

New Legal Framework for Payments in the Internal Market
BEUC position on the Communication
Summary

Many consumers cannot benefit concretely from the Single Euro Payments Area. It is high time to deliver on efficient - reasonably cheap - but also secure and convenient payments. Enforcement of existing legislation will not be enough: binding instruments backed with appropriate sanctions are needed.

However, the current level of consumer protection at national protection shall not be called into question, as consumers expect to benefit from the same level of protection in the Internal Market as in their country of origin.

The Regulation on cross-border payments in Euros needs to be implemented consistently. The fees for a cross border payment must be the same as for the most similar national payment, if such a payment 'option' is not in place at national level.

Binding rules regarding credit transfers need to be amended and strengthened. As a rule, the full amount transferred should be credited to the beneficiary's account. The execution time for cross-border transfers shall not exceed the one for national transfers. Value dates need to be regulated with a strict – low- limit. The money back guarantee must be increased to 50,000 €.

To improve customer mobility, fees for closing an account must be at a low level and in line with real costs. Such fees should be banned when the decision to switch is due to non-acceptance of new banking or contractual conditions. Binding measures have also to be considered to ease the administrative burden.

Revocability of payment orders must be possible under specific circumstances. Also, joint liability between the payment service provider and the merchant shall be set up for distance commerce and face-to-face. Protection must be consistent across card types and cover disputes on the 'quality' of the product or service, problems with the payment itself and non-delivery.

The payment service provider should be held liable for executing a payment order, including in case of breakdown of the system. A maximal delay for reimbursement shall be set. A fair risk distribution must place the burden to show that a transaction was not affected by a technical or other deficiency on the provider.

In fact, the consumer cannot provide factual information allowing the presumption that he could not have authorised the transaction. Therefore, the holder should have limited liability before notification and no liability after notification. If the electronic payment instrument has been used fraudulently without it having been stolen or lost, the holder shall not be held liable. Also, the consumer, in case of fraud should receive back the debited sum on his account speedily: a strict time limit for reimbursement shall be set.

New Legal Framework for Payments in the Internal Market BEUC position on the Communication

On 2nd December 2003, the Commission published its Communication on a New Legal Framework for Payments in the Internal Market¹. BEUC has been actively involved in the discussions on the Single Payment Area for some time, owing to the importance of payments in the daily life of consumers².

BEUC broadly welcomes the aim of reaching a coherent and comprehensive modern legal framework for retail payments in the Internal Market. Consumers have been waiting for much too long to reap benefits from the achievement of a Single Payment Area.

It is high time to deliver on efficient - reasonably cheap - but also secure and convenient payments. Consumers must be well protected when making payments. A fair balance between consumers rights and obligations must be achieved. This is of utmost importance, not only to consumers, but also to the European economy as a whole. For instance, trust in distance commerce badly needs to be fostered.

I. Consumers are still waiting for a Single Payment Area...

The current state of play regarding the creation of a Single Euro Payments Area is unsatisfactory. Some binding measures are necessary to ensure the achievement of the Single Payment Area in good time and for consumers to actually benefit from it

A. The banking industry has been slow in developing a pan-European credit transfer system

Under the initiatives under way from the European Payments Council (EPC)³, as far as 2010 is the final deadline. Also, the conventions adopted by the EPC in April 2003⁴ are not legally binding. The fully integrated European payments infrastructure will only be achieved in steps, first for credit transfers in combination with existing clearing and settlement systems.

¹ 'Communication from the Commission to the Council and the European Parliament on a New Legal Framework for Payments in the Internal Market', COM(2003) 718 of 2nd December 2003

² Cf. 'Single Payment Area (Legal Framework) – BEUC Comments on Commission document', BEUC/X/028/2002 of 29th July 2002 and 'Payments in the Internal Market – BEUC position on the discussion document', BEUC/X/023/2003 of 15th April 2003.

³ Cf. 'Euroland: Our Single Payment Area', White Paper, May 2002. The summary is available at : <http://www.fbe.be/pdf/WhitePaperSummary2.pdf>.

⁴ The CREDEURO Convention establishing a standard for cross-border credit transfers (information requirements, 3 days execution time from acceptance to beneficiary credit), and of the Interbank Charging Principles Convention (full amount to be credited to the beneficiary customer).

At the technical level, binding measures should be considered. The Commission and the European Central Bank should be more proactive, since an efficient cross-border payments system does not seem to be in place.

In its Communication on Retail Payments in the Single Market from 2000, the Commission had suggested that the TARGET system could play a role for urgent small value transfers. Linkages could be improved between the various national Automated Clearing Houses (ACHs) or a separate Pan-European ACH (PEACH) could be established.

B. Many consumers cannot benefit concretely from the implementation of the Regulation on cross-border payments in Euro.

The most concrete benefit consumers could hope to gain from the changeover to the Euro was to pay the same (much lower) charges for national and cross-border payments, under the Regulation on cross border payments in Euros⁵. As of 1 July 2003 the cost for making cross-border € payments between bank accounts should have been the same as for national € payments, making such transactions cheaper for consumers. Since July 2002 the cost of € cash withdrawals at ATMs should have been the same for national and international withdrawals.

