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NOTE

from:	Presidency
to:	Working Party on Financial Services (attachés - payment services)
No. Cion prop. :	15625/05 EF 62 ECOFIN 407 CONSOM 54 CRIMORG 155 CODEC 1165
Subject:	Proposal for a Directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 97/7/EC, 2000/12/EC and 2002/65/EC

Please find attached the Presidency compromise text for titles I and II.

Changes compared to the previous text, document 12285/06, are underlined.

TITLE I

Subject-matter, scope and definitions

Article 1

Subject matter

(...)

3. This Directive lays down rules concerning the taking up, pursuit of and prudential supervision of the business of payment institution, access to (...) payment systems, transparency of conditions and information requirements for payment services, and the respective rights and obligations of payment service users and payment service providers in relation to the provision of payment services(...).

(...)

Article 2

Scope

- 1. This Directive shall apply to the following categories of payment service providers:

- (a) (...) ¹ credit institutions within the meaning of Article 4(1)(a) of Directive 2006/48/EC;²

¹ The scope of the (entire) Directive as such should not be determined by the existence of authorisation. The authorisation requirement is taking into account in Articles 2a (Prohibition to provide payment services) and 4a(-2) Authorisation requirement for payment institutions) as proposed below.

² Corresponds with ECON 24, even though in different Article.

- (b) (...) electronic money institutions within the meaning of Article 1(3)(a) of Directive 2000/46/EC;¹
 - (c) post office giro institutions, as referred to in the second indent of Article 2 of Directive 2006/48/EC, which are entitled under national (...)law to provide payment services;
 - (d) payment institutions within the meaning of Article 4(2b) of this Directive;²
 - (e) Member States and their regional and local authorities when they do not act in their capacity as public authorities;³
 - (f) the European Central Bank and national central banks when they provide payment services as defined in this Directive, without prejudice to the tasks assigned to them in their capacity as monetary or public authorities.
1. This Directive shall apply to payment services within the Community. However, Titles III and IV of this Directive shall only apply (...), where both payment service providers are, or the sole payment service provider in the payment transaction is, located in the Community.⁴

¹ Corresponds with ECON 25, even though in different Article.

² Corresponds with ECON 26, even though in different Article.

³ Compatible with the idea of ECON 28.

⁴ ECON Compromise A first paragraph, slightly amended as Article 65 proposed to be deleted.

2. Titles III and IV of this Directive shall apply to payment services made in euro or any other national currency of one of the Member States.¹

3. Member States may waive the application of all or part of the provisions of this Directive to credit institutions referred to in Article 2, except the first and second indent, of Directive 2006/48/EC.²

³*Article 2a*

Prohibition to provide payment services (...)

(...) Member States shall prohibit natural and legal persons other than (...)

(...)

a) the European Central Bank and national central banks of Member States;

b) Member States and their regional and local authorities;

¹ ECON Compromise A, third paragraph, slightly amended.

² The new paragraph would allow the Member States to waive fully or partly from this Directive those credit institutions to which according to Article 2 of Directive 2006/48/EC the said Directive does not apply.

³ Article 2a takes into account the substance of ECON 126. The intent is to further clarify the text without changing its intended substance.

c) authorised credit institutions(...);

(ca) authorised electronic money institutions;

(cb) payment institutions;

(cc) post office giro institutions;

d) legal and natural persons¹ benefiting from the derogation in Articles 2(3) and 21 of this Directive; or

e) legal and natural persons² benefiting from the derogation in Article 8 of the Directive 2000/46/EC

from providing payment services.

¹ In order to clarify that waived entities can also be natural persons.

² In order to clarify that waived entities can also be natural persons.

Article 3

Exemptions from the scope

This Directive shall not apply to the following:

- (a) payment transactions exclusively made in cash directly from the payer to the payee, without any intermediary intervention;
- (aa) payment transactions from the payer to the payee through a commercial agent authorised to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or the payee;
- (b) professional (...) physical transport (...) of banknotes and coins, including their collection, processing and delivery¹;
- (c) payment transactions consisting in the non-professional cash collection and delivery within the framework of a non-profit or charitable activity;
- (d) cash provided by the payee to the payer as part of a payment transaction following an explicit request by the payment service user just before the execution of a payment transaction through a payment for the purchase of goods or services;²

¹ To further clarify the text.

² ECON 36.

- (e) money exchange business consisting solely of cash to cash operations, where the funds are not held on a payment account;¹
- (f) payment transactions based on any of the following documents drawn on the payment service provider with a view to placing funds at the disposal of the payee:
 - (i) paper cheques in accordance with the Geneva Convention of 19 March 1931 providing for a Uniform Law for Cheques;
 - (ii) paper cheques similar to those referred to in point (i) and governed by the law of Member States which are not party to the 1931 Geneva Convention;
 - (iii) paper-based drafts in accordance with the Geneva Convention of 7 June 1930 providing for a uniform law on bills of exchange and promissory notes;²
 - (iv) paper-based vouchers;
 - (v) paper-based traveller's cheques;

¹ ECON 37, slightly amended.

