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BARCLAYS RESPONSE TO QUESTIONS RAISED :
A POSSIBLE LEGAL FRAMEWORK FOR THE SINGLE PAYMENT AREA IN THE INTERNAL MARKET

1. Do we need a coherent concept to improve the Single Payment Area?

   Currently there is a piecemeal approach to legislation comprising one Regulation, several Directives, one Recommendation and a number of communications on Retail payments which address different aspects with some overlap. In addition, there exists different interpretations and applications of each. A single proposal could achieve a high degree of consolidation, legal certainty and simplification of legislation. It is however likely to be most effective when legislators and industry work together. This could be achieved through the setting of clear timeframes and objectiv es by the legislators within which self regulation should operate, acknowledging that legislation will follow if the objectives are not met.

2. General Considerations – Do you have any further suggestions for subjects to be examined in this context?

   Rationalisation of clearings – Direct Debiting is mentioned but not the need to look at RTGS or ACH systems. Step 2 is an industry initiative that should also be noted here.

3. Do you agree that all means of payment – credit transfers, card payments and electronic payment instruments, direct debiting as well as cheques – should be considered by the initiative?

   No we believe that cheques should be excluded from any legislation in this area.

   With its declining use and the advent of newer more efficient ways of ma king payments the use of the cheque should not be encouraged. Clearing cheques on a domestic level is expensive and less secure than other means of payment. To introduce a pan -European cheque clearing system or overhaul the existing products offered by b anks would involve a very high level of investment and resource. Given that banks have limited investment funds the customer would be best served by our investment in better and cheaper Inter - Member State instruments (electronic or plastic).

   In the short term the legislation should address immediate issues such as cross border direct debits, while issues such as e -money could be safely left to the medium or longer term.

4. Do you agree that both payments made within the European Union, at national level and cross-border payments, should be covered?

   Yes, this has to be done to create a Single European Payments Area.

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5. Do you agree to keep the threshold of euro 50,000 for retail payments?

   In terms of the application of a consolidating proposal, yes. However, this should not extend beyond what is necessary to make the payment system(s) work.

6. Do you agree that the "customer" (hence including SMEs) not the "consumer" should be addressed by the initiative?

   We do not differentiate between our personal and corporate customers.

7. Do any of the definitions presently contained in the existing legal texts present difficulties? Is there a need for adaptation/clarification?

   There is a requirement to ensure consistency in interpretation across the Member States and remove ambiguity. For example the recent Pricing Regulation when translated into local language has a different interpretation in France than it does elsewhere, i.e. relates to same amount payments rather than corresponding payments. Also, the practical effect of an out-country opting in to the Regulation is unclear.

8. Is there a need to review at EU Level the market access and licensing requirements for undertakings providing payment services?

   In order to create a level playing field then yes. It should be done in such a way as to promote competition and customer choice, perhaps through a focus on the removal of barriers to entry.

9. Should there be a special regime for undertakings providing only payments services?

   The regime should apply equally to all those providing payment services.

10. How can competition between payment service providers (including payment transmission services) be improved?

    Through:
    - Creation of a SEPA with genuine cross-border capability
    - Consolidation of ACHs
    - A level playing field
    - The direction of finite investment funds to initiatives that would produce actual benefits
    - Maintenance of a market approach to pricing allowing market forces to drive down price
    - "Light touch" regulation allows greater competition in the longer term than does restrictive legislation.
    - More open and direct access to and transparency of prices.

11. Is there a need to establish a new EU -body to improve the standard setting in the field of payments?

    A co-ordinated and structured approach would significantly enhance consumers' and merchants' confidence in payment products. This applies to both payments and e -money where a proliferation of standards would reduce STP, increase development/BAU costs and delay or invalidate the formation of schemes which are likely to be compatible with only one standard. The aim of standard setting should also be to achieve interoperability between parties and systems offering a similar service.

    Legislators should be setting the public policy objectives but where possible, industry should be given the opportunity to set standards to achieve them.

    This could be a role for SWIFT or ECBS as it does not need to be a new body.

12. If the affirmative, what would be the appropriate form/statute of such a body? How should such a body act to va lidate standards?

    See above.

13. What is the role for legislation in this area?

    Legislation should be used to set out clear public policy objectives, with the industry then self-regulating within this framework as shown above

14. Is the VAT question a seriou s concern in the field of payment services?

    Yes, insofar as there appear to be different levels of tax applied across Member States.

15. Are there other issues related to payment services and taxation?

    If there is differing tax treatment toward investment t hen this may give an unfair advantage to players in those countries with a beneficial tax regime.

16. How does each Member State deal with the issue of non -resident accounts? What are the justifications for a different treatment between residents and non -residents in this area?