BEUC conducted a survey on the implementation of the Regulation over the summer last year⁶.

Banks have largely failed to deliver: many consumers are still unable to benefit from the same (much lower) charges for cross-border and national credit transfers. This is the case in six countries (Belgium, Finland, Greece, Italy, Netherlands and Spain). New fees have been introduced such as advice and typing fees, transparency is lacking, misleading advice is widespread.

In a certain number of banks in Austria, Belgium, France, Germany, the Netherlands, consumers were being charged much higher fees after they had been asked and eventually agreed to bear all the costs for the transaction. This is a very innovative interpretation of the Regulation, as banks have on their own account decided that the Regulation would only apply if the 'sender' agrees to share the costs of the transaction with the recipient.

Various other problems have been reported such as lack of transparency, non-disclosure of important information or misleading advice.

Regarding cash withdrawals, implementation of the Regulation in Italy seems problematic. In our survey, a significant difference between a withdrawal abroad (in the EU) and a national withdrawal remained for Banca Popolare di Milano and Intesa⁷.

In six countries and with some fifty banks, our members noticed an increase in national charges for domestic payments, as well as for withdrawals since autumn 2002: increases ranging from 14 to 163%⁸ were reported in Austria, Belgium, France, Germany, Greece and Luxembourg. One may also suspect some cross-subsidisation to occur, through making consumers pay more for other banking services/products. These tariff increases appear to be unrelated to actual

⁵ Regulation 2560/2001/EC on cross-border payments in Euro

⁶ 'BEUC pan-European survey on charges for cross - border payments', X/048/2003 of 5th November 2003

⁷ According to our survey, if an Italian has a bank account at the Italian bank Intesa and withdraws money at an ATM in Milan, he pays 2 € If he withdraws the same amount in Madrid, he will pay 8€for charges, which amounts to four times the cost of the same transaction at domestic level.

⁸ Before the implementation of the Regulation, a national payment (outside the network) in the Greek bank Eurobank cost 8€ Now, the same payment costs 21€(i.e. an increase of 163%).

costs. Before the regulation had been adopted, the banking sector had been claiming that there was one cross-frontier transfer for every 100 domestic transfers. Consequently, the added cost of implementing the Regulation, if any, would be minimal.⁹

These increases of national charges are violating the spirit if not the letter of the Regulation. We call on the report from the Commission on changes in the charges levied for national payment transactions planned for July 2004 to duly take this into account.

The 'considerable reduction in the price for cross-border payments in the Internal Market' highlighted by the Commission¹⁰ has failed to materialise for many consumers.

The Regulation on cross-border payments in Euros needs to be implemented consistently. Any innovative interpretation of it by the banking sector must be banned.

- In particular, consumers shall pay the same fees for cross-border and national payments when the customer chooses to pay all the charges. The fees for a cross border payment must be the same as for the most similar national payment, if such a payment 'option' is not in place at national level.
- National authorities in charge of implementation shall be set up, and monitoring strengthened.

C. Cross-border credit transfers are still on average slower, less reliable than national payments.

A number of reports from our member organisations highlight the slowness and more limited reliability of cross-border credit transfers as compared to national ones¹¹. BEUC is critical of the content and of the implementation of the Directive on Cross-Border Credit Transfers (97/5/EC).¹²

Long execution time, belated value dates, double charging and lack of money-back-guarantee are key issues in that respect.

The execution time for cross-border transfers shall not exceed the one for national transfers, if a Single Payment Area is ever to be achieved. Failing this, the incentive for banks to actually improve the system will be small. Indeed, competition in the banking sector is limited - few consumers actually switch banks. Imposing settlement time could well mean a better service for consumers willing to engage into cross-border credit transfers. More importantly, consumers in certain Member States would be worse off if settlement time for national transfers would be aligned on the one for cross-border transfers.

⁹ As stated by the Commission in a memo dating from 26th June 2003, 'assuming that the cost of a transfer is €25, a simple calculation shows that domestic transfers would cost an extra 25 cents. But this reasoning does not take account of the enormous gains in productivity resulting from the automation of formerly manual operations.' :

http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/03/1400|RAPID&lg=EN&display=

¹⁰ Communication from the Commission, p. 2 & p. 4.

¹¹ 'L'ULC s'inquiète du maintien des tarifs élevés des virements transfrontaliers', ULC (Luxemburg) Press Release of 6th February 2003. 'Les virements transfrontaliers restent trop coûteux', Press Release Test Achats (Belgium) and 'L'euro devise les banques divisent', Budget & Droits 165 of 5th November 2002. 'Las fronteras caen... poco a poco', OCU (Spain) Dineros y Derechos n°73 Noviembre-Diciembre 2002.

