The EMA's Response to the Communication from the European Commission Concerning a New Legal Framework for Payments in the Internal Market

The Electronic Money Association
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PREFACE

This submission by the Electronic Money Association is a formal response to the communication from the Commission to the Council and the European Parliament concerning a 'New Legal Framework for Payments in the Internal market'.

It reflects the views of the members of the Electronic Money Association but does not necessarily reflect individual views – a full list of members is provided in the appendix to this document.

Comments, questions or requests for further details should be addressed to:

Dr Thaer Sabri
Chief Executive
The Electronic Money Association
47 Marlborough Gardens
Lovelace Road
Surbiton
Surrey
KT6 6NG
Tel: +44 (0)20 8399 2066
Email: Thaer.Sabri@e-ma.org

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Key Points

- The EMA supports the objectives of the Financial Services Action Plan, the internal market arguments made, as well as the goal of removing barriers to a safe and efficient payment market place.
- The EMA believes that the communication is at too early a stage to warrant consideration of a Regulation, and significant work must be done before a Directive or an amendment to a Directive can be contemplated.
- The scope of the communication appears very wide, this means that issues are not addressed in sufficient detail for a proper assessment to be made.
- The lack of definition for key terms, means furthermore, that the implication and consequence of much of the document to the business of e-money issuers remains unclear.
- **Annex 1** addresses electronic money but derives a new definition that is distinct from that of the e-money Directive. This creates much confusion and prevents a proper consideration of the regulatory issues that may arise.
- The annex adopts a narrow interpretation of e-money, suggesting that account based electronic money does not meet the Directive's definition. This is at odds with the consensus of both regulators and industry, and if accepted would result in almost all e-money products failing to qualify for e-money regulation.
- The EMA notes the Commission's current consultation with the Banking Advisory Committee regarding the status of certain prepaid services such as prepayment for mobile telephony, and trusts that the current Communication will take such conclusions into account.
- The EMA also notes that the Electronic Money Directive is schedule for review in 2005, and proposes that this would be an appropriate means of addressing any issues arising from this Directive.

- The EMA supports the proposal to enable the providers of money remittance services to become authorised in a single EU jurisdiction, and to then benefit from mutual recognition.
- If mutual recognition is thought to be unlikely without minimum requirements, then a new regime to enable passporting is acceptable. This however is conditional on such requirements being proportionate to the risks posed, and to only extend to the activity of 'money remittance' and not other 'payment services' such as e-money.
- Furthermore, should such a regime be established, both deposit takers and electronic money issuers, currently subject to more proscriptive regulatory requirements, should be able to undertake such activity as part of their existing authorisation.
- **Annexe 2**: the overlap between information requirements under this annexe and those provided under the E-commerce & Distance Marketing of Financial Services Directives has not been addressed.
- The EMA believes that more limited but meaningful and accurate information would be of greater value to consumers and merchants, informing without overwhelming users.
- **Annex 7**: the EMA is in agreement that legislation is not the appropriate means of developing common standards. The evolution and development of industry standards is best led by industry needs and market requirements; to this end no further legislative initiatives are believed to be needed.
- **Annex 8**: FATF SR VII will have a significant impact on the businesses of electronic money schemes, particularly those comprising a number of interoperable issuers.
- The definition of 'payment service provider' must be provided in this respect, providing clarity regarding the extent of compliance that is required.
- Minimum information should, be allowed for e-money products, in the same manner as it is provided for credit and debit card payments.
- An exemption de minimus threshold of Euro 3000 for transactions within a single jurisdiction is sought and Euro 300 for cross border transactions..

