

15. February 2004

Communication from the European Commission to the Council and the European Parliament Concerning a New Legal Framework for Payments in the Internal Market (“Communication”):

A Submission on behalf of Western Union Financial Services, Inc. and its parent company, First Data Corporation

Introduction:

This comment paper is submitted on behalf of Western Union Financial Services, Inc. (Western Union) and its parent company, First Data Corporation (First Data). First Data, a New York Stock Exchange listed, Fortune 500, company is one of the world’s leading payments processors and, through various subsidiaries, including First Data Europe and Encorus, has significant operations in several European Union Member States. Western Union, a wholly owned subsidiary of First Data, is a leading provider of money remittance services in over 190 countries and territories around the world. Western Union offers remittance services through a network of agents in all current Member States and in all of the enlargement jurisdictions. Western Union’s agents in Europe include most of the national post offices

Western Union maintains offices in 10 Member States¹ and holds equity investments in several companies based in Europe that provide money transfer services, including a joint venture with La Poste in France. Through its network of agents, Western Union offers cross border payment services within the EU, as well as outbound remittance service from the EU and inbound service from outside the EU for payment inside the EU.

This submission primarily concerns payment service providers active in the money remittance sector. The Annex reflects concerns related to payments connected with mobile commerce.

Western Union’s customers are overwhelmingly members of the general public who purchase financial services at retail; Western Union does not serve institutional customers. Western Union’s mission is to provide its customers with a fast, safe, convenient and cost effective money transfer service for a fee certain. In 2003, Western Union processed 81 million separate money transfer transactions for customers around the world. Each transaction averaged just over EUR 300. In most cases, remittances were made available to recipients in a

¹ Western Union has management offices in France, Ireland and Austria, agent support offices in the UK, Italy, Belgium, the Netherlands, Sweden and Spain, and call centers in Belgium and Germany.

matter of minutes; over 95% of all Western Union remittances are picked up, wherever in the world, within 24 hours of being sent. Accordingly, Western Union is very interested in the Commission's efforts to modify the legal framework for retail payments in the European Union. Western Union applauds the Commission's goal of achieving a more efficient, cost effective and safe cross-border retail market within the EU. Our comments below address some aspects of the very comprehensive Communication.

Some General Observations:

Western Union's comments center around two areas of concern. First, the Communication makes continuous references to the "payments industry." In the context of these references, we at Western Union and First Data have some concern that inadequate attention may have been given to non-bank payments industry participants, such as Western Union, e-money institutions, mobile phone payment facilitators and similar ventures involving payments processors and their business models (broadly defined as Payment Service Providers, or "PSPs"). PSPs provide meaningful competition in the financial services market in the EU and they should not be regulated as if they were banks or as though they operate as banks do.

For example, the Communication discusses the "crediting of accounts" by PSPs, and refers to account numbers as if they were common to all financial transactions. The money remittance business conducted by Western Union and many of its competitors does not involve the creation of an account or deposit relationship between the PSP and its customer. Each transaction is processed separately and has an individual reference number that can be used to identify and trace a transaction in the Western Union proprietary system and determine whether it is available for payment or has been paid. A money remittance is typically paid in cash, not credited to an account. Provisions requiring that funds be credited to an account in a certain number of days do not fit the business model of a great many PSPs. Accordingly, such provisions should be amended to incorporate the broader concept that good funds should be made available to the recipient within a certain period of time. By the way, with the Western Union service, funds are available within minute—not days--of a transaction being entered into, and accepted by, the Western Union system.

Western Union's second general area of comment relates to the emphasis on a high level of consumer protection. While Western Union supports consumer protection measures, we believe that it is necessary to balance the interest of the consumer with the goal of promoting a safe, cost effective, efficient and competitive market for cross-border retail payments services in the EU. As the Communication recognizes, overregulation of payment businesses will discourage innovation and increase costs, which will be passed on to consumers, and erect barriers to entrance by new competitors.

