragraph 4 – payments in third-country currencies must be excluded*

The scope should be limited to payments in euros and other EU currencies. Payments in third-country currencies inevitably entails an acquisition in the third-country involved, which, among other things, has a significant influence on execution times (Article 30) and booking and value dates (Article 31).

Article 3(4) should therefore read:

*This Directive shall apply to payment services in EU Member States currencies ~~and other currencies, unless stated otherwise.~~*

Furthermore, it cannot be the aim of this directive to accord all EU currencies equal treatment for payments in the European Union. The stated aim of the European banking industry is to create the Single Euro Payments Area. In the interests of efficient processing, a conscious decision was taken not to cover all EU currencies.

#### *1.2.3 Scope of Title III should be confined to amounts below a maximum*

Originally, the civil law provisions in Title III of the legal framework (Article 16ff.) were intended to apply only to payments not exceeding 50,000 euros and exclude high-volume

payments because of their particularities. This is also the approach of the EU Credit Transfer Directive and the EU Regulation on cross-border payments in euros. Now, however, no such maximum amount is envisaged. This would significantly increase the liability risks of the payer's service provider, particularly those associated with the strict liability rules in Article 32(3). Once again, the payer's service provider would face the choice of either refusing to handle payments above a certain maximum amount or passing on its additional risk provisioning costs to service users – and thus making services considerably more expensive.

An additional paragraph (6) should therefore be added to Article 3:

*Title III of this Directive shall not apply to payment services where a payment transaction exceeds the equivalent of 50,000 euros.*

*1.2.4 Paragraph 5 – bills of exchange and other collection documents should be excluded from the scope*

As per recital 26, Article 3(5) should exclude bills of exchange and other collection documents from the scope of the directive as well as cheques.

## 2 Title II – Payment service providers

### 2.1 General – risk assessment of service providers without a banking licence is incorrect

Under Article 4 the provisions of Title II are to apply only to payment service providers which do not hold a banking licence. It remains an open question why it should be permissible for payment services to be provided by service providers that do not possess a full banking licence. The draft directive assumes incorrectly in recital 35 that payment institutions pose a considerably lower risk for the public and the system than do financial institutions; in consequence it is sufficient to impose a less stringent supervisory regime on payment institutions. This differentiation is not appropriate:

Providing payment services has traditionally – and quite rightly – been considered part of the financial institutions' core business and is therefore also covered by banking supervision law. The financial institutions have to meet strict supervisory requirements which ensure, in the interests of the economy and consumer protection, that payment services

remain viable, dependable and secure. It would thus run counter to the public interest if the opening up of the market meant that new payment service providers had to fulfil less stringent requirements in this area than do the financial institutions. It would also result in a clear distortion of competition.

Transactions initiated by the payee (“pull transactions”; see recital 21 for the distinction between “pull” and “push” transactions), such as direct debits and card payments, give rise to a particularly high credit risk for the service providers involved because of the possibility that payments will not be honoured or will be returned by the payer. The smooth functioning of the entire system is dependent on an appropriate supervisory regime ensuring that all payment service providers maintain specified minimum levels of liquidity and adequate risk management systems. If service providers without a banking licence are not required to fulfil these requirements, logic demands that they should not be permitted to provide any services associated with pull transactions.

Were, on the other hand, the assumption put forward in recital 35 to be deemed correct – namely that providing payment services carries only minor risks requiring no regulatory protection – then payment services performed by institutions with a banking licence would also have to be exempted from the strict supervisory regime in order to avoid distorting competition.

## 2.2 Article 5ff. – prerequisites for authorisation to provide payment services without a banking licence should be the same as those applying to financial institutions

The modified supervisory requirements to be met by payment institutions in Article 5ff. should differ from standard banking supervisory requirements only on points where a payment institution really cannot be compared to a financial institution with a full banking licence.

Should the currently envisaged rule be retained allowing payment institutions to issue guarantees for payment services and conduct giro business (Article 6(1)(b) and (c)), the provisions governing the organisation and supervision of these institutions must be adjusted to reflect existing banking supervisory rules. This is essential both to protect the integrity and smooth functioning of these operations and create a level playing field. It is the only means of ensuring that service providers without a banking licence observe the high standards needed to safeguard the interests of the users and financial institutions involved in a payment transaction. The main points which need to be re-examined are the requirement to obtain authorisation, the qualifications of top management and reputation

of the owners, start-up capital, and adequate own funds and solvency (liquidity). These requirements should be set out in the form of a list based on harmonised criteria. The register should be established on the basis of this harmonised list. It is important to ensure consistency across all member states. And in the interests of preventing money laundering in the internal market, all payment institutions must also be subject to the provisions of the EU Money Laundering Directive.

### 2.3 Article 6 – scope should be limited to conventional payment services only

We welcome the fact that Article 6(1)(a) now stipulates that payment institutions may not provide payment services involving the receipt of funds from the public which constitute a deposit or other repayable funds. This quite rightly draws a distinction between the business of a payment institution and that of a financial institution within the meaning of Article 1 of the First Banking Co-ordination Directive (2000/12/EC).

The definition of a financial institution in Article 1 of the First Banking Co-ordination Directive goes beyond the distinction drawn in Article 6(1)(a), however. It defines a financial institution as an undertaking whose business consists of receiving deposits or other repayable funds from the public and granting credit for its own account.

Article 6(1)(a) should therefore be reworded as follows:

*to carry on the business of rendering payment services, where the receipt of funds by such institutions ~~does neither~~ constitutes a deposit nor other repayable funds nor the granting of credit for its own account according to Article 3 of Directive 2000/12/EC or electronic money according to Directive 2000/46/EC.*

On the basis of the above definition, the reference in Article 6(1)(b) to issuing guarantees for payment services then needs to be deleted. This activity may be deemed a banking operation within the meaning of Article 1 of the First Banking Co-ordination Directive and thus cannot be performed by a payment institution.

