

EUROCHAMBRES
Position Paper
2004



**CONSULTATION ON A NEW LEGAL
FRAMEWORK FOR PAYMENTS IN
THE SINGLE MARKET
(COM (2003)718)**

February 2004

SUMMARY OF EUROCHAMBRES' POSITION

- EUROCHAMBRES believes there is a need for an oversight of the existing rules on payments.
- EUROCHAMBRES welcomes the change of focus from directives to directly binding EU rules in this area.
- EUROCHAMBRES suggests that mutual recognition is the correct way to continue working with these issues, coupled with work on the directive on services and national deregulation.
- EUROCHAMBRES suggests that self-regulatory solutions are evaluated more in detail and given time before legal information requirements are established.
- EUROCHAMBRES strongly rejects any ideas of joint liability as directly detrimental to the development of the Internal Market, and suggests that other avenues of law are tried instead to come to terms with merchants that act in a questionable way.

INTRODUCTION

EUROCHAMBRES welcomes the opportunity to give input to the important process of simplifying payments on the internal market. This paper is the European Chambers' answer to the open consultation on the way forward to a single payment area.¹

EUROCHAMBRES supports the initiatives in this area and recognises them as important and instrumental to the realisation of the single market, and to the further development of the Lisbon process.²

GENERAL REMARKS

EUROCHAMBRES agrees with the general observation that there is a need for an oversight of the existing rules on payments. We also welcome the ambition to make cross-border payments as efficient as those at national level. It should be recognised however that there might be differences between national and international payments that are related not to legal uncertainty or market inefficiencies, but to the fact that all payments are made with respect to the assessed risk of the payment in question.

A cross-border payment may in certain circumstances have qualities that necessitate different rules than those payments that occur on the national level. This specifically applies to those countries in the Union that have not yet decided to adopt the euro.

In the majority of cases however, we feel that the ambition of creating a single payment area is commendable and necessary to further the Lisbon process, as observed in the consultation communication.³

EUROCHAMBRES also welcomes the change of focus from directives to directly binding EU rules in this area. The experience from the implementation – or lack thereof – of the Data Protection Directive (95/46/EC) for example suggests that it would be far more efficient and clear for most actors on the market to have single set of regulations to adopt. This especially applies to the case where the object of regulation is naturally multinational as in the case of cross-border payments.

¹ http://europa.eu.int/comm/internal_market/payments/framework/communication_en.htm

² Eurochambres participates actively in this process. See http://www.eurochambres.be/PDF/pdf_position_2003/LisbonProcessDef.pdf

³ *Communication from the Commission to the Council and the European Parliament concerning a New Legal Framework for Payments in the Internal Market* COM(2003)718 p 7



The current situation – with a set of instruments on different levels – is clearly not satisfactory, and EUROCHAMBRES agrees with the assessment that the co-existence of the different legal instruments is indeed confusing. The example given in the report, that information duties occur in all the different legal instruments, would surely worsen should the chosen form of legislation for the new legal framework be anything else than binding EU-rules, provided that Member States are careful to eliminate national regulations that create unnecessary transaction costs.

Technological development is important to take into account, although EUROCHAMBRES recommends that no particular technology is favoured by the legislative approach. There are, for example, those that are highly sceptical of attempts at micro payments.⁴

EUROCHAMBRES also finds the guiding principles set out in the communication to be balanced and useful. Efficiency, security, competition, customer protection, technically neutral legal provisions, value-added legal changes and the nature of the future legal instrument are all important principles (although EUROCHAMBRES feels that the last principle should be more properly called “legislation at the appropriate level”).

EUROCHAMBRES would like to add one principle to the set proposed by the Commission, and that is the principle of flexibility. We feel that it is important that any future legal framework can be quickly recast to reflect new payment behaviours and technologies. Merely opting for technically neutral legislation will not be enough in this case. All legislation must be flexible, that is, it must be open to reform and not unnecessarily detailed, cumbersome or costly for neither payment providers nor payment customers.

Finally, EUROCHAMBRES stresses the importance of not including telecom operators' functions in the definition of payment services unless the operators provide services clearly equivalent to other payment services. EU legislation should not interpret prepaid mobile phone cards as payment services, nor should premium rate phone services be considered as payment services.

EUROCHAMBRES agrees with the need to involve all stakeholders in this process, and submits its reply to the consultation in the hope of a continued dialogue with the Commission on these issues.

RIGHT TO PROVIDE PAYMENT SERVICE TO THE PUBLIC

EUROCHAMBRES, having reviewed the three alternatives set forth in the communication favours the first solution, where the principle of mutual recognition coupled with the evolving work on the directive of services is used to ensure that there are no unnecessary restrictions on the payment providers.