- E-money issuers should not be treated as ‘intermediaries’ for the purpose of the Recommendation, as the fungible and commingling nature of a purse makes the following of payments through a purse meaningless.
- The harmonisation of the implementation of SR VII in the EU is essential in order to enable the smooth flow of payment transactions across member state borders.
- **Annex 10**: the negotiable nature of electronic money means that payment is immediate and final, and revocability cannot be contemplated.
- Furthermore, any revocability that is allowed to credit card, debit card or bank transfers (which are used for funding e-money purchases) must be made conditional upon the non-completion of the underlying transaction
- **Annex 11**: the proposal to create joint liability between e-money issuers and merchants is strongly resisted. It would deter the recruitment of all but the most established merchants, and would suffocate the market. It would also lead to significant cost increases, to the detriment of all.
- **Annex 12:** strict liability is inappropriate for failures in the payment system; issuers have adequate incentives to provide good customer service, and can only bear the cost of failures caused by their own systems, and not by systems outside of their control.
- **Annex 13**: the EMA opposes the proposal to make issuers liable for fraudulent and unauthorised losses of e-money prior to issuer notification of such loss, or where an issuer’s product makes it unable to prevent subsequent use of the e-money purse.
- This is because of the negotiable nature of the product, where a payee that receives payment in good faith is entitled to keep such payment and receives it free of defects in title, and
- Because e-money is intended and is used as an equivalent of cash where consumers are aware of and accept the risks associated with loss of a purse, and hence limit their exposure.

- If provisions are introduced, making issuers liable for losses incurred subsequent to notification, such provisions should also address and seek to minimise the consequent exposure of issuers to first party fraud.
- **Annex 20**: the development of security requirements is an evolutionary process; there are already high level systems requirements set out in the E-money Directive, and both industry and the ECB are currently addressing this issue for e-money products. There is therefore no need for further legislation in this regard.
- The proposal to address security concerns by way of the Data Protection Directive is also believed to be inappropriate. Security properties are wider than confidentiality of information, and this would fall short of security requirements in this regard.
- **Annex 21**: There is no appreciable need to introduce new legislative provisions to deal with the consequences of a breakdown in a payment system. Commercial factors address such issues adequately.

1.0 ***General issues raised by the Communication***

1.1 The EMA supports the objectives of the Financial Services Action Plan: improving customer convenience and protection as well as assisting industry in a achieving a safe and efficient market.

1.2 It furthermore supports the internal market arguments of removing legal barriers and uncertainty, creating a more efficient and integrated payments market and addressing the prospective needs of enlargement.

1.3 Similarly, it supports the guiding principles for the proposed framework: efficiency, security, access to market and a level playing field, consumer protection and technical neutrality.

2.0 The nature of a future legal instrument

2.1 The choice of instrument is affected by the objectives of the framework, the requisite timetable for implementation and the need for flexibility at Member state level. Furthermore, the degree of clarity and development of the proposals will also determine whether the proposal can be formulated as a Regulation, a higher level Directive, or an amendment to an existing Directive.

2.2 The EMA has many reservations as to the suitability of the proposed draft, these are outlined in detail in the responses to particular annexes,. It omits from the discussion integral regulatory issues, it does not address significant areas of risk, and proposes solutions that have detrimental consequences elsewhere in the payments process.

2.3 It is not appropriate therefore to propose a Regulation as a means of progressing such proposals, and indeed, significant progress must be made before a proposal for a Directive or amendment to a Directive can be reconsidered.

3.0 Scope of payments covered by the New Legal Framework

3.1 The scope of payments addressed is wide, addressing all ‘instruments’ that are used in place of legal tender. This includes small and medium size payments, prepaid products, debit type products as well as the grant of credit. The range of

issues to which these products give rise to is substantial, furthermore the distinctions between the risks and consumer protection objectives are similarly diverse. It would not therefore be expected that a single regulatory instrument could address the spectrum of issues raised by the diversity of products.

3.2 Furthermore, there are currently established regimes that address most of these products, and in the most part adequately.

3.3 A narrower focus would therefore be preferable, together with a clear objective that identifies a specific, or a number of specific issues, rather than a more ambitious 'framework for payments'.

4.0 Definitions

4.1 Considerable uncertainty is created in the document due to an absence of sufficient definitions; both technical as well as typological. Key definitions that are omitted include the following:

4.1.1 **Payment service provider**: does this include regulated entities that provide payment products such as banks or Electronic Money Issuers? Does it include third party providers of technical and processing services for the provisions of payments? Are resellers of payment products included?

4.1.2 **Micro-transactions**: what is the scope of such transactions? Are they below a single Euro cent, below a Euro, below 10 Euro, a 100 Euro or 1000 Euro?

4.1.3 **Small value accounts**: what are these? What are the limits of 'small'? How are these different from 'limited value'? Are these distinguished from microtransactions? Or electronic money?

4.1.4 **Real bearer instrument**: what is the definition? Is this a technical term? What does 'bearer' mean in the context of an electronic means of payment?

