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Herr
Dr. Alexander Schaub
General Director
European Commission
Internal Market
C107 06/74

B – 1049 Brussels
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Communication from the Commission to the Council and the European Parliament
A New Legal Framework for Payments in the Internal Market (Consultative Document) dated 02.12.2003, COM (2003) 718 final

Dear Dr. Schaub,

I refer to our discussion of 21.07.2003 and have pleasure in forwarding you the enclosed Report containing the Comments of the München Financial Centre Initiative on the above matter. I would be grateful if our views could be taken into account.

In addition, Minister of State Dr. Wieshau will be writing to EU Commissioner Bolkestein on the same subject.

Best wishes as always,

Yours,

Picker [*signature*]

Report

of the meeting of the Ad-hoc Payment Transaction Working Party of the München Finance Centre, held on 15.12.2003 from 10 a.m. to 13.40 p.m., in the Conference Room of the HypoVereinsbank, Tucherpark 16 in Munich on the Communication of the Commission to the Council and the European Parliament on a New Legal Framework for Payments in the Internal Market**.**

Present:

Dr. Wolfgang Burghardt, Lawyer
Departmental Director, Central Legal Department
and Herr Manfred Plantz
Departmental Director Global Clearing
HypoVereinsbank

Wolfgang Mehringer, Lawyer
Legal Expert
Sparkassenverband Bayern [Association of Bavarian Savings Banks]

Steffen Hahn, Lawyer
Banking Department
Genossenschaftsverband Bayern [Association of Bavarian Co-operatives]

Dr. Dietrich Keymer, Bank Director
Spokesperson for Private and Transaction Banking Management
Bayerische Landesbank [Bavarian Regional Bank]

Herr Paul-Joachim Kubosch
Head of the European Commission's representation in München

Council Minister Michael Pinegger
Bavarian State Ministry for Economics, Transport and Technology

Alexander Radwan
Member of the European Parliament

Council Minister Dr. Stumpf
and Herr Igloffstein, Regierungsrat
Bavarian State Ministry of Justice

Prof. Dr. Günther Picker
Member of the Board of Management
Bayerischer Bankenverband e. V. [Bavarian Banking Association]

The meeting discussed Annexes 1, 2, 4, 5, 6 and 10 to 16 of the above draft and came to the following conclusions:

Annex 1 - Right to provide payment services to the public

In Germany, only institutions licensed as banks as laid down in the German Banking Law [KWG] can perform this function. The payment service, in all its multifarious manifestations, is one of the principal fields which underlie the remaining activities of a bank. For the purpose of protecting bank customers and especially consumers, a very high degree of professionalism in the execution of payment transaction services must be maintained. In fact, the security of payment systems and instruments is the *sine qua non*. The New Legal Framework must not allow the demands placed on the present payment service, which in every respect operates reliably and securely, to be relaxed. In view of the immense sums, especially deposits, that are transferred each day, the banking oversight authorities must be given responsibility for payment transaction services. The restricted banking licence provided for by the German Banking Law [KWG] could be used in this respect.

Whatever the circumstances, the technical reliability of the Payment Service Provider must always be guaranteed. It is essential for the statutory regulations regarding reliability, licensing and monitoring of Payment Service Providers to be uniform if equal competition conditions are to be guaranteed.

Annex 2 - Information requirements

- If the Commission's *Bringschuld* (here, an obligation to supply information to the customer/consumer) proposal were to be adopted, the customer would be overwhelmed by a flood of information (e.g. about 130 pages just to open an account) which he simply could not take in, rendering it of no use to him at all. The banks, for their part, would be faced with a mountain of superfluous and environmentally unfriendly paperwork, all of which would increase costs substantially.
- These costs escalate because the Commission is clearly assuming that the bank has to furnish documentation not only when asked for it by the customer (*Holschuld*) but also generally by statutory requirement (*Bringschuld*). In the early stages of a bank-customer relationship it is generally not possible to foresee what documentation the customer will need in the future so that the bank in its uncertainty would feel constrained to 'supply' the new customer with as much information and banking terms and conditions as possible. This causes a flood of information, which the consumer does not need in practice and so runs counter to the principle of market efficiency.
- An information obligation conceived of as a Bringschuld (an obligatory statutory requirement to supply information) would not only further increase the density of what is today already a jungle of regulations, but would at the same time clear the way for considerable quantities of new red tape which would be meaningless to the customer, and not only to him. And this at a time when we have recognised the need to regain our competitive flexibility and are putting everything on deregulation. To the extent that statutory regulations apply (§§ 676a et seq. German Civil Code [BGB]) it ought to be enough, all things considered, to refer to the relevant standards without having to quote the law chapter and verse.
- If, despite the significant number of misgivings being aired, a standard EU-wide information obligation were to be created, this *Bringschuld* would have to be restricted to absolute essentials. One way forward would be for banks to have an information sheet of no more than two pages detailing the essentials of the customer-bank relationship. The business groups concerned could draft this information sheet. One objection here could be that, for an information sheet to contain sufficient details, it would probably need more