    In the majority of instances non -residents and residents are treated equally in terms of the services offered in the UK and we see no reason to differentiate. The exceptions are where certain account packages are not available to non -residents, e.g. student accounts.

17. Do you agree that the special treatment and conditions for non -resident account-holders is an obstacle for the Single Market that has to be solved?

    Yes this is a barrier to SEPA.

18. Is there a need to regulate value dates for payments at European level?

    Yes, there is a need for a standard Industry approach to remove or harmonise local practices in order to achieve a level playing field

19. Are there different needs for different kinds of payment instrument?

    For the payments covered within this document then value should be given when it is received. See later questions for comments on Consumer protection.

20. Do you consider that portability of account numbers could also be a realistic approach for the payment sector in the fu ture?

    No.

    This would challenge the introduction of the IBAN as a means of supporting STP. IBAN is not portable in those countries (such as the UK) which have included the BIC (whole or part) in the IBAN.

    In addition, most personal accounts have de bit cards – whose numbers are part of a global system. The card scheme structure is based on BINs allocated to each member for routing transactions.

    Truly portable account numbers will require a standard numbering and associated routing information for each and every individual account in the EU. The relative benefits are small and achieved more effectively through the adoption of schemes similar to those used in the UK to switch accounts and ensure the speedy transferral of information.

    Within the UK the Competition Commission has concluded that account portability would require major investment and significant changes to the operation of clearing systems and that as the inconvenience of changing account numbers was only one of many constraints on switching, the costs of development would very likely exceed the benefit.

21. What should be done in order to avoid excessive charges preventing customer mobility and competition?

    We do not charge a customer for closing the account unless a specific contract ha s been entered into to provide specific services for a set period of time and to which an early closure penalty applies – this is rare for consumers and SMEs.

    The UK Banking Code also confirms that should we vary our terms and conditions then we will give our customers notice of this during which time they may decide to switch to another provider and for which no extra fees would be incurred.

    To ensure a level playing field we should look to the establishment of an Industry standard across the EU, prohibi ting the taking of fees to close an account.

22. Is there a need to introduce legal provisions as a framework to facilitate the introduction of the Common criteria/Protection files methodology in the EU?

    The combination of market forces and industry specific regulations are sufficient to drive the required security improvements. A recent example is the development of electronic (mainly internet at the moment) payment authentication systems by the card payment schemes, such as "Verified by Visa" (previously kn own as 3D Secure). The card schemes' systems and Identrus scheme (co -founded by Barclays) for B2B electronic signatures demonstrate that the industry understands, and is managing, the risks associated with its role in facilitating e -commerce.

23. What should be the role of the public authorities within a co -ordinated and structured security approach involving all stakeholders?

    Public authorities can complement and assist the activities of the financial sector by ensuring that laws evolve with technology and its use to define clearly the limits of legal behaviour, to implement the measures necessary to detect, and the processes to prosecute, criminal behaviour, and to co -operate in cross-border harmonisation of both the legal frameworks and prosecution of crim inals.

    We recognise and welcome recent developments/initiatives on cybercrime as mentioned in the working document.

24. Are further initiatives needed, and if so on which specific problems, in the legally binding and non-binding field in order to make networ ks and information systems more secure with respect to payments transactions?

    We do not believe that at this time it is appropriate to intervene in the development of the e-commerce marketplace and its use of payment systems. A holistic approach is needed to security and Visa and Mastercard's electronic payments authentication systems achieve this, and demonstrate that the industry is responding to the needs of the market. Regulation of network and/or merchant system security would be mis -targeted and probably ineffectual, and the resulting over -regulation could damage the marketplace.

25. In the affirmative, which stakeholders should be more involved? What should be the role of public authorities in the EU?
    N/A

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26. Which appropriate legal measures should be considered in relation to the allocation of legal responsibility and customer protection in the case of breakdowns or disruptions of a payment network?

Payment networks nowadays rely on many factors such as services provided by third parties, telephone lines and computer systems it would be a significant change in current legal practices to seek to impose liability on a payment service provider in respect of liabilities resulting from breakdowns and disruptions to any part of a network.

Acceptance of a higher level of liability would have a severe impact on the consumer who would have to pay extra charges to cover the additional risks incurred by the industry. Currently very low costs are associated with many of the payment services.

27. Are there any legal or administrative obstacles to implement FATF Recommendation VII, which need to be removed?

Any legal issuance should be carried out on an EU-wide basis rather than leaving it to individual country interpretation and decision whether to make it regulatory. There is also a need to understand the responsibilities on the validation of inward payments.

Domestically, it is possible in the UK to include the appropriate detail within a CHAPS message but for BACS there is insufficient capacity to carry the requi red number of characters without reducing the size of the reference field.

There could be conflicting legislation in the disclosure of information versus data protection and customer confidentiality which need to be explored further.

