



*The Retail, Wholesale and International Trade Representation to the EU*

## **Payment Systems**

*THE NEW LEGAL FRAMEWORK FOR PAYMENTS IN THE  
INTERNAL MARKET*

*POSITION PAPER*

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## **Introduction**

The commerce sector in Europe welcomes the European Commission's initiative to create a real Internal Market for Payments. Great benefits are expected from a well functioning Internal Market for Payments. EuroCommerce is therefore happy to supply the Commission with its comments regarding the barriers that merchants face with the payment system(s) in the Internal Market.

Established in 1993, EuroCommerce represents the retail, wholesale and international trade sectors in Europe. Its membership includes commerce federations in 29 European countries, European and national associations representing specific branches of commerce and individual companies.

On behalf of its members, EuroCommerce is championing the cause of free and open markets both within the European Union and beyond to the benefit of consumers. It is a key player in the process of implementing the Internal Market for consumers. EuroCommerce stands for sound and fair competition where all distributors have free access to the activities and markets of their choice.

Commerce is the closest link between industry and the 450 million consumers across Europe. It is also the largest consumer-related market service. It is a dynamic and labour-intensive sector, which plays a significant role in the European economy, generating 13% of the EU's GDP through 4,7 million companies. 95% of these are small enterprises, which are vital to Europe's economic and employment prospects. The sector is a major source of employment creation, providing jobs for 22,5 million people from all sections of society.

EuroCommerce strives for proactive supervision of the payment system, in particular with regard to transparency, market forces and technology. This is in order to reduce the high entry thresholds and charges, to prevent any abuse of power and to stimulate technological developments. Without transparency and competition it is impossible to determine the efficiency of cash or electronic payments or to introduce improvements.

The retail trade plays an important role in the payment system:

- The retail trade is not only a user of the payment processing system, but also a promoter of it.
- Retailers strive to optimise the payment behaviour of consumers in shops. This serves two purposes: a reduction in costs, but also increased security in and around shops. Security for the consumer, for the retailer and for the shop employees.
- Retailers are prepared to pay for the payment processing services they receive. This means, though, that the costs and benefits of the payment processing system must be divided reasonably between the various parties involved. In order to assess this, the costs which the banks impose must be transparent and subject to competition. Only then will it be clear to everyone that they are not being overcharged.

EuroCommerce is of the opinion that the costs and benefits of the payment processing system are divided unreasonably between the various parties involved.

## I. General Comments

Firstly, we would like to stress that the legislation regarding the banking sector is not harmonised at European level. National differences in legislation and monopolies create legal uncertainties and disparities between Member States. A lack of harmonisation in legislation can lead to unfair competition, which can have negative influence on those using the payment system. As a result, it becomes harder for merchants and consumers to fully benefit from the advantages expected from the creation of an EU Internal Market. This is also true from a technical point of view, leading to differences in taxation, standards and innovative trends.

EuroCommerce would like to emphasise that the NLF should embrace all kinds of non-cash payments issues - with the exception of cheques. Even though the NLF already addresses numerous issues, it should remain possible to introduce new issues in the future should this be considered necessary. For example payments by mobile phone will soon emerge as a new payment instrument.

In order to make progress, the commerce sector favours regulations over directives as a legal instrument. This in order to ensure that provisions are implemented in as uniform a way as possible. EuroCommerce is of the opinion that implementation and harmonisation on a voluntary basis will not lead to the desired result. As the June 2003 progress report "Towards a Single Euro Payment Area" published by the European Central Bank (ECB) shows, the banking sector has not had sufficient success in implementing common standards, for example.

Before going into detail on the issues the New Legal Framework (NLF) (COM (2003)718) intends to address, we would like to make some remarks on two specific issues related to the NLF and the evolution and well-functioning of the payment system in the Internal Market we consider to be of importance. We are of the opinion that the European Commission should take these into consideration when publishing its "New Legal Framework for Payments in the Internal Market".

### **Cross border acquiring**

Within Europe, card fees vary widely. Understandably, merchants would like to be able to process all their transactions in the country where fees are lowest. This should be possible in an Internal Market where the principle of free competition rules. However, credit card companies only allow cross-border acquiring when the fee of the country where the transaction takes place is levied (1). In effect this makes real cross-border acquiring impossible. Merchants cannot make the most out of lower fees despite the existence of an EU Internal Market.