4.1.5 **Durable medium**: what is a durable medium? Does it include electronic forms of storage? Do electronic files qualify? Do emails qualify? Are web sites durable?

4.1.6 **Credit transfer**: does the definition provided in Annex 8 on SR VII apply to the entire document? Are e-money payments credit transfers? Is the bank funds transfer carried out in the redemption of e-money a credit transfer?

5.0 Annex 1 Right to provide Payment Service to the Public

5.1 The Annex states at the outset that it does not 'constitute a literal interpretation of existing community legislation', rather it is, to 'promote an open discussion on the best way forward'.

5.2 It presents however an interpretation of e-money (see 5.4.1 below) that is far narrower than the definition in the Directive itself, excluding for example account based products from qualifying as e-money. This is at odds with the interpretation of most Member State Regulators, the ECB and the Commission's own DG Internal Market Banking Unit. It is also inconsistent with the views of the majority of industry.

5.3 The e-money Directive's (2000/46/EC) definition of e-money is broad and states that such products should be prepaid, electronically stored and accepted as payment by persons other than the issuer. Annex 1 suggests that e-money should comprise 'a real bearer instrument' and that it must circulate freely within the subscriber community A to B to C etc.

5.4 This raises two concerns:

5.4.1 If this is an alternative definition that is being proposed ('a prepaid payment system where the monetary value issued circulates as a real bearer instrument from holder A to holder B to Holder C and so forth'[1]), then the Appendix should clearly say so, and provide the rationale for the proposal to change the electronic money Directive's existing definition.

5.4.2 In this event however, given that the Directive is scheduled for review in 2005, it would be appropriate to consider the definition at that time, and in that context, taking into account other experiences, and issues raised by industry.

5.4.3 If however this is an interpretation of the definition, then it should clearly state whose interpretation this is; and the basis upon which this interpretation is being made.

[1] Annex 1 page 22 of the present Communication.

5.4.4 In both cases, the document should have regard to the work of the GTIAD and BAC committees that have already considered the definition of e-money, and to ensure that the proposals in this Appendix are consistent with the conclusions reached by the European Commission, as advised by member state regulators through these bodies.

5.5 In the event that this is an interpretation, then the following is of note:

5.5.1 The interpretation is not technologically neutral, and would differentiate between different products based on the technology adopted.

5.5.2 Given the similar regulatory risks of bearer and non-bearer implementations of e-money – eg. prepaid float, requirement for systems and controls etc. it would be inequitable to propose a regulatory framework that differentiates between such products on this basis.

5.5.3 Similarly, where the business propositions and markets for such products are similar, they should again be treated in an equivalent manner.

5.5.4 There are currently, to the knowledge of the EMA, no products that are truly 'bearer' in nature, (with the exception of Mondex within Norway) that are in public use in the EEA, and the Directive would in this event be largely redundant. There are however several million consumers in the UK using various e-money products issued by a combination of fully authorised Electronic Money Institutions and those operating under a 'waiver'. These are based on accounted server solutions as well as smart cards and are benefiting, and wish to continue to benefit from the E-money regulatory framework[2].

5.5.5 Furthermore, the requirement for value to flow from A to B to C etc. is commercially restrictive – many business models are predicated on consumer to merchant payments, and do not provide for free circulation of e-money. Even Mondex, for example, which is bearer in nature, restricts the circulation of value.

[2] There are currently three fully authorised ELMI's and fourteen small (waived) issuers in the UK.

5.6 The suggestion that account based electronic money products may comprise deposit-taking activity ('closer to credit transfer in a centralised account system') or require a new legislative framework is again opposed. This issue has been discussed a numerous number of times by local regulators, the ECB, and industry, and it has become accepted that deposit taking does not arise.

5.7 The EMA would however support any proposal that aims to create a payments framework for different types of payment products and that applied regulatory provisions in a manner that is proportionate to the risks posed. This would enable member state regulators to tailor the regulatory regime to the nature of particular products; the EMA is opposed in general however to any increase in the regulation of payment service providers.

5.8 In this context, the EMA would support a proposal to enable the providers of money remittance services to become authorised in a single EU jurisdiction, and to then benefit from mutual recognition. This would encourage competition and simplify compliance within the internal market. Such a regime should however be proportionate to risks posed – recognising for example the absence of a prepaid float.