Article 6(1)(b) should therefore read as follows:

*(...) to perform operational and related ancillary services such as ~~issuing of guarantees for payment services~~ foreign exchange services and safekeeping activities and storing and processing of data on behalf of other undertakings or public institutions.*

Giro business should also be deemed a banking operation and therefore not an activity that may be carried out by a payment institution. Banking supervision rules in (most) member states define giro business as the execution of cashless payments and clearing operations. The aim of making this type of business subject to banking supervision is to guarantee the security and viability of these economically significant operations. Clearing operations comprise the processing by the financial institutions of interbank payment transactions (clearing and settlement). This covers clearing through the banking system's giro network, for example. It involves offsetting a clearing member's liabilities against its receivables. The resulting residual amounts are then entered in the giro accounts that clearing members hold with the Bundesbank or a clearing house.

Against this background, Article 6(1)(c) should be deleted.

We would like at this juncture to reiterate our view – already largely reflected in Article 6 – that it would be advisable from the standpoint of legal doctrine for Article 2's definitions of "payment service provider", "payment institution", "payment service" and "payment transaction" not to cover deposit taking, giro business or credit card operations.

#### 2.4 Article 13 – waiver of supervisory requirements should be more narrowly formulated

Article 13's envisaged option for member states to waive the application of provisions to payment institutions must not be allowed to undermine an otherwise uniform supervisory regime. In its present form, Article 13(1) gives each member state discretion to determine to what extent it will exercise the waiver and thus secure a competitive edge for its national institutions. As soon as one member state waives a number of the provisions on the basis of Article 13, pressure will mount on other member states to follow suit to prevent their own institutions from relocating. The waiver rules in Article 13(1)(a) to (c) should therefore be more narrowly formulated. Article 13(1)(a), for example, should cover only payment institutions whose activities do not exceed fifty transactions or a total of 10,000 euros per day. Furthermore, it is essential to ensure that no waivers affect obligations to comply with requirements aimed at preventing money laundering or terrorist financing.

### 3 Title III – Payment services

#### 3.1 Article 16 – scope of Title III

##### *3.1.1 Option of limiting the scope of Title III provisions should apply to all enterprises*

We welcome the option envisaged in Article 16(2) of limiting the scope of Title III's provisions in agreements with large enterprises ("corporate users"), since many of these rules are not suited to such business relationships.

This option should not be confined to agreements with large enterprises, however. The Explanatory Memorandum makes it clear that the directive's civil-law provisions are intended to establish a consistent level of consumer protection. Consequently, the directive follows an approach already adopted by other EU legislation and aims first and foremost at protecting the consumer. This distinction between consumers and enterprises, based on the formers' greater need for protection, should be reflected in Article 16(2): it should be possible to agree different rules with all types of enterprise and the higher level of protection should apply on a mandatory basis only to services provided to consumers. This would also be line with the normal business practice of distinguishing exclusively between retail customers (consumers) and corporate customers (all types of enterprise). Furthermore, the distinction between SMEs and large enterprises in Article 2(8)'s definition of "corporate users" would be extremely onerous to apply in practice, since the criteria are difficult to measure and vary over time. It should therefore be possible to diverge from the specified provisions in Title III in agreements concluded between payment service providers and all types of enterprise.

##### *3.1.2 Option should be extended to Articles 29 and 32*

It should also be possible to agree different rules with enterprises from those in Article 29 (execution for the full amount) and Article 32 (liability). It is a normal business practice for enterprises to make a specific agreement with their foreign counterparts regarding the distribution of payment transaction fees and they usually want to be able to choose freely between the various options available. This practice can only be retained if it is permissible for service providers to agree with enterprises to diverge from the provisions in Article 29. It is also normal practice for service providers to agree special liability rules with their corporate customers, at least where certain payment transactions are concerned. The extent of the liability borne by the service provider can then be reflected in the price

charged for the service. It should therefore continue to be possible to include liability rules diverging from Article 32 in agreements with enterprises.

Paragraph 2 of Article 16 should consequently be amended as follows:

*Payment service providers and ~~corporate~~ payment service users who are not consumers may agree different rules from those in Articles 17 to 21, Articles 24, 26, 27, 29, 31 and 32. Unless explicitly agreed to the contrary, Articles 17 to 21, Articles 24, 26, 27, 29, 31 and 32 continue to apply.*

3.2 Article 17 – prior information requirements – and Article 18 – modifying the terms in case of framework contracts

3.2.1 Article 17(1) – *it should be sufficient to make the information available*

The way in which the information is furnished should reflect existing information requirements in Article 3 of the EU Credit Transfer Directive and Article 4 of the EU Regulation on cross-border transfers in euros. The financial institution should only have to “make available” the information (onus on the customer).

Article 17(1) should therefore read:

*~~In good time~~ Before the payment service user is bound by any payment service contract covering a payment transaction or an initial payment service agreement followed by successive payment transactions or a series of separate payment transactions of the same nature performed over time, the payment service provider shall ~~communicate~~ make available to the payment service user on paper or on another durable medium ~~available and accessible to him~~ all the conditions governing the provision and use of the payment service (hereinafter “the conditions”).*

3.2.2 Article 17(1) in conjunction with Article 18(3) – *rules on furnishing information when transaction-related prices and service details change should be simplified*

The envisaged obligation under Article 17(1) in conjunction with Article 18(3) for service providers to actively inform customers about changes in their business conditions is not practicable, particularly where transaction-related prices (e.g. fee for standard EU credit transfer) or service details (e.g. execution time for a credit transfer to Sweden) are con-

cerned. (“Shall communicate” – onus on the service provider.) Such conditions have to undergo frequent adjustments to reflect a continually changing market. Customers would be confronted with a constant flow of information, even if they were not actually making use of the services involved at the time. This requirement would also be extremely costly. A service provider with one million customers, for example, would have to spend about 600,000 euros on printing and posting information about a single modification. These costs would have to be passed on to the customers, making banking services more expensive.

