



Comments of Visa EU regarding the Commission Communication Concerning a New Legal Framework for Payments in the Internal Market (COM(2003) 718)

Visa EU appreciates this opportunity to comment on the Consultative Document concerning a New Legal Framework for Payments in the Internal Market. Visa EU has participated in the debate on the New Legal Framework through the past years with great interest and will of course continue to do so going forward.

Visa EU supports the general aim of the New Legal Framework, i.e. the creation of a Single Payment Area and welcomes the overhaul of the existing legislation in order to ensure consistency and avoid overlap. At the same time, Visa EU believes that further regulation should only be used as an instrument when deemed necessary, and consequently when a specific need is identified, and no lesser means of achieving the same objective such as self-regulation are available.

Visa EU agrees with the guiding principles specified by the Commission for the New Legal Framework, efficiency and security being amongst the most important objectives. Visa EU believes that any Commission initiative should foster and enhance efficiency, whereas too much or too detailed regulation may have the opposite effect.

Terms such as Payment System Provider, Payment System User and Payment Service are used throughout the Communication, however, the exact definitions are lacking in the Communication itself. Further consultation will be needed on these specific points once these definitions have been developed. Based on the content of the Communication we make the assumption that entities such as Visa are not covered, nor intended to be covered by the term Payment System Provider.

Visa EU agrees that consumer protection is an important policy objective for legislation in relation to payments; however, the use of the term customer in the consultative document does extend “consumer protection” measures to businesses including retailers and SMEs using payment services. Such an extension could give rise to increased costs, and “ordinary” consumers would be partly funding protection for customers not necessarily requiring the same level of protection.

Furthermore, we would like to ask for further clarification on the difference between individual and bulk payments as stated in the Communication, in order to be able to comment on these two concepts.

In the following, Visa EU will only focus on those issues listed in the annexes, which are considered most relevant from our perspective.

Annex 1: right to provide payment service to the public

The Commission's Consultative document proposes three different options concerning the right to provide payments services to the public. The first option is mutual recognition of national license requirements (combined with an EU Passport defining minimum licensing or registration requirements for payment services). The second option is to introduce a third specific category of licensing for payment activities. A third option lies in transforming the E-money Directive into a Framework Directive.

Option two proposes the introduction of a specific licence for non-banks providing payment services. Such a licence could be added as a third specific category in addition to credit and the e-money institutions.

Creating and maintaining a level-playing field amongst providers of payment services must be a priority in this area and we feel that option two may be the most appropriate way of achieving this. Changing the E-money Directive in order to try and achieve the same aim at this point in time is not regarded as an appropriate approach as the effects and impacts of the Directive still have to be clarified.

However, the detailed requirements for such a new category of Payments System Providers are not specified in the Communication and further consultation is needed in order to ensure that a level playing field is established.

In our view, Visa EU would not be regarded as a Payment Service Provider under any of the proposed options, as Visa EU doesn't provide any services directly to customers.

Annex 2: Information requirements

The Commission is proposing to establish an exhaustive EU list of essential minimum information requirements that the payment services provider would be required to communicate to the user. The provider shall provide such information both prior to a contract and subsequent to a transaction.

Visa EU supports ensuring confidence and protection regarding payments by providing clear and relevant information to customers.

Visa EU believes that the focus should be on essential, clear and transparent information that is to be provided to the Payment Service User. Providing very detailed information may in fact deprive Payment Service Users of the most essential information, as this will be lost in the level of detail.

Moreover, given the fact that the proposed provisions are to be applied in general to a wide variety of different payment services, it is questionable whether the Payment Service User will require or need all the information, in all instances. The requirements on e.g. issues such as the technical requirements on the communication equipment authorised for use or the period within which the user will be invoiced are by no means relevant for all products.

There is a further risk that such new provisions would overlap with both the Distance Selling Directive, and the Distance Selling of Financial services Directive and finally with the Cross Border Transfers Directive.

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

Visa EU shares the Commission's priority regarding the security of payment instruments and components. At the same time, Visa EU strongly believes that presently any initiative in relation to this matter should be industry led and not achieved through regulation.

As far as the introduction of the CC/PP methodology in the EU, Visa EU would like to emphasize that the lack of comparability of testing-results in the different Member States and in different laboratories is a cause for concern. There currently is neither visibility nor consistency with regards to the approval process of laboratories within the different Member States. Moreover, there is a danger of lack of consistency in tests undertaken by different laboratories. There is frequently also a lack of visibility regarding the different laboratories' ability to perform adequate security evaluations on the relevant product under evaluation. At the same time, there is a lack of transparency and information regarding the individual reviews undertaken on products and the quality and quantity of tests carried out. Finally, the outcomes of these tests are currently only made available in part in most cases.

Based on common denominator testing, Visa EU's current evaluation processes take into account the global nature of Visa products and national markets' requirements, carrying out the necessary tests accordingly. In Visa EU's opinion, it will currently be quite difficult to obtain any mutual recognition of standards between national markets. Even if the markets were to agree on minimum common standards, a level of additional testing would in most cases still be required.