5.9 If mutual recognition however can only proceed with the identification of minimum requirements, then the creation of a new regime to enable passporting is acceptable. This however is conditional on such requirements being proportionate to the risks posed and to only extend to the activity of ‘money remittance’ and not other ‘payment services’ – such as e-money.

5.10 Furthermore, should such a regime be established, both deposit takers and electronic money issuers, currently subject to more proscriptive regulatory requirements, should be able to undertake such activity as part of their existing authorisation.

5.11 The brief reference to the regulation of post-paid services is opposed, as this is already adequately addressed by way of consumer credit legislation. Furthermore, the risks posed by such services are considerably different to both prepaid e-money and money remittance services, and are not considered in the current reference.

5.12 Given the objections to the provisions of this appendix, it would not be appropriate to implement any of these by way of a Regulation. A Directive or the amendment of an existing directive would provide greater opportunity for discussion and for the regulatory objectives and requirements to be identified.

5.13 In conclusion therefore, we believe the approach taken with regard to e-money is inappropriate, and inconsistent with current regulatory interpretation as well as industry practice.

5.14 Furthermore, the current proposal should have regard to the current work being undertaken by the Banking Advisory Committee and its GTIAD expert group of member state regulators. This body is addressing existing areas of uncertainty and the outcome of its deliberations should inform current proposals.

6.0 *Annex 2 Information requirements*

6.1 The principle of providing full and meaningful information to consumers at the outset is supported; subject however to a pragmatic implementation that addresses both the extent of information required as well as the means of communication. In this respect, we note the following:

6.1.1 There is no definition of a ‘durable medium’; it is essential that such media include emails, digital record forms and web sites.

6.1.2 Draft paragraph 1 states ‘in good time before the payment service user is bound by any contract or offer’. This statement appears to contemplate an extended period of time, which may for example reflect consumer decisions regarding the taking up of investment products. It does not however reflect the instantaneous nature of the opening up of e-money accounts.

6.1.3 Consumers are able to make such decisions quickly, and this reflects the relatively small risk associated with the taking up of a prepaid payment product. The natural pace of business and the requirements of consumers should not be interrupted unnecessarily. Introducing an artificial delay to the take up of products may disrupt business and have adverse consequence on the take up of e-money. This could be resolved by removing the words ‘in

good time' whilst maintaining the requirement that disclosure is made 'before' a consumer is bound by any contract.

6.1.4 There are existent disclosure requirements that are provided for under both the e-commerce Directive (2000/31/EC) and the Distance Marketing of Financial Services Directive (2002/65/EC). These overlap with the provisions that are made in this Annex, and it may be appropriate to review these in light of existing requirements.

6.1.5 Greater effect may be achieved by addressing the quality and veracity of information that is provided rather than its extent. Consumers may be overwhelmed by information so that the effect is to detract from its usefulness. The EMA believes that more limited but meaningful and accurate information would be of greater value to consumers and merchants alike.

7.0 *Annex 7 The evaluation of the security of payment instruments and components*

7.1 The issues raised regarding the variation in security requirements amongst different member states, as well as the non-recognition of security certificates from one to another are concerns shared by industry. The resultant expense and delay in repeating certification work is also an additional burden that creates inefficiency.

7.2 The EMA concurs that legislation is not the appropriate means of developing common standards. The evolution and development of industry standards are best led by industry needs and market requirements. To this end, no further legislative initiatives are needed.

8.0 Annex 8 Information on the Originator of a Payment (FATF SR VII)

8.1 The approach that is adopted by the Commission is welcome, the following responses however address the specific questions posed in the text.

8.2 **Should SR VII be transposed by EU legislation or by national legislation?**

8.2.1 The choice will not significantly impact the businesses of issuers except in so far as there will be a common basis of implementation in the Internal Market. It would not be helpful if different Member states were to adopt significantly different implementations leading to discrepancies in regulatory requirements, and barriers to the adoption of payment products.

8.2.2 The EMA therefore supports the Commission in seeking to establish a harmonised implementation of this recommendation.