To avoid inundating customers with information they do not necessarily want – at least not at the point in time they receive it – it should continue to be sufficient to ensure that information on current transaction-related fees and service details is always available to the customer on demand. This would enable the customer to ascertain the price and service details associated with a particular transaction prior to making use of the service involved. What is more, gearing the provision of information to the customer’s concrete needs in this way reflects normal commercial practices: before making use of a service, it is possible to check the price. This does not put customers at any kind of disadvantage since they are free to access all the information they need and want before a transaction is carried out. If they are not satisfied with their service providers’ modified fees and service conditions, they are not obliged to go ahead with the transaction on such terms. They can switch at any time to another service provider offering what they consider more favourable conditions.

An additional paragraph (6) should be added to Article 18 permitting information to be furnished in this simplified form:

*Paragraph 3 does not apply to the modification of transaction-related charges and maximum execution times if the payment service provider has made the new charges and maximum execution times easily available to the payment service user and the user is allowed to terminate the framework contract.*

### *3.2.3 Article 17(3) – amount of information should be limited*

The envisaged prior information requirements go beyond what is necessary and it is open to question whether this amount of information really serves the customer’s interests and expectations.

In principle, a standard information sheet as proposed in Article 39(1)(e) would greatly assist payment service providers in complying with information requirements. Making it available only after the directive enters into force would be impractical, however, since this would entail duplicate implementation work. Furthermore, it would become clear when preparing the sheet whether the envisaged amount of information was intelligible to consumers.

As a general principle, it should not be mandatory to advise customers of items which, when the directive is implemented, will already be covered by national law (this applies, for example, to the information required under Article 17(3)(b), (e), (g) and (j)). It is not up to the service provider to inform customers about existing statutory rules and regulations.

*3.2.4 Article 17(3)(e) – information requirements about the effect of statutory rules on execution times should be deleted*

Requiring additional information to be provided about statutory rules that may have an effect on execution times is not acceptable. Should compliance with anti-money laundering regulations cause the execution of a credit transfer be delayed, for example, it would hardly seem advisable to require the service provider to inform its customer of this fact. In this respect, too, it cannot be the service provider's task to inform customers about statutory rules and regulations that are already in force. In the context of the fight against money laundering, this could even prove counter-productive.

Article 17(3)(e) should therefore be deleted.

*3.2.5 Article 17(3)(g) – information about execution times should be limited to push transactions*

The new draft is correct to assume that the service provider is in a position to provide information only about maximum execution times of credit transfers. When it comes to direct debits, on the other hand, it makes little sense to introduce a requirement to advise maximum execution times. These payments are initiated by the payee and the payer's service provider has no means of finding out when this will happen. The same goes for card payments: the execution time largely depends on when the merchant forwards the payment data to his service provider. Information requirements concerning execution times should therefore be limited to push transactions.

*3.2.6 Article 18(2) – requiring the service provider to make available information on the user's reporting and tax obligations is inappropriate*

It is true that Article 18(2)'s additional information requirements for framework contracts put the onus on the customer by requiring only that the data be made available. They should nevertheless be dropped so as not to inflate the existing volume of information requirements still further. Moreover, it would be completely inappropriate to impose the requirements in subparagraph (2)(c) on the service provider since it is the service user who bears sole responsibility for familiarising himself with balance of payments reporting requirements and tax obligations. It is not up to the service provider to furnish legal or tax advice. Should information sheets on these matters be prepared by the authorities and made available to service providers, the maximum that could be considered would be for these to be furnished to customers on demand.

*3.3 Article 19 – requirement for payer's merchant to advise currency conversion rate is not feasible*

It is not feasible, on the basis of existing point-of-sale technology, to furnish information about currency conversion rates. Furthermore, this rule imposes an obligation on the payer's merchant. This runs counter to the approach of the directive, which is otherwise addressed to payment service providers and service users only.

Article 19 should therefore be deleted.

*3.4 Article 20 – it should be possible to furnish information on executed payments via statement printers and online banking*

It should also be possible to comply with Article 20 by making information on executed transactions available to service users on demand, for example via the service provider's account statement printers or via online banking. This practice is extremely widespread today and is becoming increasingly popular among users.

3.5 Article 22 – relevance of additional information requirements in other legislation should be clarified

We welcome the statement in paragraph 1 that the information requirements for payment service providers set out in the directive are exhaustive. This is subsequently undermined in paragraph 2, however.

To better clarify the relevance of other information requirements, Article 22(2) should be amended as follows:

*However, where there are provisions in Community legislation which contain information requirements covering issues ~~not addressed by the present Directive~~ other than payment services, these requirements shall continue to apply.*

3.6 Article 23 – the rules on the authorisation of payment transactions should more clearly reflect the legal construction of the German *Einzugsermächtigungslastschriftverfahren*

The authorisation rules in Article 23, viewed in conjunction with recital 54, are a marked improvement on the previous version of the directive. In particular, we believe the second sentence of paragraph 1 will take account of the envisaged European direct debit scheme whereby a mandate sent by the payer to his financial institution once constitutes authorisation for several subsequent direct debits. We also welcome the fact that the first sentence of paragraph 2, in conjunction with recital 54, sentence 3, makes clear that the payer's instruction does not necessarily need to be present at the paying bank when the transaction is executed. It should continue to be sufficient for the paying bank, in the event of a dispute, to obtain the mandate from the creditor or the collecting bank on demand.