¹² Directive 97/5/EC on Cross-Border Credit Transfers of 27 January 1997, commented upon in BEUC/266/94, 'BEUC's comments on the proposal for a European Parliament and Council Directive on cross-border credit transfers', of 16/01/1994.

Value dates are not always specified in advance and they make it more difficult to compare prices. Binding rules have to be considered: transparency is not enough.

Also, beyond normal contractual conditions of application when receiving a payment, many consumers have complained of double charging, even when it had been specified that only the originator should be charged. 'Intermediary' banks in the payment chain sometime deduct part of the amount being transferred. The full amount transferred by the originator should be credited to the beneficiary's account. We welcome the proposal from the Commission¹³ in that regard.

Binding rules as regards credit transfers need to be amended and strengthened. In particular, the full amount transferred by the originator should be credited to the beneficiary's account. The execution time for cross-border transfers shall not exceed the one for national transfers.

Beyond these aspects, there is a need for a substantial improvement in respect of efficiency, security and protection of users of means of payment.

II. A need for more Competition and better choice

Competition between payment service providers (including payment transmission services) badly needs to be improved. In the UK, the Cruickshank report underlined the need for sector-specific competition powers to require firms to provide access on fair, reasonable and non-discriminatory terms. The Communication does not seem to take this on board.

Customer mobility is key. It has to be ensured that fees for the closure a bank account are reasonable and at a low level. They should in any case be in line with real costs - this is not the case currently. Such fees should be banned when the decision to close an account is due to non-acceptance of new banking or contractual conditions. Also, only an explicit answer shall mean acceptance by the consumer of the new conditions. The administrative burden of switching accounts must be eased. Binding measures have to be considered.

Consumers can consider switching payment provider if and only if they are actually in a position to easily compare payment services and, if needed, to change the payment provider. Transparency of contractual obligations is key in that respect. **'Choice' as such is not always conducive to the real competition that would benefit consumers: quality of choice is what really matters.**

The practical, day-to-day provision of clear and comprehensible information seems to be particularly difficult in the banking sector. Lack of transparency is widespread. Our French Member UFC-Que Choisir in a survey of 23 French banking institutions published on 14th March 2003, found that 180 different fees were being charged to consumers. Furthermore, in its annual survey on bank fees published on 11th April 2003, our French member CLCV underlined the lack of public display of tariffs (publicly available in only 24% of cases in France). This confusion can only be detrimental to competition and consumers' interests.

Binding measures to promote customer mobility and the provision of clear and comprehensive information shall be considered. Appropriate sanctions in case of non-enforcement must be in place.

¹³ Annex 14 of the Communication.

III. Consumers protection needs to be safeguarded and strengthened

It is clearly in the interest of consumers to promote efficient and secure payment means and systems, to enhance consumer protection and strengthen consumer confidence relating to all payment means. Also, with the changeover to the Euro, it has become clear that as far as payments are concerned the Internal Market has to be held as a domestic market, as implied by the Regulation on Cross Border Payments in Euro.

Recent years have seen a sharp decline in the use of paper cheques in general, while electronic transactions have grown steadily. This is the case in most EU countries, although in a few countries, most notably France and the UK, cheques are still used on a large scale. Whilst we are open to the idea of their not being covered by the current initiative, it should be duly noted that many consumers do not wish to be forced to subscribe to other means of payments.

It is therefore bizarre that the Commission seems to consider, along with the banking sector, that cash payments are likely to be increasingly replaced by modern non-cash means of payment¹⁴. Consumers' preferences vary, not only between Member States, but also amongst consumers. Some consumers might have difficulties with 'modern' means of payment. 'Efficiency' should also be assessed in terms of simplicity, user-friendliness and safety/perception of safety. **Consumers are best placed to choose what is in their view the most 'efficient' means of payment.**

BEUC welcomes the focus on technical security and on legal security ("refund", "burden of proof") so as to enhance consumer confidence. Clearly, ensuring security of payments is a minimum requirement one would expect to see fulfilled by payment providers. This is not always the case today, although a study conducted for the Commission in 2003¹⁵ painted a (overly) positive picture of the situation. The methodology used in this study is open to criticism, as regards the sample used for instance¹⁶. The 'media hype' factor as such cannot explain the lack of confidence: this is not only about 'perceptions'. Beyond information, binding measures have to be taken to boost consumers' trust. Refunds/chargeback schemes must be duly considered.

The improvement of cross-border payment systems shall not have negative consequences on national payment systems. We deem it important for future technological and other developments not to be inhibited, in order to offer a more efficient payment environment with lower costs and prices. However the need for technical neutrality and flexibility in the legal framework shall not have a negative impact on the level of protection consumers currently enjoy. Simplification as such shall not be an objective – contrarily to what the Commission is stating¹⁷ this is not necessarily in the interest of consumers. Consumers protection is key to create confidence. A high level of consumer protection should be the objective, and not an 'adequate' level as put forward by the Communication.¹⁸

¹⁴ Communication § 3.6. p9.