We respectfully submit that a concept of an "average consumer" should be reflected in any measure. That average consumer should be expected to exercise reasonable amounts of "due diligence" regarding any transaction in

which he or she engages. In particular, we discuss below the concept that a PSP should somehow guarantee the delivery or adequacy of a good or service purchased with a money transfer.

Finally, as a general policy matter, Western Union believes that considerable care should be taken in implementing rules on the basis of a “level playing field” argument— i.e., same activity, same risk, same regulation. The Communication places great emphasis the role of banks in the payment industry, the activities of the European Payments Council and the business model that banks use in cross-border retail payments. However, if new competitive forces are to be encouraged and not stifled in Europe, different regulation that supports the safe and efficient operations of PSPs will be necessary. PSPs may not take deposits or repayable funds from the public and use those funds in their business operations to make loans or make illiquid investments; that is, PSPs may not take credit or market risk. Therefore, the imposition of bank-style regulation on PSPs would be inappropriate and costly—even though it might seem to be rhetorically justified by a misapplication of the “same activities, same risk, same regulation” argument. Western Union strongly supports careful consideration of exactly what the risks are inherent in payments business models developed by non-bank PSPs and how those risks can be efficiently regulated. We believe that a different set of regulations should apply to PSPs-- which do not take deposits or make loans—from those that apply to banks involved in money transfer services in addition to their other, traditional banking activities. Such an approach will not only regulate for real risk, but also encourage new innovation and deliver more choice to EU consumers.

Specific comments regarding certain Annexes to the New Legal Framework for Payments in the Internal Market follow.

Annex 1: What kind of registration/licensing scheme?

Western Union supports the Commission’s idea to promote PSPs access to all EU markets by harmonizing the authorization and regulation of PSPs across the EU. We have some concern, however, that this exercise will result in the over regulation of PSPs by the time the “harmonization” exercise is done. Such overregulation would raise costs to PSP users, discourage new entrants, decrease competition and generally discourage faster, cheaper forms of payments innovation (for example, in mobile phone micropayment services). Therefore, Western Union would support an EU wide license for PSPs provided that such a plan:

- (a) is based on appropriate regulation calibrated to address real risk; and
- (b) allows a PSP to appoint independent authorized representatives to provide the service on behalf of the PSP.

In connection with deliberations over this sensitive area, we note the following. First, money remittance is not a core bank activity; it is a limited form of financial service. It does not involve deposit-taking, i.e., accepting repayable funds from

the public and using them to extend credit or to make illiquid investments. Typically, in a money remittance transaction, the funds remain with the money remitter for only a brief period while they are “in transit” between time that the sender delivers value at a send location and the time the equivalent value is paid to a recipient at a payment location. In the Western Union remittance business model, Western Union authorizes the payment of funds within minutes after the sender delivers value at the send location. That is, the paying location does not have to have actual receipt of good funds related to the transaction at the time it pays the recipient. Receipt of good funds by the paying location, or settlement, typically occurs through a settlement cycle among the sending agent, Western Union and the paying agent. At all times, however, Western Union stands behind receipt of the funds by the paying agent, even should there be some failure at the sending agent location to pay Western Union.

In other words, money remittance does not involve the kind of debtor/creditor relationship that exists between a credit institution and its customer, where typically the depositor delivers funds to the credit institution with the expectation that the funds will be kept safe until either repaid to the depositor or delivered in payment to a third party on the order of the depositor. In this type of relationship, the credit institution may compensate the depositor for the use of his/her funds in the banks’ business with interest and may use the funds in its lending or investment businesses. Of course, a credit institution’s solvency is a matter involving systemic risk as its failure will involve claims against deposit guarantee schemes.

Money remitters do not accept funds in the capacity of a debtor of a sending party. They accept funds under a contractual relationship, the primary purpose of which is to provide the remittance the funds from the sending party to a specified receiving party. The sending party is buying a service from the money remitter, i.e., the transfer of a sum of money from the sending party to the receiving party, for a fee. That fee may be a commission or a charge for currency conversion, or both. Other services may be bundled with the money transfer such as telephone notification of the recipient, home delivery or the like. Money remitters are not covered by deposit guarantee schemes and its customers do not pay funds to them in the expectation that they are covered by such schemes.