8.3 **Which types of payment transaction should be covered?**

8.3.1 The FATF interpretative note to SR VII defines the subject of this recommendation, 'wire and funds transfer' widely, it states:

'any transaction carried out on behalf of an originator person (both natural and legal) through a financial institution by electronic means with a view to making an amount of money available to a beneficiary person at another financial institution'

8.3.2 It is difficult to envisage therefore an implementation of this recommendation that did not encompass most payment transactions. Thus although the values associated with electronic money transactions may be relatively small, such payments appear to fall within the scope of the recommendation.

8.3.3 It is however of some comfort that the interpretative note distinguishes between payments made within a single institution and those made from one institution to another.

8.3.4 This distinction has been carried forward into the draft legislation proposed in this annexe, shown as footnote (48) defining the term 'credit transfers'.

8.3.5 Clarity as to the definition of a payment service provider is sought however, as a means of gauging the extent of the proposed legislation's application. Distinction is sought for example between an issuer of e-money that may be a payment service provider in the present context, and a distributor of e-money that may only administer the e-money product.

8.3.6 Similarly, some payment products comprise a number of institutions within the same group, catering for different geographical markets, but providing the same product, and often employing the same transactional systems.

8.3.7 Such group companies should not be treated as separate payment service providers and should benefit from the exemption provided to payments within the system of a single payment service provider (see footnote 48 of the Communication).

8.4 **Which information regime should apply: minimum information or full information?**

8.4.1 It is anticipated that interoperable electronic money products where e-money is issued by one institution and redeemed by another, will be required to comply with this requirement.

8.4.2 In this event, it is essential that such products can benefit from the minimum information allowance. E-money products are intended to affect small value payments, akin to cash in the physical world, and hence could not be made subject to extensive information disclosure with every transaction.

8.4.3 The FATF interpretative note allows for the adoption of minimum requirements for credit and debit card products; e-money poses a smaller risk, and should therefore also benefit from this allowance.

8.4.4 If such disclosures were required for e-money transactions, there would also be privacy and data protection issues. Consumers will not wish to disclose personal details to (many) merchants and consumers with whom they transact.

8.4.5 Furthermore, there are provisions for purses of limited monetary value, where full originator information may not be available. In such circumstances, the scheme relies on verification of identity at the point of redemption of e-money, making such products unattractive to would be money launderers.

8.4.6 To this extent, the application of SR VII to e-money transaction should be considered carefully, and industry seeks detailed consultation on these issues prior to the publication of any legislative proposals.

8.5 **Need for derogations from the full information regime in the case of 'batch' transfers?**

8.5.1 Electronic money issuers do not currently employ batch transfers in their technologies, this is not therefore of immediate relevance to issuers.

8.6 **Need for exemptions/thresholds?**

8.6.1 The EMA is in favour of introducing a de minimus threshold for transactions, provided however that appropriate systems and controls are used to detect any attempts at exploiting such an allowance.

8.6.2 It is not economical, nor practical to include originator information in small value transactions, nor does it meet with data protection and privacy concerns where such information may include the name, address and other personal details of consumers.

8.6.3 Indeed such disclosures may assist in the perpetration of identity fraud, a matter of significant concern at the present time.

8.6.4 An exemption de minimus threshold of Euro 3000 for transactions within a single jurisdiction is sought and Euro 300 for cross border transactions. This should however be made subject to a condition that appropriate systems and controls are in place to detect 'smurfing' transactions[3] that seek to exploit the de minimus limit.

8.6.5 This would confine the introduction of originator information to more substantial transactions, and relieve the payment service provider from the obligation of including unnecessary information that is of limited law enforcement value.

8.7 **An additional issue that is raised by the interpretative note, and which is addressed at paragraph 5 of the current draft relates to intermediary payment service providers** (described in the interpretative note as 'Intermediary Financial Institutions').

8.7.1 Electronic money institutions should not be treated as intermediates in financial transactions, and be required to attach originator information from

[3] Smurfing involves making transactions that fall below the detection or de minimus limit that is set, as a means of avoiding detection.

payments into an account or purse to outgoing payments. This is because of the commingling of funds in an electronic money purse.

8.7.2 Electronic purses act as a store of money into which payments are received and from which they are made. Payments from different sources commingle and make it impossible to 'follow' or trace a particular payment into an account and then out again. It cannot be said that a payment out of a purse originated from a particular payment in, as funds in the purse are indistinguishable. It would therefore be meaningless to seek to attach originator information from a particular payment in, to a subsequent payment out.