28. How do you evaluate the present legal environment for digital certification services for payments in the Internal Market? Are there any loopholes which are specific for payment transactions?

We do not believe that it is necessary, at this time, to extend existing (or to create new) legal frameworks to cover the use of electronic signatures in payment applications, or to cover other financial sector activities. We would also observe that the payments industry is already subject to the jurisdiction of a number of regulators, both as a sector (eg the FSA within the UK) and for specific payment schemes (Visa, SWIFT etc) which have formal scheme regulations and supporting audit regimes. The actions of these regulators appear to be sufficient for the purposes of driving the necessary developments in payment instruments to support electronic commerce, and there is therefore a risk that legislation may prove not only unnecessary, but that it may also further suppress activity in a marketplace which is still evolving rapidly.

In addition, the tScheme is a voluntary UK body set up by players in the industry to provide accreditation services for digital certification. This body was set up in response to the Government's proposal that they set up a formal body and regulate parties themselves. The Government (Office of the e-Envoy) has a seat on the tScheme board.

29. Is there any legal or technical barrier hampering the mutual recognition of electronic signatures for payment applications in the Internal Market?

    There are technical barriers to presenting an electronic signature as absolute proof of a customer's authorisation of a particular payment, and therefore a combination of controls will be required to obtain the necessary confidence, which will be different depending on the risk profile of the context (eg high value payments over the Internet).

    In our view, there are no legal barriers hampering the mutual recognition of electronic signatures in card payment systems, as customers contractual terms and conditions, both between the card issuer and cardholder and merchant and his bank, are sufficient to support the use of electronic signatures where appropriate.

30. Would there be problems if the information requirements (pre contractual, contractual and subsequent information) relating to the use of any non-cash payment instrument were to be harmonised in Community legislation?

    No, we agree that it would be beneficial if there was a single view of the information to be provided to customers, that could cover a number of different payment methods (excluding cheques), but we do not see a need to increase the requirements any further from those required for the Directive on Cross Border Credit Transfers.

31. Is there agreement on the necessity to further promote the idea of Alternative Dispute Resolution mechanisms in the Single Payment Area by foreseeing legally binding provisions regarding ADRs in any future EU-payment legislation?

    We support ADR and would agree that the idea should be promoted. There is no reason why EU payment legislation should not promote ADR but it should also be clear that the Courts must remain the ultimate authority for the settlement of disputes.

32. What is the legal situation in Member States for different kinds of payment instruments in this respect?

    Our contractual position is that all electronic payment instructions are irrevocable unless practical issues permit the ability to stop a transaction or make a recall before the beneficiary has received any notification of having received the payment.

    For example Direct Debit transactions can be returned by the payer or payer's bank (or recalled by the originator) within certain timing parameters.

33. Do you consider that diverging rules on "revocability/cancellation" a problem for the well-functioning of the Internal Market?

Currently there is no common customer proposition unless a pan european system is used, eg Different payment schemes across Europe have different rules as opposed to the single set for Step 1.

Diverging rules are a problem if banks and customers are confused by them, and how they affect bank accounts in different countries, for example if the ability to recall is different in each country. Banks will need to negotiate on the ability to recall before a customer receives the money (or is advised). No recall should be permitted once a payment has been made by one bank to another. This is particularly important as we move towards faster processing and the customer receiving value "same day".

Pan-european schemes should not have diverging rules, however, it is acceptable that between different transaction types then different rules will exist.

34. Do you consider it necessary and appropriate, to introduce sanctions or penalties for cases of non-compliance with certain provisions of the payments legislation?

Any sanctions need to be proportionate to the non-compliance involved and should be applied equally across the EU.

35. Should the payment provider have under certain circumstances joint responsibility with the merchant in the case of "non-delivery" of the product?

We are already under an obligation regarding credit cards, in respect of Section 75 of the Consumer Credit Act, to accept liability in respect of misrepresentation or breach of contract for any services provided by the beneficiary of the payment transaction with our liability being limited to transactions between £100 and £30k. We do not see a need to extend this further.

36. Should the payment provider also have responsibility in the case of "non-conformity of the product or service with the contract"?

As above.

37. In case of responsibility of the payment provider, should it cover all non-cash payments (including cheques, credit and debit transfers, micropayments etc) provided by the payment provider?

No. This would lead to a significant increase in liabilities on financial institutions. In the case of credit and debit cards which have charge back procedures with merchants we are able to limit our liability with respect to Section 75 of the CCA. No such procedures exist for other products and it would be unlikely that any payment providers would wish to continue operating such payment systems with unlimited liability.

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38. In case of responsibility of the payment provider, should it be limited to distance selling?

    Yes, provided that in addition it is also limited to credit card transactions. There is no reason for service providers to accept responsibility for any other devices used for distance selling such as BACS.