Money transfer does not involve credit risk, because the funds accepted by remittance are not lent to third parties. In fact, the funds pass through the system and self liquidate very quickly. However, a PSP offering money transfer services does have some liquidity risk. Accordingly, money remitters should be subject to some reasonable rules related to the liquidity of the investments they may make with funds they take in for remittance.

Finally, money remitters should, of course, be subject to anti-money laundering rules. As a first step, money remitters should self certify that they are aware of, and have systems and procedures in place to be compliant with, applicable anti-money laundering rules. This will give enforcement authorities a basis for investigation and prosecution of noncompliant parties.

Annex 2: Information requirements

Western Union concurs that awareness is a crucial element for consumer protection and that the PSP customers should be able to obtain clear information about the service offered by the PSP. However, the requirements of disclosure and the provision of information should be different for operators using different mechanisms to transfer money. For example, if an organisation such as Western Union does not use SWIFT to send the money transfers it executes for customers, then requirements directed at providing information at each stage of an inter-bank transfer using the SWIFT system would not be appropriate to impose on such organisations. Indeed, most of the stages of money transfer in the SWIFT system do not exist in Western Union's money transfer system.

However, Western Union actively encourages disclosure of relevant information at the point of sale. Consumers want a remittance provider to have a system that is trustworthy and secure so that the money actually arrives and is paid at the specified destination. The element of trust is extremely important. Numerous market surveys indicate strongly that consumers use Western Union's money transfer system because it is viewed as safe and reliable. From the consumer's point of view, the security and reliability of the money transfer system is and should be a primary concern.

Western Union does not object to a requirement that PSPs deliver information about their service to their customers, provided the terms and conditions are, in fact, applicable to the service being provided and the manner in which it is provided. These information requirements should be directed at the legitimate concerns of the relevant consumer; the focus should be on what information is pertinent for the consumer. For example, senders of money transfers should be informed about their right to refund if the transfer is not paid. On the other hand, the sender of a remittance has no interest in what happens to the money after it is delivered to the sending agent until it is paid to the receiver.

The sender of a money transfer is typically concerned with the cost that the sender and receiver must pay in order to make or collect the transfer, and the time when the money will be available for payment at destination, and his or her ability to obtain a refund should the transfer not be available for payment. These issues are the most pertinent issues from a consumer's point of view and should be disclosed.²

² The disclosure of foreign exchange rates for money remittances is a complicated subject. In general, Western Union supports the disclosure of the foreign exchange rate applicable to a sender's transaction; however, care must be taken to prevent consumers using money remittance services for currency speculation, and so the PSP must be able to modify the exchange rate to market after some reasonable period of time. (In this respect, recall that approximately 95% of Western Union remittances are paid within 24 hours after they are sent.) Furthermore, a few countries with weak, volatile or closely-controlled currencies (e.g., Brazil, India) may require that the foreign exchange rate be established only at the time the remittance is paid. Senders in the EU should be provided with remittance services to those countries, even though the exchange rate may not be determinable at the time the money is sent.

Annex 8: Information on the originator of a payment (FATF Special Recommendation VII)

Currently, most Member States allow financial institutions some flexibility with respect to the identifying their permanent customers (as opposed to one-off occasional consumers). According to the EU Anti-Money Laundering Directive 91/308/EEC, occasional consumers are generally not subject to identification obligations *unless* the relevant transaction (or a series of linked transactions) exceeds a defined threshold. Under the EU Directive, this threshold is € 15,000. One-off customers may include, for example, purchasers of travelers cheques or stored-value cards, people exchanging money, and senders of money transfers.