than two pages to set out the essentials. In Germany, for example, the banking industry uses a charge and service schedule, which has been standardised as far as possible and which currently runs to around 10 pages. In addition, every branch of a bank posts a list of charges on its walls. Accordingly, this information sheet, which could be drafted by the business groups concerned, would, in Germany at least, not be of any real additional benefit to bank customers. The 'non-consumer' customer group should anyway be exempted from the *Bringschuld*, the reason being that there is *ipso facto* no need for regulation here.

- The minimum conditions under consideration – if indeed this were the way to go – would still need to be redrafted (e.g. the terms 'execution time' and 'execution period'). As for information obligations in relation to transactions, the option of referring to other regulations that have proved important (e.g. notice of charges displayed in banks, charge and service schedule) must be retained.

Annex 4 – Value dates

It is true that the 'value date is the reference date used by the payment service provider for his customer for the calculation of positive or negative interest'.

However, a sharp and unambiguous distinction must be made between the posting date and the value date. In the sense intended above, unless a bank is prepared to accept a loss, it cannot credit an amount to an account until it has itself actually been credited with the necessary funds. Yet it is not unusual for an amount to be posted to an account before the bank has received the funds in question because these days a bank gets advance electronic notice of a future payment.

The proposed Article concerning the use of value dates should at least run as follows: 'The value date for the posting of a credit transfer to a customer's account must be not different from the date on which the payment service provider concerned has actually received these funds as per the payment instruction. Arrangements differing from the above may be made with customers provided they are not consumers.'

However, owing to the types of payment processes that banks practise, it is not a practical proposition to create a statutory ruling to cover cheques, debit entries and other payment instruments and processes. This is because postings are generally

subject to the fulfilment of certain conditions and are not yet finalised at the time of posting.

Annex 5 – Portability of bank account numbers

The Commission's proposal not to pursue action on the introduction of portable bank account numbers is in line with what we said on 12 September 2003.

Annex 6 – Customer mobility

We refer here to our comments of 12 September 2003. Setting an upper limit to charges is **absolutely** the wrong approach. There would always be the question of under what circumstances and how this upper limit could be adjusted in the future if the market situation and currency stability were to differ from today's market conditions.

Annex 10 – Revocability of a payment order

The proposed Article on payment instructions, which are given directly to a payment service provider (e.g. credit transfers) ought to run as follows: 'A payment order given by the originator to his payment service provider is revocable until the money transfer has been initiated and an initiated money transfer is one where the payment service provider has done everything in order to execute the payment instruction.' An instruction must cease to be revocable not later than when a transfer has left the transferring bank.

We are in fundamental agreement with the proposed Article regarding payment instructions issued by the payment recipient. However, there is a need for clarity as to how far the rules will apply to debit entries.

There should at all events be a clear ruling that the provisions on irrevocability do not apply to payments from one bank to another, unless the banks concerned have agreed otherwise.

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

With regard to this, we refer to our statements of 12 September 2003.
To that we add the following: The reference to the statutory provisions in the United Kingdom, Finland and Sweden on reimbursement needs an accurate and thorough examination of the legal environment in those countries as well as the actual circumstances. Revocability of electronic payments and credit card payments would completely shatter the confidence of the parties to transactions in the definitive nature of payment processes in many countries. One could already foresee that this would greatly detract from the efficiency of payment transaction processes. A number of merchants would feel forced to insist on cash payments even though credit card payment is now coming to be regarded as a replacement for cash payment (as the Federal Supreme Court has ruled in Germany).