The following point nevertheless requires clarification. The rule evidently deals with the authorisation of payment orders by the payer to his service provider (see Article 23(1), sentence 2). It does not, on the other hand, cover the authorisation of a payment order by the payee to the payee's service provider. This needs to be spelled out in Article 23(1) more clearly. The content of paragraph 2, sentence 2, and recital 54, sentence 4, is crucially important to the future of the German *Einzugsermächtigungslastschriftverfahren*. According to the authorisation theory of the Federal Court of Justice, authorisation of the direct debit may also take place after the payment has been executed. Under German law, the direct debit is deemed to have been subsequently authorised if the payer consents to

the corresponding debit entry either explicitly, implicitly or by failing to contest his statement of account. The possibility of subsequent authorisation also has implications for Article 26(1), since the payer's claim for refund will expire if he has authorised the payment. To make this situation absolutely clear, we suggest adding a new sentence to paragraph 2 and following it with the fourth sentence of paragraph 1.

Article 23(1) would then read:

*A payment transaction is authorised by the payer, if the respective payment order addressed to the payer's payment service provider is covered by the payers' consent. The payer's authorisation might cover one or more payment transactions. The payer might transmit his consent by using a payment verification instrument. This consent might be communicated directly to his payment service provider or indirectly via the payee but needs always to be addressed to ~~his~~ the payer's payment service provider. ~~If such consent is missing the payment transaction shall be regarded unauthorised.~~*

And Article 23(2) would read:

*However, evidence of the authorisation does not need to be present at the point in time of the execution of the payment transaction by the payment service provider. A payment transaction may be authorised by the payer prior or subsequent to the execution of the payment transaction. Payment transactions initiated by third parties without initial explicit authorisation by the payer shall not be deemed authorised until definitively expressly or implicitly accepted by the payer after the execution of the transaction. If there is no such consent, the payment transaction shall be regarded as unauthorised.*

### 3.7 Article 25 – allocation of the burden of proof to one party only in disputed cases lacks balance

The rules are a considerable improvement on the previous version. Nevertheless, the evidence rule in the second sentence of Article 25(2) continues to place the entire burden of proof on the payment service provider and thus runs counter to the principle of a balanced burden of demonstration and proof. It also encroaches excessively on the rules of civil procedure in member states and on the principles of considering evidence established there by case law. It should ultimately be left to the court to weigh the evidence in each

specific case as it sees fit in the light of all the circumstances. The directive should therefore refrain from prescribing that the entire burden of proof must be placed on one party.

In addition, the rule in Article 25(2), sentence 2, limiting the court's ability to consider evidence would call into question principles of evidence established through case law at national level, such as prima facie evidence, which is accepted in Germany in cases involving card-based payments owing to the extremely high level of technical security throughout the entire system. This would have unforeseeable consequences. In the context of PIN-based transactions (e.g. ATM transactions, electronic cash), a key question is whether the service user has exercised due diligence in keeping his verification means (e.g. bank card, chip card with electronic signature) in a safe place and not disclosing his PIN. If a court was no longer allowed to make a decision based on prima facie evidence, financial institutions would be stripped of virtually any possibility of protecting themselves against fraudulent actions by customers who untruthfully disputed carrying out a transaction. The costs incurred as a result of fraudulent actions by customers would increase significantly and ultimately result in providers having to raise the prices of payment services. Furthermore, there is a danger that some payment services, such as online banking or certain card transactions, could not longer be offered in the form they are today. In summary, fraudulent actions by a small minority of customers would limit the range of payment services offered to all clients and make them considerably more expensive. Such a development could jeopardise the functioning of payment methods.

The admissibility of prima facie evidence was recently explicitly upheld in Germany by a decision of the Federal Court of Justice on 5 October 2004 (Ref. XI ZR 210/2003). This ruling should not be called into question by EU legislators.

Should the evidence rule nevertheless be retained, Article 25(2), sentence 2, should be amended as follows to preserve the principle of free consideration of evidence by the court:

*In this case, it has to be evaluated whether or not the use of a payment verification instrument, recorded by the payment service provider shall ~~not, of itself,~~ be sufficient to entail either that the payment was authorised by the payment service user or that the payment service user acted with gross negligence or fraudulently with regard to his obligations according to Article 24 Paragraph 1.*

3.8 Article 26 – allocation of losses of unauthorised payment transactions must safeguard the interests of both parties

*3.8.1 Limitation of liability should preferably be dropped*

The envisaged liability ceiling of 150 euros in total in the second sentence of Article 26(3) is an excessive shift of the liability risk onto the payment service provider and would increase the opportunities for fraud by service users. Yet it is the user who has sole control over his payment verification instrument. In the event of fraudulent use, therefore, a risk has been realised which lay in his sphere of responsibility alone. We understand that the introduction of a 150 euro liability ceiling for cardholders in Belgium, for example, has led to a sharp increase in cases of fraudulent card payments. This can be explained by the fact that there are now only minor disadvantages for cardholders if they fail to inform their card issuer without delay of the loss, theft or suspected fraudulent use of their card.

Sentence 2 of Article 26(3) should therefore be deleted.

*3.8.2 Liability ceiling should apply at most if the user has not yet discovered the loss or fraudulent use of his verification instrument*

In the event that a liability ceiling for the user is nevertheless retained, Article 26(3) to (5) should make the following distinction in cases of unauthorised use of the payment verification instrument. The distinction is based on the principle that the user has an obligation to prevent and minimise losses:

1. If the user has not yet discovered the loss, theft or misappropriation of his payment verification instrument, an appropriate ceiling could be envisaged to limit his liability risk, as long as he has not violated his obligation to exercise due diligence in keeping the instrument in a safe place.
2. If the user has already discovered the loss, theft or misappropriation of his payment verification instrument, he has unlimited liability for losses arising between noticing and reporting unless he can prove that the loss would have arisen even if his card had been blacklisted without delay. This is the only way to motivate the user to take action to blacklist the card and thus prevent losses to himself and his service provider. It is reasonable to expect him to report the loss or suspicion without delay since he is the only party able to prevent further damage.