39. Do you agree that a payment provider should have the obligation, in the case of dispute, to prove that a payment transaction was accurately executed?

    Potentially yes. In theory this evidence has to be provided currently when say the payment of a cheque is queried.

40. Are there other issues to be addressed in the context of burden of proo f?

    Our contract with the customer states that our records will be used as conclusive evidence except in the case of obvious errors. This means that we have a duty to prove that a payment transaction has been accurately executed but that our records can b e regarded as good evidence. We would not wish to see any weakening in the evidential integrity of our records.

41. Should the issue of consequential damages be dealt with in the legal framework?

    No. In the vast majority of cases the payment provider has n o idea of the underlying nature of an individual transaction and it would be out of proportion to the cost of each transaction to expect a provider to be liable for any non -obvious/indirect losses that are suffered. The costs associated with such liabili ty would have to be passed on to the payer and unless the framework limits liability in respect of consequential losses very clearly it would be best left to each financial institution to address in their own contracts. Alternatively, if payment providers had to accept consequential loss, then they are likely to respond by limiting the value of transaction, exiting certain types of transactions or concentrating traffic in -house. This will lead to concentration in a few organisations reduced competition an d increased costs to customers..

42. What is the existing legal situation in Member States in the area of payments with regard to consequential damages?

    Our current contracts are based on the above premise and seek to limit our liability for consequential lo sses.

43. Re OUR BEN and SHA distinction disappearing – Please comment on these considerations and changes to be envisaged. Are there specific further aspects to be covered resulting from the concept?

    The current position is inconsistent with the domestic s ituation. Our preferred position would be:
    1. OUR with STP and non -STP MIF
    2. OUR with STP MIF set at 0 and Non -STP MIF
    3. SHA

44. Are there any difficulties with the Commission's plans to reduce the present 6 days default execution times for cross -border credit transfers to a much shorter period?

    We are already supporting the introduction of the Eurocred which provides the beneficiary with funds within 3 days of the acceptance of the instruction.

45. Are there any other problems or shortcomings in the processing of cro ss-border credit transfers which should be addressed by future legislation?

    Other banks in the UK receive inward payments and then process onto the beneficiary's account using BACS which extends the processing time, however this would not necessarily be helped by legislation.

46. Are there other circumstances or payment instruments (cheques) to determine execution times in the payment area?

    No

47. Is there agreement with the Commission's plans to raise the "money back guarantee" of Art8. In Directive 97/5/EC to 50,000 euro?

    We believe that this would be acceptable as it is rare that funds go missing completely and we would refund the fee for the transaction anyway.

48. Are there any similar problems or shortcomings in operating cross -border credit transfers which should be addressed by future legislation?

    No

49. Should all EPIs be covered in the same legal framework?

    Barclays does not support the EPI and therefore does not have a view.

50. IS there a need to take account of the different nature of different EPIs?

    N/A

51. Would there be any problems if respective obligations and the liabilities of the holder and issuer of an EPI were harmonised in binding legislation in accordance wit the REP?

    N/A

52. Should the holder be obliged to notify the issuer without delay after beco ming aware of the loss or theft of the EPI or the means that enable it to be used?

    N/A

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53. Should the issuer be obliged to give the holder at least one month's notice before changing the terms relating to the use of an EPI?

    N/A.

54. Should the holder have limited liability before notification in case the instrument has been used fraudulently by a third party (eg. Non-authorised transactions), and if the holder has acted in accordance with terms and conditions of the contract?

    N/A

55. Should the holder have no liability after notification where the instrument has been used fraudulently by a third party?

    N/A

56. Should the issuer be liable for the non-execution or defective execution of a holder's transaction?

    N/A

57. Do you see any problem to oblige the issuer to ensure that appropriate means are available to enable the holder to make a notification at any time of the day and to provide the holder with the means of proof that he or she made such a notification, especially in the case where the notification was made by telephone?

    N/A

58. Do you agree that there is a need to harmonise the legal framework relating to direct debiting?

    Yes, but is it achievable? There would need to be an acceptance of scheme rules and guarantees of the lowest common denominator and in the UK this would lead to a degradation of service which would be rejected by the consumer.

    A possibility would be to create a new DDR standard enabling a new scheme operator to introduce a new infrastructure (eg Step 2). Each bank could then choose to offer domestic and/or pan-european service with a commercial decision being made as to whether to maintain the existing domestic offering.

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59. Do alternative means for cross border payment exist for all the cases that are today covered by the cheque?

    Today the customer has the choice of:

    1. Electronic
    2. Obtain a draft and mail it
    3. Cheque (which is slow and expensive and to bring into scope would mean a backwards step)
    4. Plastic card

    However in the future the technology will be there to support the making of a payment where the bank details are not known eg:

    1. SMS
    2. E-Mail
    3. Using a plastic card.

Barclays PLC
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