Taking in account the above, we believe that:

- Information accompanying cross-border and domestic transfers (within the EU) should contain the name and the address of the originator of a money transfer. Because of the absence of a bank account relationship, the MTCN (Money Transfer Control Number) is, for Western Union, the identifier that will permit the transaction to be traced back to the originator;
- The requirements in paragraphs 1 and 2 of the Commission's proposed Article on originator information contained in Annex 8 will not be applicable to money transfers, if the amount to be executed does not exceed €3,000; and
- In case the transaction does not include the required originator information, a PSP may refuse to process the transaction. In such circumstances, the sender may always request the PSP to refund the principal amount.

Annex 10: Revocability of a Payment Order

The Western Union consumer has the right to revoke a money transfer at any time before the remittance is paid to the recipient. Prior to the payment, if the sender changes his mind, he may request a refund of the principal amount. Note that Western Union money transfers are typically available for payment within 15 minutes after they have been originated, and the vast majority are paid within 24 hours after origination. Western Union would be in favor of the creation of a specific set of "revocability rules", taking in consideration the specifics of this type of service.

With respect to the language proposed in connection with a harmonized regime, Western Union proposes that the article for payment orders given to the payment service provider read as follows: "*A payment order given by the originator to his payment service provider is revocable until the money transfer*

has been paid. Upon revocation, the originator shall be entitled to a refund of the principal amount sent.” This proposed language, which is consistent with Western Union policy, would be clear to consumers and, in conjunction with the proposals related to transparency and consumer disclosures, would allow consumers to make an informed decision prior to engaging the payment service provider to send money.

Annex 11: The Role of the PSP in the Case the Customer/Merchant – Dispute in Distance Commerce

In this Annex, the Commission considers whether PSPs should be liable for nonperformance by merchants to whom a payment is made.

It is important to recognize that a PSP (unlike a credit card association) generally does not have a relationship with a recipient beyond the simple payment of funds. For money remitters, the primary service is the transfer of value from the sender to the recipient. In general, no inquiry or due diligence is made regarding the purpose of the transfer or the nature of the business or transaction to which the transfer relates. (There are exceptions, of course, if the size or frequency of transactions gives rise to concerns about money laundering, or if the name of the sender or recipient appears on a list of persons suspected of involvement in terrorism, drug smuggling or the like.) This enables the remitter to deliver the funds quickly and efficiently at a reasonable price.

On this point, it is illustrative to compare a PSP that operates a money remittance service to a credit card association or bank that operates a credit card acquiring program. A merchant-acquirer has an ongoing relationship with the merchant to whom it is making payments, and charges the merchant for the convenience and security of accepting credit and debit cards. A PSP, on the other hand, does not charge the recipient of a money transfer, and has no ongoing relationship with the recipient and no value stream against which to offset fees and charge-backs.

If money remitters were asked to guaranty the underlying transaction, they would be placed in an entirely different position vis-à-vis the service they provide. A PSP’s assumption of that responsibility would involve much more due diligence than it is capable of performing if it is expected to continue to deliver funds quickly and for a reasonable price. If a PSP is required to guarantee the underlying transaction, the PSP will need to be compensated for this risk. At the very least, consumers should have the right to waive this form of insurance in exchange for a lower charge than if they obtain this kind of guarantee and remitters should have the ability to charge for this additional security and to add additional qualifications to the service (e.g., delays).

Some important policy issues are presented by this proposal as well. A PSP may become property insurers if it were made responsible for the non-delivery of goods ordered at a distance. Would a PSP then need to be licensed and regulated as an insurer? Would the imposition of this responsibility on PSPs

lead to more fraud because it would create the impression that the consumer is relieved from exercising responsible due diligence regarding merchants because they can make a claim for non performance on the PSP? In this connection, we refer back to our earlier general comment about the need to adopt a concept of an “average consumer”. This “average consumer” should be expected to discharge some reasonable responsibility/exercise of judgment with respect to initiating sales at a distance.

A separate Annex is attached to this submission incorporating the views of another segment of First Data’s family of companies active in the EU. In particular, they focus on concerns and views of firms active in mobile commerce.

Western Union and First Data stand ready to be of any assistance with regard to any questions that may arise in connection with this submission. Please direct any questions to Mary Patricia Azevedo, Consultant, International Regulatory Affairs at mazevedo@intl.westernunion.com. We thank you for your kind attention.