3. After reporting the loss, theft or misappropriation, the user is exempted from all liability for losses subsequently arising (cf. also Article 26(5)) since he has taken all reasonable steps to prevent or minimise the damage.

The second step of this three-step liability model could be reflected in the directive by amending Article 26(4) as follows, for example:

*The payment service user shall bear all losses of unauthorised transactions if he supported them by acting with gross negligence or fraudulently ~~with regard to his~~. In determining the payment service user's gross negligence, account shall be taken of all factual circumstances. He shall be deemed to have acted with gross negligence if he has failed to fulfil his contractual obligations in accordance with Article 24 Paragraph 1b. The limit referred to in paragraph 3 shall not apply. ~~In determining the payment service user's gross negligence, account shall be taken of all factual circumstances.~~*

### *3.8.3 Need to differentiate between different methods of use*

It must also be borne in mind that the amounts involved when using the electronic payment instruments bank cards and online banking are very different. If the envisaged 150 euro liability ceiling for the customer were to apply to both card and online banking payments, few financial institutions would be prepared to go on allowing their customers to execute high-value payments online. A liability limit set as low as 150 euros is particularly inappropriate in cases in which an enterprise uses electronic communication to send payment instructions to its bank for large amounts (e.g. multiple credit transfers for monthly payrolls). The financial institutions would have to make provisions to compensate for all increases in the liability risk associated with payment services, which, in turn, would have an impact on their prices. There is, moreover, a danger that financial institutions would no longer be able to offer certain services.

## **3.9 Article 27 – refund of a payment transaction**

### *3.9.1 Limit scope of paragraph 1 to pull transactions*

The expression “acting in good faith” should be deleted from the first sentence of Article 27(1) since action with fraudulent intent is excluded in any event. Otherwise, this wording would have to be included in every rule.

Furthermore, the refund rule is only suited to pull transactions, which are initiated by the payee and thus cannot be controlled by the payer at the time the amount is deducted. With push transactions, on the other hand, the user is in no such need of protection. A payer does not deserve to be protected if he gives the payee a signed blank remittance form and the latter fills in a higher amount than that which was agreed before presenting it to the payer's service provider. In terms of the finality of the transaction, the payer's service provider must be able to rely on the fact that the amount on the form is covered by the remitter's signature. Any risk of fraudulent use must be resolved exclusively between the payer and the payee.

Article 27(1) should therefore read as follows:

*A payer ~~acting in good faith~~ shall have the right to refund of a payment transaction which he ~~had~~ authorised, which was initiated by the payee and which has already been executed (...)*

### *3.9.2 Exemption of direct debits authorised by the payer to his bank direct (Abbuchungsauftragslastschriften)*

An additional exemption should be included in Article 27(2) to take account of the special features of the *Abbuchungsauftragslastschriftverfahren*, the second German direct debit scheme, which is popular and well-established in the German corporate customer segment. Unlike the *Einzugsermächtigungslastschriftverfahren*, which is used almost exclusively in the retail customer segment, the *Abbuchungsauftragsverfahren* provides for very early finality by allowing the payer only two days to revoke the payment, regardless of whether or not the amount is specified from the outset or not. This short deadline for revoking the payment is justified because, unlike with the *Einzugsermächtigungslastschriftverfahren*, the payer in the *Abbuchungsauftragsverfahren* authorises his financial institution directly to honour the direct debit payment (not, as is usual with direct debit systems in other member states, indirectly via the payee and the payee's financial institution). If the payer gives his financial institution direct authorisation to execute the direct debit, it is not necessary to allow him a long period in which to lodge the revocation. The situation is comparable with granting a power of attorney over an account, which also does not provide for lodging an objection. Any disagreements must be resolved outside the context of the payment transaction directly between the payee and the payer.

Paragraph 2 should therefore read as follows:

*The right to refund in paragraph 1 shall not apply for currency exchange reasons, if the reference exchange rate agreed with him according to Article 17, paragraph 3, letter (i) was applied or to payment transactions authorised directly by the payer vis-à-vis his payment service provider.*

*3.9.3 It should be possible for the payee to bear the refund costs*

Paragraph 5 envisages that the payer will not have to bear any costs for successful claims for refunds. It should, however, be possible to charge the payee a fee if he was responsible for the refund.

The second sentence of Article 27(5) should therefore read as follows:

*No fees borne by the payer shall be due for successful claims for refund.*

*3.10 Article 28 – rules on the irrevocability of a payment order should be more precise*

The scope of the rules on the irrevocability of a payment order will be determined by the broad definition of the term “payment order” in Article 2(20). The following transactions will therefore definitely be covered:

- credit transfers (instruction by the payer to his service provider to execute the transfer in accordance with the wording in the first alternative “payment order initiated by the payer”),
- direct debit collections (collection order by the payee to his service provider in accordance with the wording in the second alternative “payment order initiated by the payee”) and
- card payment collections (instruction by the card acceptor to his service provider to collect the transaction amount in accordance with the wording in the second alternative “payment order initiated by the payee”).

It is less clear whether the following are also to be covered by the scope of the rule:

- orders to honour direct debits (instruction by the debtor to his bank to pay direct debits drawn on his account in accordance with the wording in the second alternative “payment order initiated by the payee”) and

- card payments (instruction by the cardholder to the card issuing institution to pay the card transaction in accordance with the wording in the second alternative “payment order initiated by the payee”).