¹⁵ 'Study on the Security of Payment Product and Systems in the 15 Member States – Internal Market DG', 16th June 2003

¹⁶ The sample for what PwC describes as 'direct research' was heavily biased. 'Focus groups' were organised through the PwC e-business networks in the EU member states. Each network was asked to take sounding amongst PwC clients and PwC colleagues, 'to take the pulse of national attitudes to confidence in EPIS'. An online survey was posted on the PwC national portals, the various PwC intranets for each Member State, and also on the Eurochambres website. Even if PwC contends that its national portals have high hit-rates, it is very difficult to imagine that the views of the general public could be well represented that way.

¹⁷ Communication p8.

¹⁸ Communication p2.

Consumers expect to benefit from the same level of protection in the Internal Market as in their country of origin. Minimum harmonisation should be the only option where a maximum harmonisation measure would reduce the level of protection in member state(s) or a maximum harmonisation measure would not be readily adaptable to changing market conditions.

Also, we hold the view that the exemption of retail payment services from VAT shall not be called into question in those countries where it is currently the case.

Legal security, as much as technical security, must be promoted. A chargeback/refund scheme would enhance legal security and consumers trust. The current level of consumer protection at national protection shall not be called into question, as consumers expect to benefit from the same level of protection in the Internal Market as in their country of origin.

IV. Binding measures are needed

BEUC has been involved in the elaboration of codes of conduct in the area of financial services. However, they can only work if they are backed by 'credible threat' of binding instruments should they fail to 'deliver'. In that light, the actual 'record' of the sector is disappointing - for instance, the implementation of the Recommendation on Electronic Payment Instruments has been limited. This has been amply documented, for instance in a study published on 17th April 2001¹⁹.

BEUC favours binding instruments backed with appropriate sanctions. No topic should be left completely to self-regulation. Furthermore, enforcement of existing legislation will fail to address all the difficulties consumers have to face. A comprehensive review of a number of regulatory measures is needed.

- **Member States shall be authorised to take specific measures in the general interest of consumers.** In particular, actual access to bank accounts and basic banking services are of growing concern across Europe. Universal Service Obligations in the field of financial services have to be duly considered. A 'basic' banking service is already in place in France²⁰ and in Belgium. Our French member CLCV has been campaigning for such a universal banking service and has defined such a service as including notably the opening and closing of a bank account and a cash-withdrawal card operating on the network²¹.
- **The Recommendation on Electronic Payment instruments 97/489/ needs to be updated and made legally binding,** as regards information requirements and rights and obligations of cardholders and card issuers, for instance.
- **Binding measures, duly backed with appropriate sanctions, are necessary for both unauthorised transactions and non- or defective execution.**
- The issue of **legislative backing for "refunds"/chargeback has to be a priority.** The Communication fails to address this in a comprehensive manner.
- To improve customer mobility, **binding measures to limit fees to close an account and to ease the administrative burden have to be considered.**

¹⁹ 'Study on the implementation of Recommendation 97/489/EC concerning transactions carried out by electronic payment instruments and in particular the relationship between holder and issuer', CRID, Call for tender XV/99/01/C, 17th April 2001

²⁰ Art. L. 312-1 Code Monétaire et Financier, Décret 2001-45 17 Janvier 2001 & Journal Officiel 12 Décembre 2001.

²¹ Cf. <http://www.clcv.org/> at <http://www.clcv.org/index.php?v=detail&a=info&id=20>

ANNEXES TO THE COMMISSION'S COMMUNICATION

Annex 1 - The right to provide payment services to the public

Competition between payment providers need to be fostered

Competition between payment service providers (including payment transmission services) badly needs to be improved. In the UK, the Cruickshank report underlined the need for sector-specific competition powers to require firms to provide access on fair, reasonable and non-discriminatory terms. The transmission mechanism between wholesale and retail markets is the most important element of this system for consumers. There is also a need for a commitment to increase transparency in retail pricing²².

We consider it necessary to review at EU level the market access and licensing requirements for undertakings providing payment services as it should be ensured that undertakings providing payment services are subject to similar legal requirements from one Member State to another.

BEUC favours as broad a definition of payment services as possible. Although specific measures could apply to undertakings providing only payment services, we are of the view that a common set of rules would be useful to foster competition in the sector.

We consider with interest the option underlined in the Communication for a special license or registration for 'Payment Service Providers'. However, this should deliver the same high degree of legal and technical security to consumers.

Annex 2 - Information requirements

Consumers need clear information about the payment service they want to use or which has been provided to him. Also, consumers can consider switching payment provider if and only if they are actually in a position to easily compare payment services and, if needed, to change the payment provider. Transparency of contractual obligations is key in that respect. 'Choice' as such is not always conducive to the real competition that would benefit consumers: quality of choice is what really matters.

Information has to be supplied in good time and in a clear and comprehensible manner. The right content and amount of information requirements is key.