The card acquiring service is not dependent on local circumstances, but it is a service that consists of the same components everywhere within the EU where it is rendered. It is therefore hard to defend the enormous differences in fees. This can only be upheld by the possibility to keep markets separated. If the Internal Market for card acquiring would exist, a more uniform and lower fee level would be developed by free competition. This would remove what is currently a barrier to the development of retail operations across borders, allowing retailers to operate more efficiently to the benefit of consumers.

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<sup>1</sup> This was actually officially allowed in a ruling of 24 July 2002 in which the Commission exempted Visa from the European Competition rules for five years ( Case No COMP/29.373)

The typical examples below show the huge differences in costs currently faced by large retailers.

#### Examples

A) A retail company operates in both Germany and Austria. On an annual turnover of €3 billion on credit cards in Germany, it pays fees of 1.55% or €46.5 million. In Austria, where the fee for the same service is 3.35%, it pays €100.5 million. If the retailer were allowed to have all its transactions processed in Germany at German prices, this would represent a saving of €54 million.

B) Another retailer operates in both Spain and Portugal. Again on an annual turnover of €3 billion on credit cards in Spain, the company pays 0.62% in fees on each transaction, amounting to €18.6 million. In Portugal meanwhile, the fee is 1.99%, which works out €59.7 million. The retailer would face an additional €41.1 million in fees due to the credit card schemes distortion of the internal market.

As the European Commission states in its communication, the major aim of the NLF is to boost competition in the Internal Market's payment system. Therefore we urge the European Commission to take the necessary measures to remove this unjustifiable distortion to trade.

To this end, the present action of the European Commission should focus on opening up cross-border competition in acquiring and transparency of rates and processes in the banking sector. Both the business sector and the end consumers would benefit from this evolution, as price comparison is the first step to enable real competition on a given market.

#### Secure payments (EMV)

The European commerce sector wants to make clear that it wishes to participate in the discussion on the role it can play in preventing non-cash payment fraud. EuroCommerce wishes to point out, however, that retailers cannot be held responsible for the fact that companies issuing non-cash methods of payment have introduced a payment instrument which is vulnerable to fraud. The bank or issuing company bear the primary responsibility for the safety of their products.

EuroCommerce therefore urges the banking sector (i.e. issuing companies) to accept their responsibility with regard to fraud with non-cash payments. The banks remain responsible for the quality and user-friendliness of the technology and products they put on the market. The retailers, and thus indirectly consumers, are those who pay the bill for the fraud committed, through higher commissions and higher consumer prices. This is unacceptable. A global payment card scheme recently claimed a budget of €160 Millions for a new safety development to payment cards (e.g. EMV). In order to implement this technology, each terminal at point-of-sale in Europe, costing approximately €550, will have to be changed or adapted. Considering the number of terminals in use in Europe, it is pretty sure that the effort of the commerce sector for this increase in security will be labelled in billions. Considering this fact, we think it should be acknowledged that merchants are involved and active in the field of security.

EuroCommerce supports co-operation between retailers and the banking industry on assessing the introduction of EMV and the viability of Chip cards with PIN at the point of sale. There should be an open debate between the parties concerned about the best way to introduce EMV. This is unfortunately not the case at the moment. The companies behind EMV are forcing the system into the market through the application of liability shifts. According to EMV, the liability shift will be applied as of 1 January 2005. How can a shift in liability be applied (e.g. because the retailer does



not have an EMV-compliant terminal), if the essential EMV-components (i.e. hardware and software) are not yet ready for implementation and/or use? The fact that the timetable on the implementation of EMV will be different throughout the EU is a very unhealthy development in the creation of a better Internal Market.

Also it is not sure that EMV cards from one country will be usable and guaranteed in another country. The EMV standard allows national specification in the software in the different countries. The consequence will be that the payment card market could be even more separated in national markets. Eurocommerce can only favour EMV as a tool to make the payment system (e.g. payment cards and terminals) more secure under the condition that it is not clearly detrimental to the aim of a competitive and unified Single Payment Area.

Finally, EuroCommerce deems it only logical that if merchants decide not to implement EMV and accept to take on the risk and costs of fraud themselves, a clear cut in Merchant Service Charge (MSC) paid by the Merchant to the acquiring bank should be made possible. In order to achieve this, banks will have to become more transparent in the cost structure of the MSC and the underlying multilateral interchange fee (MIF). Currently the three cost components making up the MIF, being cost for processing card payments, an interest free period for the cardholder and a payment guarantee are bundled in one fee. In order to make a liability shift as described above acceptable, these cost will have to be 'unbundled'<sup>2</sup> and made negotiable on a separate basis. If costs for the payment guarantee are covering 50% of the fee, a similar reduction in card fees should take place for the merchant taking responsibility for fraud himself.