Our view of the (possible) scope of the rules is as follows:

- We warmly welcome the proposed irrevocability rule for credit transfers in the first alternative since it guarantees early finality of the transaction.
- The rule for direct debit and card payment collections in the second alternative is acceptable. However, it will probably become relevant only in the rare cases in which a submitted payment is inaccurate due to an error by the direct debit creditor or card acceptor and should therefore not be executed.
- As for the collection of the direct debit by the payee’s service provider possibly covered by the second alternative, the determining factor is not the revocability of the payer’s instruction (“payment order initiated by the payee”). Though it is true that the instruction is addressed to the payee’s service provider, it is not always in its possession at the time the payment is executed. Rather, the payer’s objection to a direct debit is a direct instruction by the payer to his service provider not to honour certain or all direct debits drawn on his account. This set of circumstances should not be mixed with two cases mentioned above, but should be dealt with separately.
- With card payments guaranteed by the card issuer (e.g. Maestro card payment or payment using PIN), the right to payment of the card acquirer or the card acceptor begins at the time the guarantee is given. The legitimate cardholder should not be allowed to contest the execution of such card payments once the card issuer has given its guarantee. Otherwise, the cardholder would be able to revoke a payment even though his card issuer was unable to cancel it. This set of circumstances should be dealt with separately in Article 28, as was the case in a previous version of the draft directive.

Article 28(1) should therefore read:

*A payment order cannot be revoked by the initiating payment service user after the point in time of acceptance with the payment service provider of the payer for payments initiated by the payer, or with the payment service provider of the payee for payments initiated by ~~or through~~ the payee.*

3.11 Article 29 – execution of the full amount specified on the payment order and the levying of fees

*3.11.1 Paragraph 1 – responsibility for due execution only until amount credited to payee's service provider*

As already pointed out in our comments on Article 2(24) (and reflected in the EU Credit Transfer Directive), the payer's service provider can only fulfil an obligation to credit the full amount up to the time that the account of the payee's service provider is credited. This applies all the more to amounts paid out in cash, since it is not necessary for any contractual relationship to exist between the payee and the service provider receiving the funds if the latter is a financial institution, for example. Article 31 alone results in an obligation for the payee's service provider to pay out incoming funds (see comments below).

It should also be stipulated that intermediary service providers are not permitted to deduct fees. Only by extending the scope of the rule to relations between service providers can it be ensured that none of the parties involved will deduct a fee.

Article 29(2) should therefore read:

*The payment service providers ~~of the payer~~ involved in the execution of the payment transaction shall make sure that the full amount specified in the payment order shall be credited (...) to the payment service provider of the payee.*

*3.11.2 Paragraphs 2 and 3 – principle of sharing fees should be limited to euro payments indicating IBAN and BIC*

The article assumes certain conditions on which standard payments are executed: the general principle of sharing fees ("share in the domestic sense"). However, this principle is applied only to domestic payments and to euro payments within the European Union which do not exceed 12,500 euros (from 2006: 50,000 euros) and which may be processed automatically due to the indication of IBAN and BIC in the payment order. The latter are known in Germany as *EU-Standardüberweisung*. Only in these two cases can it be stipulated that fees will be shared.

The prerequisites for extending this principle to other EU currencies or non-automated payments, such as a multi-currency payments system, are not currently in place. Nor will they be in place in the future. It must continue to be possible to process such payments according to practices which are applicable worldwide and unavoidable from an organisa-

tional point of view, such as use of instructions “fees to be borne by the payer” or “fees to be borne by the payee”, especially as these are given explicitly by the payer.

Article 29(3) should therefore read:

*This article shall only apply if the payer’s payment service provider and the payee’s payment service provider are both located in the European Union and the transaction is carried out in ~~the currency of an EU member state~~ euros and the IBAN and BIC of the payee are indicated on the payment order.*

Should this proposal not be taken up, Article 29(1) would then have to be worded as follows:

*The payment service providers ~~of the payer~~ involved in the execution of the payment transaction shall make sure that the full amount specified in the payment order shall be credited (~~...~~) to the payment service provider of the payee, without prejudice to explicit agreements between the payer and his payment service provider.*

### 3.12 Article 30 – execution time

We welcome the fact that a distinction is now made between push transactions (paragraph 1) and pull transactions (paragraph 2). However, the rule in paragraph 2 ignores the way pull transactions actually function and is therefore impracticable (see below).

Paragraph 1’s differentiation according to the currency of the payment is also a positive step, though the second sentence ignores the fact that payments in third-country currencies normally entail an acquisition in the third-country involved and that more time is thus required. Payments in third-country currencies should therefore be excluded entirely from the scope of Article 30 or, at the very least, the second sentence of paragraph 1 should make a distinction between payments in EU and in third-country currencies. This distinction should then also be reflected in paragraph 2.

#### *3.12.1 Paragraph 1 – ensuring due execution should be limited to the point at which payment is received by the payee’s service provider and the three-day deadline should apply only to euro payments indicating the payee’s IBAN and BIC*

As mentioned above in our comments on Article 2(24), Article 2(24) and Article 30(1) would be at odds with both the rules in the EU Credit Transfer Directive and German

credit transfer law and extend the responsibility for due execution of the payer's service provider further along the processing chain. The decisive factor would no longer be the crediting of the amount to the account of the payee's service provider, but the crediting on the account of the payee himself. This would extend excessively the obligations of the payer's service provider and thus, in particular, its strict liability under Article 32(3) as it would no longer have to ensure only that the funds were forwarded to the payee's service provider, but also that they were credited to the payee's account there, an action over which it has no control. It is incumbent on the payee's service provider alone to credit incoming credit transfers; as operator of the payee's account it has an obligation to make incoming payments available to him. The distinction between the obligations of the payer's and the payee's service providers is particularly clear when incoming credit transfers are in a currency other than that of the payee's account. Only the payee's service provider knows which currency the account is held in and can therefore credit the incoming amount after it has been converted into this currency. Requiring the payer's service provider to credit the amount of the credit transfer in currency X to a payee's account in currency Y thus ignores the difference between executing payment transactions and operating an account.