From a market perspective, although there are currently some differences between the security evaluation processes of International Payment Schemes, a dialogue has been established in order to address the issue through EMV Co.

Visa EU is of course willing to work with the Commission in order to address these issues further.

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

Visa EU supports the Commission's efforts in implementing FATF SR VII within the EU. The obligations stemming from FATF SR VII should be harmonised within the EU in order not to further complicate compliance and a failure of harmonising these requirements could in fact hamper the creation of a Single Payment Area.

Visa EU furthermore supports applying the domestic exemption to intra EU transfers, which is in line with the concept of a Single Payment Area.

The concept of having an optional threshold needs to be clarified further and may be in contrast with the concept of a level playing field.

As far as micro payments are concerned Visa EU believes that a threshold is needed in order not to hamper future developments, however, the concept of micro payment needs to be defined further before an exact threshold can be established.

Annex 10: Revocability of a payment order

The Commission is proposing specific revocability rules for credit transfers as well as card payments.

As far as credit transfers are concerned, Visa EU supports the first alternative proposed by the Commission, which is to consider the payment order revocable until the originator's account has been debited.

As far as card payments are concerned, Visa EU is not aware of any particular issues, which have arisen due to the lack of EU wide revocability provisions. Visa EU does not question the value of revocability provisions in general, but we would like to ask for further justification from the Commission for regulating this particular area from a card payment perspective. In countries where revocability provisions do exist Visa EU has in the past experienced problems and issues in relation to e.g. employing the chargeback mechanism.

If regulation is deemed to be necessary, any such steps would have to ensure that existing or future refund or chargeback mechanisms could operate without legal constraints. Moreover, the proposed wording is in our view not sufficient to ensure this and additional and more specific provisions would be needed.

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

Annex 11 covers the issue of refunds, which indirectly covers the concept of chargebacks from a card scheme perspective. In relation to this Visa EU shares the guiding principles of convenience for consumers, neutrality between payment instruments used in distance commerce and proportionality of solutions to problems.

Visa EU still does not agree with the statement that “lack of coherent legislative basis to support refund in the Internal Market...” “Inhibits chargeback from operating, particularly in respect of cross-border transactions”. Visa EU has on several occasions demonstrated that the chargeback mechanism employed by Visa EU works well in practice, especially in a cross-border context.

Visa has carefully developed the chargeback mechanism for issuers and acquirers to solve disputes that arise between cardholders and merchants. However, it is important to recall that the chargeback mechanism is a mechanism between the acquiring and issuing banks, which derives from their contractual relationship with Visa. In the normal chargeback process, the dispute is resolved solely between the acquiring and issuing banks. As an exception, Visa will act as an arbitrator between the acquiring and issuing banks, but Visa will never become involved on the merchant - cardholder level of the dispute.

Furthermore, the chargeback system has been carefully designed by Visa to work on a global scale, and the chargeback system is continuously being further developed in order to resolve the disputes as effectively as possible. The chargeback system is widely used but it is important to take into consideration the costs of operating the system. The average cost of handling a chargeback is EUR 60. This figure should be compared to the average transaction value of EUR 55. Any regulatory intervention in this area is likely to further increase such costs.

While Visa EU recognises that distance commerce has generated a fairly high level of disputed and fraudulent card transactions in the past, the level of disputed transactions is decreasing. In the past year Visa EU has seen an impressive increase in volume of e-commerce transactions, which indicates growing confidence amongst consumers combined with a decrease in e-commerce related disputes. This decrease is a result of various measures employed by Visa EU in order to reduce such disputes. As already stressed at several occasions we do not believe that the answer to the problem lies in the introduction of legislation with a “refund right” where payment providers would be jointly liable with the merchant in the case of a dispute with a cardholder.

As far as the suggested specific rules on revocability for e-commerce transactions are concerned we find that such an approach would be unmanageable both from a technical and a legal perspective, and strongly urge the Commission not to explore this further. Non-delivery is already covered by the Visa chargeback rules, nevertheless, if particular problems are identified in relation to the non-delivery of goods, Visa EU is willing to discuss this issue and possible non-legislative solutions in more detail, but we would like to stress that fundamentally this is not a payment issue.

Finally, although Visa EU acknowledges that some cardholders feel concerned about paying online, it is important to keep in mind that there is a significant difference between the perception of the problems and the reality as also reflected in the recent Commission “Study on the security of payment products and systems in the 15 Member States”.

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

Visa EU agrees with the general principle that a cardholder should not be considered liable for transactions not authorised by him or her, but we would like to emphasise that any liability provision, if not carefully drafted may have a negative effect on, for example, the level of “friendly fraud” where a cardholder is contesting genuine transactions. Reducing consumer liability without achieving a fair balance between the liabilities of Payment Service Providers’ and Payment Service Users’ could result in an increase in the fraud level.