Annex to Comment Submitted by First Data Corporation and Western Union Financial Services, Inc.: Comments Relevant for Payments in Mobile Commerce

The following comments relate to application of the proposed Legal Framework for Retail Payments in the context of the developing market segment of mobile commerce, and particularly the sub-segment consisting of Small Value Payments, or “SVP”. For purposes of these comments, SVP refers to payments of up to €10 per transaction authorized by a consumer and either charged to the consumer's mobile phone bill (either as reduction in a prepaid amount, or as an amount to be billed on the consumer's next bill), or charged against a consumer's e-money account established for use in a mobile commerce shopping network sponsored by the consumer's mobile network operator, or an association of which the consumer's mobile network operator is a member.

This type of network, referred to as a “Qualifying Mobile Network” would have the following characteristics: The principal sponsors of the network would be mobile network operators licensed in the various Member States, and the principal access devices to authorize payments would be mobile telephone handsets or other devices supported by the sponsoring mobile network operators. While digital content, such as ring tones, games, graphics, and information, would be a significant component of the goods and services available through a Qualifying Mobile Network, the Qualifying Mobile Network would be limited to providing digital contents, nor would it be limited to merchants accessible only by mobile technology. In addition, the Qualifying Mobile Network would not be limited to SVP transactions. However, SVP are the focus of these comments.

The principal focus of the following comments is that regulation of SVP for Qualifying Mobile Networks should recognize the following: (1) the benefits to consumers and merchants of new and lower cost payment methods for goods and services; (2) the early stage development of business models and technology in the mobile commerce area; and (3) the relatively small amount at risk to consumer and merchant with a SVP. In light of this, we suggest the following as a Basic Consumer Premise: Until there is more experience to evaluate, the touch stone for consumer protection relating to SVP in Qualifying Mobile Networks should be transparency, so the consumer knows what risks the consumer is taking, and limits on the amount at risk in a transaction.

Comments on specifics Annexes follow:

| Annex | Comment |
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| Annex 1 | <p><u>Position.</u> Licensed MNO should be able to provide their subscribers with access to SVP by use of prepaid accounts, or by credit to mobile service bills without strict compliance with e-money licensing.</p> <p><u>Reason.</u> SVP through Qualifying Mobile Networks have the potential of substantially increasing the range of goods, services, and information to consumers delivered through a means many consumers find attractive. However, at this time, the business models and technologies involved are still in flux. For SVP, the strict application of e-money licensing may inhibit develop of this market, without greatly increasing consumer protection. The MNOs and their customers have experience dealing with questions and disputes over service-related credits and charges that is easily transferable to SVP. In addition, MNOs are subject to regulatory supervision, which will provide additional protection. Permitting MNOs to offer SVP without compliance with what can be burdensome requirements of e-money licensing will accelerate experimentation in this new payment area, while not leaving consumers without protection. A transition to licensed e-money could come later if warranted.</p> |
| Annex 8 | <p><u>Position.</u> The threshold for coverage should be above the SVP limit; and any obligation to obtain identifying information, and to determine if transfers to or from participants are permitted, in a Qualifying Mobile Network should be placed on the MNO from whom the consumer receives service, and, in the case of merchants, the party with whom the merchant contracts for participation in the Qualifying Mobile Network.</p> <p><u>Reason.</u> Setting the threshold at or below the SVP limit will add significant cost without out significant benefit in fighting money laundering or terrorism. When it is necessary to collect identifying information, the MNO is in the best position to do so from its subscribers, and the party with a contractual relationship with the merchant is likewise best situated.</p> |
| Annex 10 | <p><u>Position.</u> SVP should be considered irrevocable once authorized. For recurring payments, revocability should be permitted until the delivery of the goods or services paid allocable to a particular payment have been made. Until experience shows that it is not sufficient, the Basic Consumer Premise should apply.</p> <p><u>Reason.</u> Enforcement and dispute resolution around revocability of payments is a significant driver of costs in traditional payment systems. In order for SVP to fulfill the promise of lower costs to consumers and merchants, costly elements of a payment system designed for large individual transactions should be limited or eliminated when appropriate. The small amount at risk in each transaction, the nature of the goods or services likely to be available, and the interest of the sponsors of the Qualifying Mobile Networks to satisfy their consumer subscribers, all favor certainty in the</p> |

| Annex | Comment |
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| | transaction over revocability and the attendant costs. |