The Commission envisages harmonising the information requirements for all similar payments instruments. For the sake of clarity and consistency, BEUC is open to this idea, although this should not in any case lead to a levelling down of the existing national requirements. We consider the list as in the Annex 2 as fairly comprehensive. However, an exhaustive list of essential information requirements should not prevent Member States from being able to add up to this 'list'.

However, the consumers shall not be deemed to have accepted the modifications of the contractual conditions if they have not terminated the payment service. Only an explicit positive answer from the Payment Service User shall be taken as an acceptance of the new contractual conditions. §3 of Annex 2 shall be amended accordingly.

²² Cf. Consumers Association's Comments on Competition in Payment Systems, March 2001.

The actual provision of clear and comprehensible information seems to be particularly difficult in the banking sector. Lack of transparency is widespread. Our French Member UFC-Que Choisir in a survey of 23 French banking institutions published on 14th March 2003²³, found that 180 different fees were being charged to consumers. Furthermore, in its annual survey on bank fees published on 11th April 2003²⁴, our French member CLCV underlined the lack of public display of tariffs (publicly available in only 24% of cases in France). This confusion can only be detrimental to competition and consumers' interests.

Actual implementation of the information requirements has to be considered, especially since there has been a lack of implementation of the information requirements set in the Recommendation on Electronic Payments. There is a **need for binding regulation** and **appropriate sanctions** have to be devised.

Annex 3 - Non-resident accounts

There does not seem to be any justification for a different treatment between residents and non-residents in this area, and it is actually an obstacle to the achievement of the Single Market. We broadly welcome the Commission's approach in that respect.

However, **the issue of the opening and running of accounts has to be considered, if the Commission is willing to improve consumers' mobility.**

Annex 4 - Value dates

There is a **need to regulate value dates for payments at European level.**

Transparency requirements in Directive 97/5/EC and in the Recommendation 97/489/EC do not go far enough in that respect. Furthermore, **binding rules as regards the transparent use of value dates would not go far enough.**

As underlined by the Commission, the very use of these value dates impairs the efficiency of cross border payments and the legal certainty as regards the execution of transfers. **Value dates are not always specified in advance and they make it more difficult to compare prices.**

Furthermore, **BEUC is very much in favour of reducing the present 6 working days default execution times for cross-border credit transfers. Settlement time should not exceed the time taken for national transfers.** Failing this, the incentive for banks to actually improve the system will be small. Indeed, competition in the banking sector is limited because few consumers actually switch banks – so it could be very well the case that imposing settlement time will mean a better service for consumers willing to engage into cross-border credit transfers.

Binding rules are needed, and a strict –low- limit should be contemplated. Failing this, consumers will continue to ignore the exact availability of the monies transmitted. This broad principle should apply across the board to all payments (except cash for which value dates are

²³ 'Frais bancaires: les Français exigent une facture séparée', UFC - Que Choisir, communiqué de Presse du 14 mars 2003.

²⁴ 'Les Banques font payer toujours plus', in 'Cadre de Vie' n°134, mars/avril 2003, Confédération Logement et Cadre de Vie.

not justifiable). **We are in favour of the articles regulating the use of value dates as proposed by the Commission.**

However, at the very time when most transactions are automated and real-time, one can be sceptical about the rationale/justification for such a charging system anyway. Our French member UFC - Que Choisir is suing a number of French banks on this issue of value dates²⁵.

Annex 5 - Portability of bank account numbers

As in the field of telecommunications, where the principle of the portability of the telephone numbers was introduced to enhance competition, we are of the view that proper consideration should be given to the idea of portability with regard to bank account numbers. Savings and credits instruments, which are often linked to a bank account, need to be considered in that respect.

We do not share the Commission's view that the usefulness of portability of bank account numbers would be limited. In particular, switching banks would be much easier – and transferring payments and following up on permanent orders would be smoother.

However, the construction of an international account number (IBAN, BIC) could be an issue at stake in that framework. Therefore, **a more simplified unique numbering system for bank accounts has to be considered, to promote efficiency and allow for number portability.**

Annex 6 – Customer Mobility

Switching accounts must be made easier

Regarding customer mobility, it has to be ensured that fees for the closure a bank account are reasonable and at a low level. They should in any case be in line with real costs.

Our French member CLCV has reported recently²⁶ on the bad practices of some French banks in that respect: fees for closure reach 80€ at Crédit Mutuel Normandie, 60€ at Crédit Agricole Alsace-Vosges, 45€ at Banque Populaire Provence et Corse, 30, 5€ at Caisse d'Epargne Midi-Pyrénées, 25€ at Crédit Lyonnais.

Binding measures should be considered as regards the level of fees for closure of an account: transparency of closure fees when opening a bank account will not be enough. In particular, these fees could increase considerably between the time the consumer opened an account and when he/she is willing to close it. A reasonable upper limit for these fees could be a solution. Such fees should be banned in any case when the decision to close an account is due to non-acceptance of new banking or contractual conditions.