Visa EU welcomes the changes to the previously suggested wording of the “Article on the obligations of the contractual parties”, paragraph 4, as the burden of proof for providing additional evidence in support of a claim of non-participation has been shifted to the Payment Service User.

It should also be stressed that in general the Payment Service Provider has limited possibilities of producing evidence for authorisation other than that the appropriate PIN code or a signature were used.

As far as the use of PIN codes are concerned, it is important to stress that Europe is moving towards a CHIP and PIN infrastructure and therefore any Commission initiative should accommodate and support this move.

Visa EU agrees that in the case where the User has notified the Payment System Provider, the User must not be held liable for unauthorised transactions after notification unless where he has acted fraudulently or with gross negligence.

Visa EU would like to suggest that point 5 of the “Article on liabilities between the contractual parties” be combined with point 7 of the same Article, which would read as follows: *“The Payment Service User shall bear the financial consequences resulting from the loss, theft or misappropriation of the payment instrument, which may not exceed 150 euros, if s/he has (not) fulfilled s/he obligation to notify the Payment Service Provider (without delay). The maximum liability of 150 euros shall not apply if the Payment Service User has acted with gross negligence or fraudulently”*.

Furthermore, deleting the word (not) in the article quoted above could reinforce the obligation of the User to notify the Payment System provider in case of lost or stolen payment instruments.

Finally, point 6 of the same provision should include gross negligence, and read as follows: *“except where he/she acted fraudulently or with gross negligence”*.

Annex 18: Data protection issue

Visa EU fully supports the view that the exchange of information among parties concerned is an essential element in any effective fraud prevention strategy as stated by the Commission.

A clarification of the Data Protection Directive would be the most appropriate way to ensure that the sharing of fraud related information between market participants could take place without unnecessary constraints and Visa EU strongly urges the Commission to pursue this option in order to ensure legal certainty. However, Visa EU acknowledges that in order to achieve results in the short term the first proposed option, which is to prepare guidelines on how to exchange fraud related data under the existing Directive, should continue to be a priority.

As far as working with the Article 29 Working Party role is concerned, Visa EU has so far actively participated in the dialogue with the Article 29 Working Party and is keen to continue to do so, in order to support the Commission’s efforts in this respect.

Annex 19: Digital Signatures

Visa EU first notes that the Commission has tendered a study entitled “The Legal and Market Aspects of Electronic Signatures” which examines in detail the application of Directive 1999/93/EC and its implementation in the Member States, the EEA, and the Candidate and Accession countries. That study identifies a number of problems and issues regarding lack of uniformity in implementation of the Directive that have arisen and need to be addressed. Visa EU strongly agrees with the need to ensure a uniform implementation and interpretation of the Directive, and to attack the problems identified in the study.

The Directive on electronic signatures establishes the general rules and conditions for electronic signatures. Recital 16 of the Directive states that regulation is not required for electronic signatures that are exclusively used within closed systems, such as the Visa system.

Visa EU fully supports the principle of party autonomy as set out in Recital 16 and finds that the existing Directive provides sufficient legal certainty in the field of e-signatures. At the same time, Visa EU believes that the authentication and verification for payment transactions within closed systems should not be dealt with by legislation since the industry continuously develops new technology for their payment systems. Moreover, the introduction of specific legislation in this field would carry the risk of stifling innovation and deployment of new technology.

Finally, Visa EU would like to make a reference to the TIDE project, in which payment authentication means are considered in the context of identity control from a European Perspective. The TIDE project is a Commission founded project aimed at developing and transforming the way in which electronic identity data is provisioned and maintained throughout the life cycle of a European citizen. Visa EU is part of the consortium behind the project.

Annex 20: Security of the Networks

Visa EU supports the second option proposed by the Commission, which is to ensure that the European Network and Information Society Agency is given a more prominent role and that the Commission refrains from further legislation at this point of time.

Concerning the suggestion to expand the general obligations contained in Article 17 of the Data protection Directive, Visa EU would like to underline that the required actions are already, to a large extent, taken by industry through appropriate means, such as authorisations requests, fraud monitoring and the chargebacks mechanism. Moreover, concerning the security of networks in general, Visa EU would like to underline that it is employing the Account Information Security Program (AIS) with relevant Visa Members.

Finally, Visa EU would like to ask for further clarification on the definition of a processor.

Annex 21: Breakdown of a payment network

Visa EU strongly believes that regulation in this particular area is not appropriate. Operational disruptions in payment infrastructure could potentially cause problems to users, and providers are doing their utmost to prevent any disruptions from happening in order to maintain user confidence. The consequences of such disruptions would be covered in the contract between the user and provider. Mandating specific liability provisions could create the basis for lawsuits where issues such as actual loss, damages and burden of proof would be next to impossible to manage in practice.

Visa EU already has a chain of internal and external stand-in and back-up procedures in place in order to minimise and reduce the impact of any systems failures. As far as Visa EU's back-up policy and procedures are concerned, the frequency of creating back-up media is adequate to facilitate recovery. In terms of system availability, Visa EU did not experience an outage causing a customer impact within the last 5 years.

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