In order not to call existing credit transfer law into question or extend liability risks for the payer's service provider, due execution should continue to be determined on the basis of when the amount is received by the payee's service provider. This would make a clear and appropriate distinction – as is currently the case under the legal systems of all member states – between the obligations of the payer's service provider and those of the payee's service provider. What is more, the existing commingling of obligations in Article 30 would have inappropriate legal consequences. It could, for example, be inferred from the first sentence of Article 30(1) that the payee's service provider has an obligation to credit the payee's account within three days irrespective of whether or not it has actually received the payment.

Shortening maximum execution times to three days for all euro payments is unrealistic. Only euro payments within the European Union which do not exceed 50,000 euros and may be processed automatically due to the inclusion of IBAN and BIC can be executed within this period.

It would therefore be advisable to word the first sentence of Article 30(1) as follows:

*For payment transactions in euros, initiated by the payer and indicating IBAN and BIC, the payer's payment service provider shall ensure that after he has accepted a payment order for execution, the ordered amount shall be credited to the account*

*of the payment provider of the payee ~~payment account~~ at the latest at the end of the third banking business day following the day including the point in time of acceptance.*

*3.12.2 Paragraph 2 – rule is not suitable for direct debits and should therefore be deleted*

Article 30(2) is likely to affect direct debits initiated by the payee and card payments initiated by the merchant. The rule ignores the differences between the collection process in the relationship between the payee's service provider (collecting financial institution) and the payer's service provider (paying financial institution), the honouring of the payment on the payer's account and the forwarding of the amount to the collecting financial institution after honouring by the paying financial institution. The rule requires the collecting financial institution to make a payment to the payee without specifying that the paying financial institution must first have honoured the direct debit or card payment. This places an unrealisable obligation on the collecting financial institution in the event that the payment is not honoured. Calculation of the execution time must logically be geared to the principle that the collecting financial institution is responsible for collection only up to the paying financial institution. The collecting financial institution cannot, in contrast, ensure that the direct debit or card payment will be honoured and the amount forwarded from the paying financial institution since it is the paying financial institution alone which decides whether or not to honour the payment on the basis of the balance on the payer's account, unless a payment guarantee has been issued.

Article 30(2) should therefore be deleted.

*3.12.3 Paragraph 4 – execution period for a payee without an account can only apply up to the receiving service provider*

The rule assumes that payees without an account will always have a contractual relationship with the service provider receiving the payment. This may but will not necessarily be the case. If the payment is sent to a financial institution and the payee has no account there, he will normally not have a contractual relationship with it either. If this financial institution nevertheless receives a payment for a customer with whom it has no contractual relationship, neither the remitting financial institution nor the receiving financial institution will be able to guarantee that the amount is made available to the payee within the period specified. The payee must first be located and asked to come to the financial institution so that the incoming amount can be paid out to him. Experience with credit transfers to payees without an account in rural areas, for example, has shown that even

after the payee is advised of the payment by the service provider on the receiving end, it is often some time before he can actually collect it owing to the distance between this service provider and the payee's place of residence. This once again illustrates that the payer's service provider can ensure only that the amount is credited to the account of the service provider indicated by the payer (cf. our comments on paragraph 1).

In light of the amendment to the concept of due execution proposed in our rewording of the first sentence of paragraph 1, paragraph 4 should be deleted.

### 3.13 Article 31 – availability of funds

#### *3.13.1 Heading – scope of rule should also cover funds for payees without an account*

In light of the proposal in our comments on Articles 2(24), 29 and 30 to limit due execution to receipt of the payment by the payee's service provider, the rule on making the funds available should, in the interests of consistency, apply to the crediting or paying out of all incoming amounts to the payee. This would make an appropriate distinction between the obligations of the payer's service provider (cf. execution rules in Articles 29 and 30) and those of the payee's service provider (Article 31).

The heading of Article 31 should thus read:

*Availability of incoming funds ~~on a payment account~~*

#### *3.13.2 Paragraph 1, sentence 1 – funds cannot be credited in real time, but on the same day at most*

The rules in the first and third sentences of paragraph 1 could be understood as meaning that incoming payments have to be credited by the payee's service provider in real time. This does not reflect the booking procedures in financial institutions. These only allow availability on the same day to be guaranteed, provided that the payment is received before the cut-off time at the bank involved. Payments received after the cut-off time can only be booked on the following banking business day and value dated the day of receipt (cf. paragraph 2).

The first sentence of Article 31(1) should therefore read:

*A payment service provider shall make funds available to the payment service user, for use for any payment transaction, from the ~~point in time at~~ banking busi-*

*ness day after the banking business day on which such funds have been credited to him.*

Similarly, the third sentence of Article 31(1) should read:

*A payment service provider shall cease to make funds available from the ~~point in time at~~ banking business day on which they have been debited from the payer's account.*

*3.13.3 Paragraph 1, sentence 2 – account should be taken of non-payment of a direct debit by payer's service provider and of currency conversion*

The first indent of sentence 2 allows the payee's service provider to agree with the payee to depart from the rule on making funds available if there is possibility of the payer disputing the payment. This is to be welcomed.

There is, however, also a risk that the payer's service provider may not honour the direct debit, but return it. It is currently envisaged that the planned European direct debit scheme PEDD will allow the payer's service provider to return a direct debit up to five banking business days after presentation.

Article 31(1) sentence 2 should provide for an exemption from the rules also in these circumstances.