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<sup>2</sup> More about the principle of 'unbundling' can be found in the preliminary conclusions of the UK Office of Fair Trading of February 2003(OFT 634) on MasterCard's interchange fees.

## **Comments on the New Legal Framework annexes (COM(2003)718)**

In response to the document published by the European Commission, please find the position of EuroCommerce on the issues addressed in the Annexes of the NLF:

### **Annex 01: Right to provide payment service to the public**

EuroCommerce is interested in following this issue since new types of payment services and payment providers could emerge and become new business processes and business partners of the commerce sector. The principle of mutual recognition should be applied to all payment services activities in the Internal Market so that Pan-European retailers are to use one common system with only one development and accreditation across Europe. However, a minimum level of security should be guaranteed. This eventuality supposes that both technical and legislative minimum standards would be adopted at EU level.

Furthermore, the right to provide payment services should be subject to the same requirement of fair competition and transparency as all other European markets. Following the free movement of service principle, any restriction should be justified, absolutely necessary and proportionate to the risks. No hierarchy among payment providers should be put in place by a new set of legislation on specific issues.

EuroCommerce welcomes the Commission's proposal for a third specific category of licensing for payment activities, as long as criteria for advertisement, information, transparency and security are discussed with all actors.

### **Annex 02: Information requirements**

The commerce sector supports the approach of the European Commission.

### **Annex 03: Non-resident accounts**

The commerce sector supports the approach of the European Commission.

### **Annex 04: Value dates**

With the aim of fair competition in the payment service market, the commerce sector recommends that banks should be forced to be more transparent on this issue. We think that a regulation setting up one single value date for the Single European Payment Area (SEPA) would be counter-productive. Value dates should be known and comparable to retailers, and thus become a competition criterion when choosing a bank.

Self-regulation could be accepted provided that transparency is guaranteed.

### **Annex 05: Number Portability of Bank Account Numbers**

At the moment it is very difficult for entrepreneurs and consumers to change from one bank to another because it entails great expenses and administrative burdens. In addition, one needs to inform all relevant parties that the number has changed. In practice this leads to many costs, errors and annoyance.

As a result, this means that even when entrepreneurs are not satisfied with their bank, the huge administrative hurdles can keep them away from changing.

Moreover, institutions, entrepreneurs and individuals increasingly use the PC and electronic banking. A European standardisation of banking software and procedures is required so as to allow easier number portability and greater customer mobility. Standardised software should therefore be made compulsory.

#### **Annex 06: Customer mobility**

The same argument as outlined in Annex 5 applies here

#### **Annex 07: Evaluation of the security of payment instruments and components**

As an important user and promoter of electronic payment systems, the commerce sector is in favour of a highly secure payment system, as long as complexity and costs stay at a reasonable level. The banks are responsible for the quality and user-friendliness of the technology and products they put on the market. Retailers, and thus indirectly consumers, are those who pay the bill for the fraud committed, through higher commissions and higher consumer prices. This is unacceptable. There must be a fair balance between risks and costs for all actors.

Regarding the potential evolution of payment instruments notably “chip and pin” cards, it is crucial that retailers are involved in this matter.

EuroCommerce proposes a better harmonisation of security in the SEPA. This would result in economies of scales, added to better interoperability and understanding of national systems. The GSM network can be used as a “good practice” example for a pan-European, cheap and reliable network.

#### **Annex 08: Information on the originator of a payment**

Standardization at European level is expected from this text in order to gain efficiency and facilitate the management of financial flows in the Internal Market.

#### **Annex 09: Alternative Dispute Resolution**

Consumers need to be able to trust online methods of payments and safety guarantees for online-shopping. The development of e-commerce could increase with the introduction of an efficient dispute resolution system

EuroCommerce is a partner of the Extra European Judicial Network (EEJ-Net) through its e-commerce trustmark; Euro-Label is the only pan-European trustmark for B2C websites. National schemes should remain the main partners when proven efficient so as to avoid the extra costs of a supra-national entity.

#### **Annex 10: Revocability of a payment order**

Due to the technical complexity of determining at which stage of the transaction process the payment order is, we recommend to consider orders irrevocable as soon as the money transfer has been initiated, excluding cases when the final amount of the transaction was not explicit at this time.

#### **Annex 11: The role of the payment service provider in a customer/merchant dispute**

The development of e-commerce heavily relies on methods of payment available. It is not clear under what circumstances a joint liability should take place in the bank/merchant relation to consumer.