The second and third alternatives – a European licensing regime and changes in the e-money directive – seem to us to be bound to result in extra bureaucratic layers of administration that would hamper rather than further the efficiency of this market. In particular, the e-money directive seems to be unsuited for such a thorough reworking.

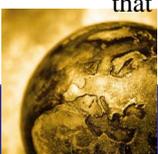
Though the multitude of legal requirements on a national level may raise issues for competition and “customer protection”⁵ – EUROCHAMBRES would like to suggest that the correct way of addressing this is through the deregulation of payment services on a national level, not the re-regulation of said services on the European level.

EUROCHAMBRES suggests that mutual recognition is the correct way to continue working with these issues, coupled with work on the directive on services and national deregulation.

INFORMATION REQUIREMENTS

⁴ See Treese, W "Putting it together: Where are the Micropayments?" netWorker Volume 7, Number 3 (2003), pp 15-17 [<http://doi.acm.org/10.1145/940830.940840>]

⁵ EUROCHAMBRES is somewhat at loss to define the differences between customer protection and consumer protection and notes that the terms, although different, are used interchangeably in much of the document in a sense that suggests a certain diffuse notion.



EUROCHAMBRES takes issue with the observation that self-regulation would require all players to commit to a *single* code of conduct in the area of information requirements. It should be recognised that self-regulation can be established as a multitude of clearly communicated codes of conduct, where the one that offers most value for all stakeholders will necessarily grow and stabilise. While it is true that it might be hard to have all players commit to a single strategy, this does not mean that the players will not find suitable forms for cooperation in different constellations. This may even be more appropriate to consumer needs than a single self-regulatory regime or code of conduct. Therefore the scepticism towards self-regulation in this area seems ill-founded.

Should the Commission persist in its view, and choose to implement the information requirements in the legal act, it is of utmost importance that the rules resulting from this decision are eminently clear and understandable. They should, in other words, fulfil the requirements in p 2 of the draft legal text.

However, the draft legal text does not fulfil these requirements itself, which is problematic. There are several examples of this:

- “a description of reasonable steps that the Payment Service User shall take...” What is “reasonable” may vary from case to case and this wording gives no clear indication of when the requirement has been met.
- “the types of all charges payable by the Payment Service User”. What is intended here? What different types of charges does the wording pertain to? Is this a requirement to list all charges or to list the types of all charges? These are different requirements.

It is seriously doubtful if the extra burden on the payment service provider is warranted by the often-marginal effect on the level of customer protection here. Especially considering that the customer’s silence is interpreted as consent. Any other regime would of course be even more burdensome for both providers and users of payment services, and is not recommended by us.

EUROCHAMBRES suggests that self-regulatory solutions are evaluated more in detail and given time before legal information requirements are set up.

NON RESIDENT ACCOUNTS

EUROCHAMBRES is hesitant to agree with the conclusion that different pricing for different accounts should be abolished. Actors close to the actual logic of a service situation are best suited to make decisions on pricing, and it is too soon to conclude that there are no factors justifying differences in prices.

The argument for regulating prices in this area, price-equality for national and cross-border payments, must be made only where the different payments can be shown not to generate different risks, and the market is probably better suited to take those risks into account when setting the prices.

A party’s possibility to assess risk covariates with the banks access to information about the payment service user, and if he/she is a non-resident, such information is more costly than otherwise. This simple fact should not be neglected in comparing national and cross-border payments.

EUROCHAMBRES recommends that pricing be left to the market, and that differences in prices may well be legitimate in certain cases, whereas we feel that directly fraudulent pricing must of course be abolished. It should also be noted that competition laws apply in cases where prices seem to be designed to minimise competition.

VALUE DATES

EUROCHAMBRES, favouring self-regulation, recommends that the Commission follow the first alternative outlined in the Annex, and that a system – or several – of self regulation is allowed to work in the context of the payment market. The regulation of transparency might enhance consumer protection, but it seems reasonable to assume that some degree of transparency will arise as a consequence of the competitive situation in the payment market. It is less obvious how a completely non-transparent payment service provider would gain customers.



Yet, there may well be a certain need for a transparency condition here. If so, that condition should be set out in clear and unambiguous terms.

EUROCHAMBRES favours a self-regulatory approach to value-dating and would like to point out that the observation that these dates may lose in importance may well be true.

PORTABILITY OF BANK ACCOUNT NUMBERS

EUROCHAMBRES maintains that bank account numbers need not have any portability, as earlier consultations have indicated. This seems to conclude this issue.

CUSTOMER MOBILITY

EUROCHAMBRES agrees with the general notion that customer mobility is a desirable aim. However, it should be reached in a market governed by the principles of contracting and self-regulation, rather than in one of regulation by legislation.