Also, the administrative issues related to the move of an account have to be dealt with as well. **The 'initial' bank should be in charge of transferring the account.** In particular, it should follow up permanent orders, transfer of payments entering into that account for a certain time

²⁵ Cf 'L'UFC-Que Choisir déclare la guerre aux ponctions occultes et injustifiées des banques', Press Release 12th December 2002.

²⁶ 'Les Banques font payer toujours plus', in 'Cadre de Vie' n°134, mars/avril 2003, Confédération Logement et Cadre de Vie.

and inform the ones having used the 'old' account of the 'new' account number. We fear that self-regulation will not deliver, as competition is in any case limited, and willingly so in many cases. **Binding measures should be considered in that regard.**

Annex 7 – The evaluation of the security of payment instruments and components

Annex 8 – Information on the originator of a payment (SRVII of FATF)

No comment

Annex 9 - Alternative Dispute Resolution

A high level of harmonisation and convergence of legislation and sector specific rules and regulations will not be effective if consumers are limited in their access to justice. The Brussels regulation provides this necessary level of access to justice through allowing access to local courts. Thus, when the consumer is not satisfied with the quality of an alternative ruling, the access to courts should remain open. We welcome the clarification on the non-binding nature of ADR mechanisms.

BEUC thinks that the FIN-net might provide a framework of ADR schemes. However, we are sceptical whether the out-of-court-settlement bodies of this Network fulfil the criteria required in the EC 1998 Recommendation. In too many instances, this does not seem to be the case in practice, for the independence criterion for instance²⁷. This would be a pre-condition for consumers to have confidence in such an extra-judicial means. Therefore, an explicit reference to the principles established under Recommendation 98/257 would not be enough as this is already a precondition for FIN-NET membership.

However, **we are open to considering the idea of promoting ADR mechanisms** in the Single Payment Area by foreseeing legally binding provisions regarding ADR's in any future EU-payment legislation. In particular, extending the current provisions of the Cross-border Credit transfers directive could be considered. **We call on the Commission to make the reference to the independence criterion explicit in the draft article on Alternative Dispute Resolution.**

Annex 10 – Revocability of a payment order

Revocability is one of the key elements to enhance consumers' confidence in distance commerce, and in electronic commerce in particular.

We think that **the initiator of a fund transfer/payment order must have the right to cancel the operation under certain conditions.** This is all the more needed if a proper chargeback system is not in place (Cf. Annex 11).

In the case of payment orders given directly to the payment service provider, we are in favour of a right to revoke payments until the amount to transfer has been credited to the beneficiary' s amount. This is without prejudice to the current level of consumer protection at national level. Besides, the options 'until the money transfer has been initiated' or 'until the

²⁷ Cf. for instance 'Médiation, peut on lui faire confiance ?', Cadre de Vie n°133 – Janvier Février 2003, Magazine de la CLCV and 'Livre Vert sur les modes alternatifs de résolutions des conflits relevant du droit civil et commercial – Position de la CLV', 30th August 2002.

payment order has been executed' would leave the door open to interpretations for the recipient and the originator as regards the time when revocability is no longer possible.

A card payment should be revocable under specific circumstances, and in particular when the amount was not known when the payment order has been given. Indeed, consumers are often asked to leave an 'electronic imprint' of their payment card as a guarantee. Consumers must have the possibility to revoke this payment order in case of abusive use.

Also, it would be necessary to introduce **sanctions or penalties for cases of non-compliance.** Implementation procedures must be clarified, including at national level.

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

BEUC is fairly disappointed with the Communication. **We call for 'legislative backing' for a system that establishes rights and basic conditions for refunds.** This is an important step to achieve consumer confidence.

Indeed, it has been underlined in the UK that joint liability resulted in consumers pursuing separate claims against the supplier and the payment provider. On the contrary, any reduction in the scope of joint liability would have resulted in even more consumers giving up claims²⁸.

The 'connection' between the card issuer and the supplier is advertised on the suppliers' premises, internally and externally, on stationery, advertisements and other materials. This is **akin to accreditation by the card issuer** - the card logo indicates a level of approval by the issuer. Consumers will assume that the supplier must have the necessary solvency, integrity and quality of service demanded by the card issuer. This encourages purchase by a cardholder who might not have done so otherwise for lack of ready cash.

In the US²⁹, the chargeback system has worked reasonably well for many years, and has fostered consumer willingness to make purchases at great distances from unknown merchants for products bought sight unseen. Also, because chargeback rights are a matter of law for all providers, the cost is spread over the entire industry and has not priced consumers out of the market.

Also, **the payment service provider can clearly influence the risk of having to resort to joint and several liability.** Financial intermediaries play an important role in policing the market by withdrawing payment card rights from merchants that generate an unacceptable level of chargebacks. Also, upgrading website security and safeguards against unauthorized use of cards is encouraged since the economic risk of insecure payments and unreliable or fraudulent merchants is shifted to financial institutions.