8.7.3 Information useful to law enforcement information can instead be provided by an examination of transaction records. These provide the sole means of extracting meaningful information in this regard.

8.7.4 The inclusion of e-money issuers as possible intermediary payment service providers is therefore resisted, and the EMA seeks explicit exemption in this regard.

9.0 Annex 9 Alternative dispute resolution

9.1 The EMA supports proposals for alternative dispute resolution schemes.

10.0 Annex 10 Revocability of a Payment order

10.1 The revocability of payments is currently addressed by industry, and provides for the specific nature of different types of payment. The paper does not sufficiently discuss the reasoning for addressing this issue by way of regulation.

10.2 In the event that the revocability of electronic money transactions is to be addressed here, then the legal nature of such transactions is key.

10.3 Electronic money is intended as a surrogate for notes and coins and to affect a 'cash like' functional form of payment.

10.4 Notes and coins are distinguished by their negotiable status; that is to say the legal property (of negotiability) that is essential to the function of money as a means of payment in day-to-day commerce.

10.5 Negotiable instruments have the following attributes:

10.5.1 They pass by delivery, so that transfer of possession also transfers title.

10.5.2 There is no need to give notice to the issuer of the instrument that there is a transfer

10.5.3 They are transferred free of any legal defects in the title of the transferor (payer), provided that the transferee receives them in good faith. That is to say, even if the payer had obtained the money fraudulently, if the receiver of payment is unaware of this fact, he receives good title to the money and is under no obligation to return it to its original owner.

10.6 The purpose of 'negotiability' is to allow daily commercial transactions to flow freely, without individuals having to investigate whether the person paying over a sum of money has proper title to the funds. A proposition that would be unworkable in day-to-day commerce.

10.7 It is this property that is replicated by electronic money products, and which continues to be provided by electronic money, enabling it to perform the function of an 'electronic surrogate for notes and coins'.

10.8 It is in this context that the EMA opposes any element of revocability for payments made in electronic money. Payments are instant, and they are final, instantaneously. This is so, even if the payer did not have proper title to the monies.

10.9 This should, as the annexe does, distinguish revocability of the payment transaction from a refund that flows from the unwinding of the underlying transaction that gave rise to payment. Such refunds continue to take place, and are not affected by the means of payment employed.

10.10 Harmonisation of payments by electronic money should therefore have due regard to the negotiability of these products, and recognise the immediate finality of payment for electronic money.

10.11 Separately, e-money issuers rely on credit cards, debit cards and bank transfers to fund electronic money purses and purchase e-money.

10.11.1 It is customary for issuers to make the e-money available as soon as the funding transaction has been authorised. Customers have then the ability to spend the purchased e-money.

10.11.2 Any revocability that is allowed to credit card, debit card or bank transfers must therefore have regard to such an eventuality. Any right to revoke such transactions must always be made conditional upon the non-completion of the underlying transaction.

10.11.3 This is essential to avoid both fraud and the delaying of the issuance of e-money. The latter would result if issuers were made subject to the uncertainty consumers' revocation rights.

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

11.1 The objective of increasing consumer confidence in e-commerce is supported, and the removal of any barriers is encouraged.

11.2 The notion of introducing joint liability for the payment provider with the merchant however places the balance of risk entirely with the payment service provider (PSP) distorting the underlying commercial relationship.

11.3 PSP's will not be able to offer a payment service except to merchant that are known to the PSP and who can demonstrate an established record of business. This greatly reduces the range of merchants that will be taken on by payment service providers.

11.4 The effect is to diminish the benefits offered by e-money products, where the cash nature of the payment vehicle means that the credit worthiness of either the merchant or consumer is immaterial, opening up e-commerce to all.

11.5 Furthermore, any increased risk taken on by the PSP is likely to be passed back to consumers and merchants by way of higher fees, to the detriment of consumers.

11.6 The principle of connected lender liability may be appropriate where there is a grant of credit by the payment service provider, and there is a wish to ensure that consumers do not pay back credit for goods that are faulty or defective in some

way. This concept however is inappropriate for cash and non-credit type transactions where the PSP's involvement is purely as facilitator of payment.

11.7 It may nevertheless be that PSP's will wish to offer a guarantee to consumers as a means of differentiating themselves in the market place, and in this case such guarantee or liability will be entirely market driven, and consumers will be free to choose the type of payment service they prefer.