The fact that some accounts come with prohibitively high closing fees may or may not be a problem. Unless hidden from the customer at the time of contracting it seems to be a fact that the customer would be able to take into account at the time of opening the account. It cannot be discounted that there are actual costs involved in closing down an account either.

EUROCHAMBRES notes that in any market a long relationship is valued higher than a short one. There are a multitude of contracts that have rules to specify fines for premature closing of the contract as such. It remains to be shown why banks should not have the freedom of contract to favour long relationships over short ones by introducing closing fees that have a slight prohibitive effect, if these fees are clearly communicated.

To see the logic of this it is enough to consider the effects of prohibiting these fees. Any party using closing fees is de facto insuring him or herself against an early break of the business relationship, in order to be able to invest for a long time relationship that will benefit both parties of the contract. If closing fees were regulated or prohibited, the expected cost of customers that leave the party would have to be spread over all customers to a bank in increase fees overall, instead of being born by the parties choosing to end the relationship at an early stage.

Price regulation in this area is clearly not recommendable, since it would actually hurt consumer interests.

Furthermore, the Commission needs to define the desired mobility better. It is not likely that complete mobility is efficient in all circumstances, and a prolonged relationship with one partner may in fact have a value of its own. This should not be disregarded in the discussion on mobility of consumers and customers. What is the optimal mobility in any given market?

EUROCHAMBRES suggests that pricing in many cases may reflect a wish for long business relationships that is legitimate and efficient, rather than simply prohibitively lock-in oriented. Thus pricing should be left to the market, provided that these conditions have been applied in a clear and transparent way.

THE EVALUATION OF THE SECURITY OF PAYMENT INSTRUMENTS AND COMPONENTS

EUROCHAMBRES strongly concurs with the view that the evaluation of standardised security requirements should be left to market actors, who have a strong and direct incentive to develop these standards. The same actors also have an incentive to foster confidence in payments, and to ensure that security of components involved. To legislate here seems premature and unnecessary.

EUROCHAMBRES favours a self-regulatory approach.



INFORMATION ON THE ORIGINATOR OF A PAYMENT (SRVII OF FATF)

EUROCHAMBRES does not have any direct views on the content of the provisions described in this issue, but we hold that it is clear that a directly applicable instrument of EU-wide legislation would be preferable to any other form of regulation. This is crucial for market efficiency.

EUROCHAMBRES stresses that legislation on an EU-level is preferable to that on a national level in this case.

ALTERNATIVE DISPUTE RESOLUTION

EUROCHAMBRES has experience from alternative dispute resolution and believes that it is indeed important to find forms and actors for this role.⁶ It seems prudent to introduce legislation on this issue, and we find no fault with the rules proposed by the commission.

EUROCHAMBRES supports the suggestion of the Commission in this section.

REVOCABILITY OF A PAYMENT ORDER

Again, EUROCHAMBRES does not agree with the view that the unlikely event of a single self-regulatory regime is an argument against self-regulation as such. This does not mean, however, that it is completely out of the question that there is a need for harmonisation. In fact, clear rules of responsibility for revocability may well enhance the efficiency of this market.

However, as there are no clear advantages to a legislative regime over a self-regulatory solution it is hard to see the justification for the loss of flexibility that such harmonised rules would cause.

EUROCHAMBRES thus favours the self-regulatory approach over the legislative one. It might however be necessary to use legislative approaches to harmonise and eliminate a plethora of national regulations in this case.

THE ROLE OF THE PAYMENT SERVICE PROVIDER IN THE CASE OF A CUSTOMER-MERCHANT DISPUTE IN DISTANCE COMMERCE

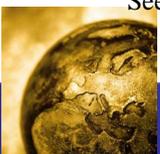
EUROCHAMBRES strongly rejects any idea of joint liability between payment providers and merchants in the case of distance commerce. The risks should be allocated in a way as to ensure that those that have the greatest ability to control them also face them. A payment service provider may well handle enormous amounts of payments, and to be liable for them would not be possible to justify economically, thus stifling rather than growing the market for cross-border payments.

This extra risk would then have to be carried by all consumers, reducing the efficiency and raising the costs of distance commerce in a way that would reterritorialise commerce rather than build the single market.

EUROCHAMBRES strongly rejects any ideas of joint liability as directly detrimental to the development of the Internal Market, and suggests that other avenues of law are tried instead to come to terms with merchants that act in a questionable way.

NON-EXECUTION OR DEFECTIVE EXECUTION

⁶ See Online Confidence (<http://www.onlineconfidence.com>)



EUROCHAMBRES tentatively agrees with the assessment on who is most suited to carry the risks for defective and non-executed payments. Furthermore we think that there is indeed a need for a clause of exemptions, with special respect to circumstances out of the control of the payment service provider, that he did not expect, or should not have expected. It is necessary to open up the possibility that there are cases in which the payment service provider is not responsible for faults in the execution of the payment.