Annex 12 – Non-execution or defective execution

Please refer to our comments of 12.09.2003. Other than that, we would add the following:
A claim for damages generally presupposes fault. A liability under this heading would contravene the underlying civil law statutes of German liability law and is therefore to be opposed.
Paragraph 2 of the proposal is unclear. The payment service provider can only be liable for errors caused by technical equipment to which he has access and so therefore not for PCs and other hardware or software of third parties. The bank has absolutely no means of checking which technical equipment the on-line customer is using and whether it is secure. Paragraph 3 is also badly formulated. Compensation is only due to the value of the actual loss incurred and not in every case the amount transferred.
Under German law, paragraph 5 is superfluous. However, if this sort of provision is to be retained, the words ‘by him’ should be added because otherwise the burden of proof for the payment service provider would be too great. Instead, paragraph 5 ought to read as follows: ‘If the payment service user claims that a payment instruction has not been accurately executed, the payment service provider shall prove, without prejudice to

evidence to the contrary produced by the payment service user, that the payment order was accurately recorded, executed, and entered into the accounts by him.'

Annex 13 - Obligations and liabilities of the contractual parties related to unauthorised transactions

This field should remain subject to self-regulation amongst the parties concerned (overregulation). It cannot be matter of policy to set a fixed sum as damages, which will in any case be arrived at arbitrarily, to apply to all parties to commercial transactions, irrespective of the actual loss-incurring situation. The parties concerned and the courts should be allowed to assess the loss-incurring situations. Limiting the secondary liability of the originator to €150 would mean that the majority of banking customers would be penalised for the negligence of individual customers by paying higher prices. This is at a time when more and more emphasis is being placed on the personal responsibility of the citizen.

In the light of the above, we refer to the following points:

- Paragraph 3 of the Article on 'Obligations of the contractual parties' should be altered and amplified as follows: 'If the payment service user claims that a transaction was not authorised, the payment service provider shall provide evidence that the transaction was accurately recorded, entered into accounts and not affected by technical breakdown or another deficiency. For the purpose of proving that the transaction was authorised and that the authority holder[1] was grossly negligent in his use of the authorisation instruments, the payment service provider shall have recourse to a less stringent process of furnishing evidence.'
- Re paragraph 4, second sentence, of the Article on 'Obligations of the contractual parties': This formulation would open the floodgates to abuses. Instead, it should be altered as follows: 'The use of a payment instrument or a personal code which enables it to be used shall not, by itself, be sufficient to entail that the payment was authorised by the payment service user, if the payment service user provides

[1] Translator's Note: Does 'durch den Berechigten' [by the authority holder] refer to both authorising the transaction and gross negligence, of just the latter?

factual information or elements which make probable the presumption that he could not have authorised the payment.'

- As regards the section on 'Liabilities between the parties', we assume that payment service user is liable up to €150 for ordinary negligence and will have unlimited liability for gross negligence and more serious conduct. An instance of gross negligence would be if he fails to report loss, theft or misappropriation. For this reason, the second half of the sentence in paragraph 5 should be deleted 'if he has not fulfilled his obligation to notify the payment service provider as required.' Paragraph 7 should be incorporated into paragraph 5. An appropriate wording might be, 'The upper limit referred to above shall not apply if the payment service user acted with gross negligence or with intent.'

Annex 14 – The use of 'Our', 'Ben' and 'Share'.

Here too, we feel that the aim of the Communication is wrong. It must be left to the market to regulate the charges. In other cross-border credit transfers within the EU contractual freedom should continue to apply in the choice of one of the three charging instructions ('our', 'share' and 'ben'). 'In standard credit transfers within the EU' it should be left to the parties to a transaction at European level to regulate this aspect for themselves. The only customer charges that should still be levied are between transferring and receiving financial institutions, i.e. between the crediting and debiting institutions of the beneficiary. We are therefore opposed, in respect of credit transfers of up to €50 000, to bringing forward applicability of the rule applying to credit transfers of up to €12 500 to the period before 01.01.2006 and opposed to inclusion of non-straight-through-processing payments.

Annex 15 – Execution times for credit transfers

Shortening the execution period from 5 to 3 days is realistic for only some payments. This is particularly so considering the imminent enlargement of the EU and because the technical infrastructure will not be available, it will not be possible to set a standard execution period of three banking days. If a standard execution period of three days were indeed to be introduced, then this could only apply to standardised credit transfers within the EU with IBAN and BIC and also up to an upper limit of

€12 500. This is because of the variety of payment transaction systems in current use within the EU.

Annex 16 – Cross-border direct debiting

In order to ensure legal certainty for all European institutions operating the direct debit system, the requirements and legal features of the new procedure should be made binding. Existing national direct debit systems should continue to exist and not be obstructed by statutory measures.

Munich, dated 28.01.2004 [*signature*] Dr. G. Picker