11.8 Legislating for liability is both inappropriate and will lead to increased costs to all participants.

11.9 The EMA is therefore against the notion of joint liability for merchants and PSP's.

12.0 Annex 12: Non Execution or Defective Execution

12.1 The objective of protecting consumers using payment systems is again supported.

12.2 It is however the core business of payment service providers to undertake such a service, and any failures in its delivery will adversely affect their reputation and their consumer business proposition.

12.3 There is therefore every incentive already in place to ensure that payment services are adequately provided and that the level of service is consummate with consumers' (and merchants') expectations.

12.4 It would not therefore be equitable to introduce a strict liability provision that does not discriminate between failures that are attributable to the PSP from those that are caused by third parties.

12.5 Electronic money issuers have no objection to addressing any failures in their systems and meeting any legitimate claims that arise.

12.6 Issuers cannot however be expected to compensate users for consequential damage, even where such loss was a direct result of the failure in the issuers' systems. Any such provision would have an adverse effect on the cost of its provision, a cost that would ultimately be borne by consumers and merchants.

12.7 Furthermore, as issuers cannot influence or address risks that are outside of their control, the proposal in paragraph 2 of the draft legislation to extend liability even when payment is initiated at (and therefore may be attributable to) equipment

that is not under the PSP's direct or exclusive control is again inequitable. It places a burden of liability at the PSP's door without the PSP having the means of mitigating such liability.

12.8 The failure in such circumstances could for example result from a failure in the computer hardware or software of the consumer, a local network failure, a failure by an intermediate Internet Service Provider or even a problem experienced within the Internet at large.

12.9 In conclusion therefore, strict liability is inappropriate for failures in the payment system, issuers have adequately incentives to provide good customer service, and can only bear the cost of failures caused by their own systems, and not by systems outside of their control.

13.0 Annex 13 Obligations and Liabilities of the Contractual Parties Related to Unauthorised Transactions

13.1 The fraudulent or unauthorised use of electronic money products is an issue for both users and e-money issuers. Issuers welcome any initiative that seeks to minimise its occurrence.

13.2 A number of matters in the draft legislation do however give rise for concern. These impact e-money products adversely.

13.3 As described in some detail in the above response to Annex 10, electronic money in its function as a surrogate for notes and coins, assumes the property of negotiability. As such, a payment in e-money just like a payment in cash is non revocable, and therefore consumers use electronic money in the full knowledge of the risks attached.

13.4 Consumers carry only limited amounts of physical cash in their wallets because of the knowledge that loss of the wallet means loss of the cash, and this is accepted.

13.5 Electronic money usage patterns have proved to be almost identical; even when the purse limit (amount of e-money that can be loaded at any one time) is in the order of hundreds or thousands of Euro, consumers will on average only carry a few tens of Euro as balance.

13.6 When they wish to make large value purchases using e-money, they charge up the e-money purse just before payments and spend it soon afterwards. This is similar to the manner in which large cash transactions are mostly made, getting cash out of an ATM just before it is needed. It reduces the risk of loss of the cash and ensures that large amounts of money are kept in interest earning accounts in banks.

13.7 It is therefore inappropriate to make issuers liable for the loss by consumers of their e-money, whether fraudulently or inadvertently (eg. loss of card or user name and password). Lost e-money can no more be retrieved than can lost cash.

13.8 It is however possible to stop use of an account based e-money product once the issuer is notified of the loss of the card or of the compromise of a user name and password.

13.9 Such risks (following notification) are within the control of issuers, and they are able to address them. Losses that occur prior to notification are both part of the risk of using an e-money means of payment, and a feature of the immediate and final nature of payment in electronic cash. (It should however be noted that certain unaccounted products allow users to make transactions that are not known or seen by issuers, and in such cases, no liability for loss can be accepted by the issuer even after notification).

13.10 If provisions for liability subsequent to notification are introduced, these should also address the risk of first party fraud and the consequent exposure of e-money issuers' to fraudulent claims.

13.11 As described previously, It would not be possible within the negotiable regime of electronic money for a payment to be rewound, even if it was made by an unauthorised person, provided that the payee had received the payment in good faith. The alternative would be for the issuer to carry the cost of all fraud and unauthorised transactions in the payment system.