EUROCHAMBRES favours the Commission's approach, but wants to add a provision for force majeure cases. The wording of the provision needs to open up considerable space for events out of the control of the payment service provider.

OBLIGATIONS AND LIABILITIES OF THE CONTRACTUAL PARTIES RELATED TO UNAUTHORISED TRANSACTIONS

It is unclear to EUROCHAMBRES why the rules set out in this Annex have to be in the form of legislation. Clearly, freedom of contract would allow more flexibility. What could be done, should the commission find that these provisions are indeed applicable to all payment instruments, current and future, is to issue recommendations on how such liabilities should be handled, rather than regulate them in law.

In fact, such legislation may increase the likelihood of fraud, should they be unbalanced in any way. This is not clear today, and it is not possible to foresee the actual effects on every possible payment instrument. Therefore, EUROCHAMBRES hesitates to support this idea.

EUROCHAMBRES favours contractual approaches to the problem of obligations and liabilities.

THE USE OF "OUR", "BEN", "SHARE"

The "full amount" principle suggested by the Commission seems reasonable in the context set forward.

EUROCHAMBRES thus sees no clear problems with this approach.

EXECUTION TIMES FOR CREDIT TRANSFERS

Yet again, the Commission seems to suspect that self-regulation would not be sufficient for the legal certainty and transparency as pertains to the execution time for credit transfers. It should be noted that the Commission's suggestion to exempt non-euro countries in fact could create new border effects that would prove detrimental to the growth of a single payment area. Allowing such non-euro transfers to have special rules would probably work against the intended aim of fostering a single payment area.

EUROCHAMBRES thus feels that self-regulation is the correct way forward in this area, and invites the Commission to follow this course longer before it disregards it.

DATA PROTECTION ISSUES

EUROCHAMBRES is strongly in favour of the third option discussed by the Commission in this section: a thorough reworking and revision of the Data Protection Directive (95/46/EC). While this work is initiated the guidelines being drafted by the Article 29 Group should be drafted in a transparent manner with the active participation of all stakeholders.

It is important to adapt the directive to the realities of an information society that differs heavily from the one envisioned during the framing of said directive.

EUROCHAMBRES thus actively supports a revision of the directive in respect to payments, but also on a general level. EUROCHAMBRES also signals its wish to participate in such a process.



DIGITAL SIGNATURES

The use of digital signatures, or rather electronic signatures, is an important part of the developing payment market. It is therefore important to foster simplicity and a market oriented approach to these technologies. The directive on electronic signatures today seems antiquated, and needs revision to be applicable at all.

EUROCHAMBRES suggests a thorough revision of the directive on electronic signatures, and that the Commission proceeds to eliminate the artificial differences introduced between AES and QES in the legislation. A harmonisation of the legislation on this issue, coupled with a simplification of said legislation is necessary.

EUROCHAMBRES is actively working to enable electronic signatures for the business sector in its project ChamberSign, and is ready to participate actively in the process of developing policy solutions for the single payment area in this area.⁷

EUROCHAMBRES agrees with the Commission on the importance of electronic signatures, and suggests a thorough revision of the legal framework for these technologies.

SECURITY OF THE NETWORKS

EUROCHAMBRES favours a stronger role for the European Network and Information Security Agency (ENISA) over a legislative approach. Especially considering that the model of the proposed legislation, the data protection directive, has been less than efficient in establishing clearly what needs to be done to meet the requirements in said directive on security of the networks used for the processing of personal data.

Thus legal measures are hardly necessary, and EUROCHAMBRES encourages the Commission to set up a business panel to work with the ENISA on these issues.

EUROCHAMBRES favours a joint development platform with businesses and the ENISA to produce standards for the security of networks.

BREAKDOWN OF A PAYMENT NETWORK

The breakdown of a payment network comes close to an event for which no single payment provider can be held responsible. Systemic weaknesses or catastrophic developments of this magnitude are hard to allocate risk for, and EUROCHAMBRES suggests that different insurance models may well be adaptable to the needs of payment providers.

Whether or not this implies that said payment providers should be obliged to have such insurance is less clear, but it is obviously an issue that will have to be considered.

Evidentiary issues, as the Commission notes, complicate things greatly. It seems hard to introduce any kind of legal framework in this respect, and EUROCHAMBRES recommends that the issue be solved by the industry in a self-regulatory framework.

EUROCHAMBRES favours a position that takes into account the presumption that no single provider should be held liable for systemic faults in the network.

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⁷ See ChamberSign (www.chambersign.com)