The economic 'leverage power' of the payment service provider could play a useful role in improving the functioning of the market, to the benefit of consumers, merchants including small and medium enterprises which don't have well known brand names and ultimately the economy as a whole.

²⁸ 'Credit cards and Connected Lender Liability – Response to the Department of Trade and Industry', National Consumers Council, June 1996, 'Connected Lender Liability: a review by the Director General of Fair Trading of Section 75 of the Consumer Credit Act 1974', National Consumers Council, August 1994

²⁹ Cf. TACD "Payment Card Redress and Protections," Doc. No. Ecom-23-01, May 2001, available at <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=95>

A joint liability system between the payment service provider and the merchant shall be set up for distance commerce and face-to-face. The consumer, in case of problem, should receive back the debited sum on his account speedily and without any obstacles or should not have to make the payment. **Protection must be consistent across card types**, including credit cards, debit cards, stored value cards, and other forms of electronic payment.

Such a liability system **should cover disputes on the 'quality' of the product or service, problems with the payment itself and non-delivery of the good/service.** Breach of contract and misrepresentation shall be covered. Refund schemes would not be complete if they would only cover disputes in case of non-delivery.

The liability should cover the entire consumer's loss and not be limited to the amount of the transaction. Failing this, consumers would have to consider taking separate legal actions for the voucher value and any cash element of the transaction. This could easily double the court costs. Many consumers would give up and suffer the loss rather than pursue two claims.

Annex 12 - Non-execution or defective execution

The payment service provider should be responsible for executing a payment order according to the mandate given by the Payment Service User. Binding measures are needed.

The consumer is not in a position to prove either a technical deficiency in the system operated by the service provider, or negligence on the part of the service provider. Even if the provider himself cannot control the technology, **a fair risk distribution must place the burden to show that a transaction was not affected by a technical or other deficiency on the provider and not on the consumer.** The burden of proof should be assigned to the party in a better position for producing proof.

Although we broadly welcome Annex 12 of the Communication, **we do not think that a 'force majeure' rule should be of application.** The proposed article on 'force majeure' is not acceptable.

Also, the consumer, in case of fraud should receive back the debited sum on his account speedily and without any obstacles (charge back). **The provider shall be liable for direct and indirect damages (consequential damages).** A legal provision should clarify this. **Also it should be clarified that 'The Payment Service Provider SHALL not contractually exclude or limit his obligations and liabilities under this legal act'.**

This is also why **we are very much in favour of raising the "money back guarantee" of Art. 8 in Directive 97/5/EC to 50,000 euros.** The principle of the liability of the originator's bank for a "lost" transfer should apply to all retail payments, which are payments up to 50,000 euros. **Consumers should also be properly informed of the obligation for their banks to reimburse them should a payment get lost, and a maximal delay for reimbursement to be effected shall be set.** As underlined by some of our members³⁰, a significant number of credit transfers get lost.

³⁰ 'L'ULC s'inquiète du maintien des tarifs élevés des virements transfrontaliers', ULC (Luxemburg) Press Release of 6th February 2003. 'Les virements transfrontaliers restent trop coûteux', Press Release Test Achats (Belgium) and 'L'euro devise les banques divisent', Budget & Droits 165 of 5th November 2002. 'Las fronteras caen... poco a poco', OCU (Spain) Dineros y Derechos n° 73 Noviembre-Diciembre 2002.

Annex 13 - Obligations and liabilities of the contractual parties related to unauthorised transactions
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Consumers have to be duly informed on the risks they face when using means of payment. The risk of fraud is not linked to the 'irresponsibility' of consumers - a fair share of the risks arises from the split between consumer needs and the proposed means of payment. Many old persons find it difficult to remember their pin code – alternative means of payment, adapted to consumer needs, should be available.

Regarding unauthorised transactions, BEUC is in favour of a binding legislation, with the Recommendation on Electronic Payments as a basis. Harmonisation of the respective obligations and the liabilities of the holder and the issuer could be envisaged, provided this is at a high level. Also, some flexibility should be envisaged, for member states to be able to go even further in that respect.

This should **apply to all kind of payment instruments: Internet banking, card payments and also to company cards.** This is the case for the new Belgian Law that entered into force on 1st February 2003³¹.

It has to be ensured that these terms and conditions are fair, and that the holder is properly informed of these in a comprehensive and clear manner. The issuer should be obliged to give the holder at least one month's notice before changing these terms.