13.12 This again is both inequitable, and will lead to the following:

13.12.1 The increase in first party fraud as a result of a realisation by criminals that issuers will always recompense claims of unauthorised use or lost e-money

13.12.2 A consequent increase in the cost of the product to merchants and consumers at large, where the resultant cost has to be funded by greater charges to consumers.

13.13 It may be that at some stage in the future, some issuers may wish to offer such a guarantee as an added feature, or a unique selling point that differentiates their product from that of competitors.

13.14 They may charge a premium for such a product or may do so as a response to commercial pressure. This is a matter that is entirely commercial in nature and should not be influenced by legislative proposals.

13.15 In conclusion, the EMA opposes the proposal to make issuers liable for fraudulent and unauthorised losses of e-money prior to consumer notification of such loss, or where an issuer's product makes it unable to prevent subsequent use of the e-money purse.

13.15.1 This is because of the negotiable nature of the product, where a payee that receives payment in good faith is entitled to keep such payment and receives it free of defects in title, and

13.15.2 Because e-money is intended and is used as an equivalent of cash where consumers are aware of and accept the risks associated with loss of a purse, and therefore limit their exposure to such loss.

14.0 Annex 14 The use of OUR, BEN, SHARE

14.1 This matter is largely outside of the scope of the electronic money business.

14.2 In the absence of a definition of a 'payment order' however, assurances are sought that the condition stating that the legislative provision is 'without prejudice to explicit agreements between the beneficiary and his payment service provider' will remain in the final text.

14.3 This provides the assurance needed that where an issuer's business model involves the levy of service charges on the receiver of payment, that such charges can be deducted from payments made upon the redemption of e-money.

15.0 Annex 15 Execution Times for Credit Transfers

15.1 Again this issue may be outside the scope of e-money issuers' business.

15.2 If the definition of 'credit transfer' provided in Annex 8 is applicable, then assurances are sought that delays in the redemption of e-money that may be attributable to fraud checks or money laundering regulations, will not be caught by this provision.

15.3 That is to say, the process of redemption should be separated from the final step of crediting a consumer with bank funds, so that 'credit transfer' is limited to the inter bank payment portion of the redemption process.

16.0 Annex 19 Digital signatures

16.1 The EMA welcomes the Commission's proposal to await the outcome of the report on the implementation of the Directive on Electronic Signatures (Directive 1999/93/EC), as a means of making a more informed assessment of the need for any further regulation.

17.0 Annex 20 Security of the Networks

17.1 The EMA believes that security of IT systems is a critical part of any framework for the regulation of payments.

17.2 The development of security requirements however is an evolutionary task, and one that requires continuous development. It does not lend itself to detailed legislative provisions, but rather to setting expectations at a very high level.

17.3 There is already a provision in the e-money Directive (Directive 2000/46/EC) for issuers to have adequate systems and controls (Article 7 Sound and Prudent Operation), and this is then implemented by way of local regulatory requirements and industry (and ECB & central bank led) standard initiatives.

17.4 It is not felt therefore that there is a need for further legislative provisions affecting the e-money industry at this time.

17.5 Furthermore, the proposal to address security concerns by way of the Data Protection Directive (95/46/EC) is not thought to be appropriate. Security properties are wider than confidentiality of information; other requirements such

as integrity or authentication of data, could not for example not be addressed by such a provision.

18.0 Annex 21 Breakdown of a Payment Network

18.1 The commercial incentive for issuers to continue to provide a reliable payment service is greater than any that could be provided by legislative provision. It is not therefore felt necessary for legislative proposal to be made in this regard.

18.2 The Commission's analysis of the difficulty of gauging the nature of any loss that flowed from a breakdown is shared by the EMA.

18.3 The combination of the existing incentives and difficulties in practical implementation dissuade in the EMA's opinion from the need for such provisions.

19.0 The EMA provides no comment on **Annexes 3, 4, 5, 6, 16, 17 & 18**.

APPENDIX

List of Members of the Electronic Money Association:

Earthport PLC
MasterCard International
Moneybookers Limited
Neteller UK Limited
O2 Limited
Orange UK
PayPal (EU) LTD
PrePay Technologies Limited
Securiclick Limited
T-Mobile UK
Transport for London
Travelex Plc
Vodafone UK
Visa International EU