In addition, the deadline for making funds available should take account of the fact that the incoming payment may be in a currency other than that of the payee's account. In this case, an additional two days need to be allowed for conversion and the possible acquisition of the foreign currency value – a period reflecting established international practices in the foreign currency market.

A further exemption should therefore be added to the second sentence of paragraph 1 as follows:

*– if the incoming funds are not in the same currency as the currency of the account of the payee.*

*3.13.4 Paragraph 2 – collection operations should be excluded and a distinction should be made between the inflow of funds, booking and value dating*

The rule on value dating must be confined to credit transfers. Its application to card payments and direct debits would be inappropriate. The same point in time cannot be specified for both collection operations (such as direct debits) and credit transfers because there are fundamental differences in the processing timetable of these transactions. The proceeds of collection operations are only made available subject to honouring of the payment, so the amount cannot be value dated until, at the earliest, the payment is honoured and the funds received by the payee's service provider.

In general, the directive fails to make a sufficiently clear distinction between the inflow of funds, booking and value dating. Booking and value dating cannot be equated with one another. The factor determining the value date on the payee's account must be the receipt of funds by the payee's service provider and the value date on the payer's account the outflow of funds from the payer's service provider. The booking process, which may take place simultaneously but may also, on account of the cut-off time, be one day later, is of secondary importance for value dating.

Article 31(2) should therefore be fundamentally revised to take account of the above points.

3.14 Article 32 – liability for the execution of a payment transaction

*3.14.1 Paragraph 3 – strict liability is inappropriate, particularly for payments to third countries*

The service provider's strict liability for the non-execution or defective execution of payment transactions envisaged in Article 32(3) is at odds with the principle of liability for negligence otherwise applying in all member states and would be inappropriate:

Strict liability for execution has been the absolute exception in civil law up to now and thus cannot be used as a principle in legislation governing payment transactions. This would not only violate universally accepted civil liability principles, but would establish far more stringent liability standards for payment service providers than for service providers in any other field.

The payer's service provider cannot be made liable if it or one of its appointed agents is not at fault or in the event of force majeure. This applies all the more to liability for the crediting of the amount to the payee's account, since the payer's service provider – in contrast to the notion set out in Articles 2(24) and 30(1) – is unable to exert any influence either legally or de facto on the operation of the payee's account (i.e. the crediting of incoming payments). This is a matter between the payee's service provider and the payee. The envisaged rule would impose strict liability on the payer's service provider for an area that it has no means of controlling. There is no justification for allocating responsibility in this way.

The intention of this rule may be to enable the initiating party (e.g. remitter or direct debit creditor) to hold his service provider accountable for errors committed by its agents (e.g. intermediary financial institutions) in the event of the non-execution or defective execution of a transaction involving several service providers. In this case, it would be sufficient for Article 32(3) to establish that, for transactions within the European Union, the service provider will be liable for its own negligence and for that of any agents it has appointed (agent liability). Strict liability, in contrast, is unnecessary.

Paragraph 3 should therefore read:

*After the point in time of acceptance a payment service provider shall be ~~strictly~~ strictly liable towards his payment service user for the execution of a payment transaction according to his obligations according to Articles 29 to 31. This ~~strict~~ liability is limited to the non-executed or defectively executed part of the ordered transaction.  
(...)*

### *3.14.2 Interbank claims for damages must also be taken into account*

In the interests of consistency, the directive should – like the EU Credit Transfer Directive – also regulate claims for damages between the service providers involved. Otherwise, the provider with liability towards its customer is likely to find it difficult to enforce its claims for damages against the provider actually responsible for the non-execution or defective execution of the payment. Only a uniform EU-wide rule on claims for damages will be able to ensure that the party which has caused the error will also have to bear the economic consequences. Self-regulation by the banking industry will not be able to establish a universally accepted rule of this kind.

*3.14.3 Liability must be limited to transactions within the European Union*

As already pointed out in our comments on Articles 3 and 30, payments to third countries must be excluded from the strict liability rules because the directive has no relevance for third-country service providers involved in the execution of payment transactions. A service provider located in the European Union would be unable in practical terms to impose the directive's excessive liability rules on a service provider it used in a third country. This applies even more to any service providers further along the processing chain, on whose subsequent involvement the payer's service provider has no direct influence. This would therefore impose an uncontrollable liability risk on the service provider. In the case of strict liability, payees and payee service providers in third countries would even be given an advantage because they would no longer have to bear any liability risk even if they were actually responsible for a payment's non-execution or defective execution. This unfair allocation of responsibility makes no economic sense whatsoever.

A new paragraph (7) should therefore be added to Article 32:

*This Article shall only apply if the payer's and the payee's payment service providers are both located in the European Union.*

3.15 Articles 39(f) and 42(a)

The term "Single European Payment Area" in Articles 39(f) and 42(a) should be replaced by "Single Euro Payments Area".

## 4 Title V – Payments Committee and final provisions

### 4.1 Articles 37ff. – comitology procedure should not result in material changes to the directive

In the interests of legal certainty, use of the comitology procedure as envisaged in Articles 37ff. must not result in the Commission or the Payments Committee alone making substantive changes to the rules of the directive. It should only be possible to issue clarifications of general rules.

4.2 Article 39(1)(f) – it should continue to be left to service providers to establish security standards

The Payments Committee should not have the authority to establish security standards without mandatory involvement of payment service providers. Their participation in the process will ensure more practically oriented results. Work on joint minimum standards is already underway in the banking industry.

Paragraph 1(f) should therefore be deleted.

4.3 Article 43 – implementation in national law should be simultaneous

For the banking industry, as one of the addressees of the directive, it is particularly important that all the national rules issued on the basis of the directive should enter into force at the same time. This is the only way to ensure that cross-border payments within the European Union will be governed by a consistent legal framework based on member states' national rules.