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| Annex 11 | <p><u>Position.</u> The PSP should not have liability to consumers.</p> <p><u>Reason.</u> The PSP serves a facilitating role among the merchant, consumer, and the consumer's chosen payment method. Especially with respect to SVP, the profit margin for the SVP is likely to be very small. Liability to the consumer will result in additional risk, which will put pressure on the PSP to increase its charges, thereby increasing costs of SVP to all concerned. So long as the consumer has adequate recourse to the merchant and the payment method provider, the consumer will be adequately protected.</p> |
| Annex 12 | <p><u>Position.</u> Force majeure exceptions should be flexible enough to recognize the inherent limitation of the mobile communication system and the risks of losing service during a purchase session. In addition, a distinction should be made between situations where the consumer has value deducted from an e-money account or prepaid account or a charge to a credit account, and where the order is not fulfilled. Restoration of lost value or a credit is appropriate in the former cases, but no liability should attach in the later. Until experience shows that it is not sufficient, the Basic Consumer Premise should apply. Finally, the PSP should be able to allocate some of the risks involved to either the payment provider or the merchant by contract.</p> <p><u>Reason.</u> Communications over mobile networks are not as secure as over fixed lines. As a result, there will be "dropped" or incomplete transactions. So long as the consumer has not lost money from the consumer's payment account for the dropped transaction, there should be no liability to any party. In other circumstances, the commercial parties in a Qualifying Mobile Network should be able to allocate risk among themselves to reflect their respective risks and rewards in the scheme.</p> |
| Annex 13 | <p><u>Position.</u> There should be some de minimus level of SVP transactions that are not contestable by the consumer if authorized in accordance with their contract and applicable law. These levels must be disclosed to consumers in a meaningful manner when they register to participate in a Qualifying Mobile Network, as contemplated in the Basic Consumer Premise.</p> <p><u>Reason.</u> In order for SVP to enable additional commerce for the benefit of consumers and merchants, there must be a high level of certainty that once as transaction is authorized it is both irrevocable and uncontestable. As with revocability, constestability adds significant cost to administering a payment system. Many consumers are likely to accept the benefits of access to additional goods and services, primarily digital content, and be willing to accept the small amount of risk involved. For those who do not want to accept the risk, they are not being deprived the opportunity to obtain goods or services that in any sense could be described as necessities.</p> |
| Annex 18 | <p><u>Position.</u> Data protection laws should be harmonized to permit a free flow of information to prevent and investigate payment fraud.</p> <p><u>Reason.</u> Payment fraud is another significant driver of costs in payment</p> |

| Annex | Comment |
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| | schemes. Participants in payment schemes, and the payment schemes themselves, should be able to share information to prevent and investigate payment fraud. This is consistent with the Data Privacy Directive and National Laws that have the effect of prohibiting this should be reviewed, modified or superceded. |

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| Annex 21 | <p><u>Position.</u> Liability of PSPs for breakdown of the payment network should be left to private contracts. For consumer protection, the Basic Consumer Premise should apply.</p> <p><u>Reason.</u> Especially with respect to SVP in Qualifying Mobile Networks, the lack of experience with new payment networks makes mandatory rules unwise at this juncture. The participants in these networks are still devising their business models, and the systems themselves are still being devised and built. Mandatory regulation could have unintended adverse consequences. The commercial participants in these on-going discussions have sufficient means to protect themselves from overreaching from each other, and so long as there are minimal protections for consumers, the commercial parties should be allowed to determine the allocation of risk among themselves, and as appropriate, to consumers.</p> |
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