However, **the risks involved with the use of technology must not be put on the consumer but should be borne by the one offering services by means of technology**, who is better equipped to deal with the risks. The wording of the proposed article on the obligation of the contractual parties needs to be corrected to reflect this. The user will not be in a position to provide factual information or elements to prove that he/she has not authorised the transaction. It is not only disproportional, but also profoundly unrealistic to expect this. **The wording 'if the Payment Service User provides factual information or elements which would allow the presumption that he could not have authorised the transaction' must be deleted altogether.**

It sounds logical that the holder be obliged to notify the issuer without delay after becoming aware of the loss or theft of the EPI or the means that enable it to be used. That means also that proper means for notification at any time of the day should be available for the holder (a pan-European phone number in all languages for instance). A deadline for this to be in place should be set, and the Commission should act if the industry fails to have this up and running by that time. The holder shall also be provided with a means to prove that he/she has made this notification. This **notification shall be effective from the onset, and shall not be made dependent on confirmations having to be sent, in writing for instance.** Also it has to be borne in mind that the consumer might find out about the means of payment having been used fraudulently only when receiving the (monthly) statement from its bank, especially in the case of online fraudulent payments.

The holder should have limited liability before notification and no liability after notification, provided he has acted in accordance with the terms and conditions of the contract. **The 150 Euros limit mentioned in the Communication seems adequate to us.** Member States should be allowed to go further. **If the electronic payment instrument has been used fraudulently without it having been stolen or lost³², the holder shall not be held liable and**

³¹ Cf. 'Enfin une protection légale', Budget et Droits, janvier/février 2003.

³² Use of the 16-digit number of a credit card when buying at a distance for instance.

the sums at stake shall be given back to the holder by the provider. Also, **the consumer, in case of fraud should receive back the debited sum on his account speedily and without any obstacles. A strict time limit for reimbursement shall be set.** In France, the limit is 30 days.

The provider shall be liable for direct and indirect damages (consequential damages).

The notion of gross negligence would need to be further clarified. We would much **prefer a reference to ‘extreme negligence’** which exists in the current Belgian Law. For instance, having noted down the PIN number in an easily readable manner on the payment instrument, or on a document kept close to the payment instrument could be seen as extreme negligence. **It needs to be ensured that this concept of ‘extreme negligence’ does not leave the door open for too much ‘innovative’ interpretation** from the payment service providers.

We hold the view that these general principles would not increase the likelihood of fraudulent behaviour of the legitimate user/holder (first party fraud).

Annex 14 - The use of “OUR”, “SHARE”, “BEN”

As far as the allocation of charges is concerned, cross-border payments in a non-Euro currency have to be duly considered, as they fall out of the scope of the Regulation on cross-border payments in Euro.

However, many consumers have complained of double charging in cross-border credit transfers, even when they had specified that only the originator should be charged. Therefore, **we welcome the general principle proposed by the Commission that the full amount transferred by the originator should be credited to the beneficiary’s amount.**

We are very much in favour of raising the “money back guarantee” of Art. 8 in Directive 97/5/EC to 50,000 euros so as to cover all retail payments. **We are in favour of extending the scope of the Regulation as soon as possible.**

Annex 15 – Executions times for credit transfers

BEUC welcomes the willingness of the Commission to propose legal provisions applicable to all credit transfers in the Internal Market.

The execution time for cross-border transfers shall not exceed the one for national transfers, if a Single Payment Area is ever to be achieved. Failing this, the incentive for banks to actually improve the system will be small. Indeed, competition in the banking sector is limited because few consumers actually switch banks. Imposing settlement time could well mean a better service for consumers willing to engage into cross-border credit transfers.

More importantly, the current execution time in certain Member States is one day. Consumers in certain Member States would be worse off if settlement time for national transfers would be aligned on the one for cross-border transfers.

The limit for execution time shall be aligned on the lowest one at Member State level, or if the 3 days limit would be kept, member states should be allowed to go further.

Annex 16 – Direct debiting

Consumer's confidence can only be obtained if there is a sufficiently long period to revoke payment – and that is the case in particular for direct debit. Indeed, **the account holder shall have a right to repeal a debit transaction on his account.**

Annex 17 - Removing Barriers to professional cash circulation

No comment

Annex 18 – Data protection issues

Without prejudice to the full implementation of Directive 95/47/EC, we are open to consider options 2 and 4 set out in the Communication. Obviously, it would have to be ensured that the basic principles enshrined in Directive 95/47 regarding the building up of databases, the control of the accuracy of data, the right of access for consumers, the process for correction of data are duly considered. However, we share the view of the Commission that **uneven implementation of Directive 95/47/EC needs to be addressed.**

Annex 19 – Digital signatures

Annex 20 – Security of the networks

No comment

Annex 21 – Breakdown of a Payment network

BEUC is in favour of liability of Payment Service Providers towards consumers in case of breakdown of a payment network. Indirect liability – consequential damage - should be covered also.

As underlined above, the consumer is not in a position to influence the technical performance of the system operated by the service provider, or negligence (e.g. lack of proper maintenance) on the part of the service provider.

The provider should be held responsible for the service it is offering. This is already the case in Belgium, as ruled by the Appeal Court of Brussels³³: a Payment Service Provider is responsible for the continuity of the service. There is an obligation to perform.

END

³³ Decision of the Appeal Court of Brussels, 12th February 2002, Droit de la consommation/ Consumentenrecht, 2002, p. 73.