It must be ensured that the role and responsibility of each actor in the payment chain is clear to the consumer; that technical neutrality is respected between different payments facilities; that proportionality and reasonable costs are respected.

The role of the merchant and the role of the credit institution are very different. Shared responsibility should be avoided. It would confuse the consumer on the respective obligations and activity of each actor and could lead to higher prices due to insurance costs.

In any case, the commerce sector should be part of the discussion with the European Commission and the bank sector in order to achieve the most balanced and fair agreement as possible in terms of liability.

#### **Annex 12: None or defective execution**

The commerce sector supports the approach of the European Commission. The payment service institution should be held responsible for the proper execution of the payment order.

#### **Annex 13: Obligation and liability related to unauthorised transaction**

The liability for an unauthorised transaction is a decisive criterion for the sustainability of the payment system schemes and the commerce sector, and especially for the development of e-commerce.

EuroCommerce is willing to explore all ways of negotiation with the banking industry in order to achieve a fair deal and clear definitions on fraud and on the responsibility of those who commit fraud in accordance with the Internal Market requirements in terms of competition and harmonisation.

#### **Annex 14: The use of “OUR”, “BEN”, ”SHARE”**

The charge of the cost of a credit transfer must be attributed to the originator (OUR), the beneficiary (BEN), or both (SHARE). Up to now, “OUR” has been the default option. EuroCommerce is of the opinion that “OUR” should remain the procedure, so that the transferred amount equals the amount of the transaction.

#### **Annex 15: Execution times for credit transfer**

Like all other banking products, the commerce sector would like to have the fastest and most secured credit transfer procedure. The execution time should be transparent and/or left to negotiation. Three working days or less should be the norm regarding the new technological capacities, to the extent that the costs of faster transactions are not disproportionately higher.

#### **Annex 16: Direct debiting**

Direct debiting techniques, allowing the beneficiary to initiate the transfer of funds from the account of the customer to his own account, are mostly used for recurring payments. It involves public and commercial services as well as payments to the commerce sector. In order to develop at EU level, direct debits require interoperability and harmonisation within the EU.

The European Institutions want to create a pan-European direct debit scheme that would not impair national systems while creating trust and legal certainty at a harmonised European level. EuroCommerce is of the opinion that EU direct debit schemes should indeed be set up, so as to create another payment option for cross-border transactions.

#### **Annex 17: Removing barriers to cash circulation**

Due to the non-harmonisation of the fund transport activities in the EU, it is to date impossible for a retailer to deliver or receive cash to/from a bank located in another Member State.

With the aim of unifying the procedure in the Internal Market, the European Commission should remove legal disparities between Member States to prevent this type of barriers and enhance competition in this field.

#### **Annex 18: Data protection issues**

Directive 95/46/EC on Data Protection provides that personal information should be collected fairly and lawfully for purposes specific and explicit to the customer. Not all Member States have



yet implemented the text and if they have, many differences still remain between national legislations and systems. This situation is confusing for European companies and is detrimental to the Internal Market.

The main aim of the New Legal Framework for Payments regarding Data Protection is to harmonise legislation at European level. Merchants are willing join the debate to promote the solution best suited for the market and/or make new proposals for better data protection in the EU.

#### **Annex 19: Digital signatures**

The commerce sector supports the approach of the European Commission.

#### **Annex 20: Security of the networks**

The security of the communications networks has become crucial for the security of payment instruments and systems. As far as data protection is concerned, online- and e-payments', and corporate networks' integrity are threatened by new forms of (intentional and non-intentional) risks. The commerce sector recognises many reasons to be involved in the global network security issues. The European Network and Information Security Agency should therefore consider having a representative of commerce on its Advisory Board.

Security will not be tackled in an effective manner if all actors are not part of the debates. For example, the commerce sector should be considered as a valuable expertise group on questions such as "How to improve networks security?" or "How to enforce security measures?".

#### **Annex 21: Breakdown of a payment network**

The reasons for the breakdown, resulting in a loss in sales and profits, corporate image and fluidity are very difficult to determine in real time. The payment processing company whose network is being used and whose network breaks down, should be held accountable for the breakdown of its system. In any case, it should be the rule that a transaction would be considered valid in case of non or too lengthy answer from the authentication party.

It is crucial for the commerce sector to take part in the debate to propose solutions on this issue. In our view, the company producing a product should be liable for its safety and reliability. There is no reason why this principle should not apply to the banking industry.