² ECON 38.

(vi) paper-based promissory notes;

(vii) paper-based postal money orders as defined by the Universal Postal Union;

(g) payment transactions carried out within a payment or securities settlement system (...) between settlement agents, central counterparties, clearing houses and/or central banks and other participants of the system, and payment service providers, [as well as their agents or branches thereof,] without prejudice to Article 23;

(ga) payment transactions related to securities asset servicing, including dividends, income or other distributions, or redemption or sale, carried out by persons referred to in (...) point (g) or by investment firms, credit institutions or collective investment undertakings providing investment services and any other entities allowed to have the custody of financial instruments; ¹

(h) services provided by technical service providers, which support the provision of payment services, without them entering at any time into possession of the funds to be transferred, including processing and storage of data, trust and privacy protection services, data and entity authentication, IT and communication network provision, provision and maintenance of terminals and devices used for payment services;

¹ To clarify the text.

- (i) services based on instruments that can be used to acquire goods or services only in the premises used by¹ (...) the issuer or under a commercial agreement with the issuer either within a limited network of service providers or for a limited range of goods or services (...);
- (j) payment transactions executed by means of (...) any telecommunication, digital or IT device, where the (...) goods or (...) service is provided to the device itself or to another such device and payment is made directly to the service provider operating the telecommunication or IT system or network and not to a third party;²
- (k) payment transactions carried out between payment service providers for their own account as well as between agents or branches for their own account;³
- (l) payment transactions between (...) a parent undertaking and its subsidiary or between subsidiaries of the same parent undertaking, without any intermediary intervention by a payment service provider other than an undertaking belonging to the same group.⁴

¹ To clarify that the point covers also rented premises.

² Follows largely ECON Consolidated 7. In addition, takes into account that the service can be delivered to another device.

³ Almost identical with ECON 42.

⁴ The definition of a group is proposed to be added to new Article 4(23) in order to avoid too wide interpretations.

Article 4

Definitions

For the purposes of this Directive, the following definitions shall apply:

(1) “*home Member State*” means (...):

(i) deleted.¹

(ii) the Member State in which the registered office of the payment service provider (...) is situated; or

(iii) if the payment service provider (...) has, under its national law, no registered office, the Member State in which its head office is situated;

(2) “*host Member State*” means the Member State other than the home Member State in which a payment institution has a branch or an agent or provides payment services;²

¹ ECON 43, IMCO 6. Deletion proposed already during AT Presidency.

² Compatible with ECON 44.

- (2a) “*payment services*” mean the business activities as listed in the Annex;
- (2b) “*payment institution*” means an undertaking which has been granted authorisation in accordance with Article 4a of this Directive to provide payment services;¹
- (2c) “*payment transaction*” means the act, initiated by the payer or by or through the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee;²
- (3) “*payment system*” means a funds transfer system with formal and standardised arrangements and common rules for the processing, clearing and/or settlement of payment transactions;

¹ ECON 46, slightly amended.

² ECON 47.

¹(3a) “closed payment system” means a proprietary payment system where a single payment service provider is the predominant payment service provider for both the payer and the payee, and where the scheme owner typically is the proprietor of the technical network which is used for routing, switching, clearing and processing the payment transactions (...);²

(4) “payer” means either a natural or a legal person who is (...) a payment account holder (...) and who allows or gives the order for a payment transaction from the account, or where there is no payment account, a natural or legal person who places the order for a payment transaction;

¹ A new definition in order to clarify the access to open payment systems.

² A new definition in order to clarify the access to payment systems. Recital 12 amended: “(12) It is essential for any payment service provider to be able to participate in open payment systems. Open payment systems are typically those where all/most of the payment service providers of a specified payment service, who are also generally competitors, cooperate in order to establish a payments network. This network allows all participants to guarantee that the specific payment service will have full reachability of all potential payers and payees in the area covered by the network. These open payment systems typically include the four party card schemes, credit transfers and direct debits. In order to ensure equality of treatment throughout the Community as between the different categories of payment service providers, according to the terms of their prudential licence, it is necessary to clarify the rules concerning access to the provision of payment services and participation in open payment systems. Provision should be made for the non-discriminatory treatment of payment institutions and credit institutions so any payment service provider competing in the internal market be able to reach any of these open payment systems under the same conditions. This should be without prejudice to MS rights’ to limit access to systemically important systems in accordance with Directive 98/26/EC. Open payment systems contrast closed or proprietary systems which are generally set up and operated by one single payment service provider. These closed systems can operate either as competitor to open systems but more typically operate in a niche not adequately covered by open payment systems. Closed schemes would cover three party card schemes, payment services offered by telecommunication providers or money remittance services and where the closed scheme operator is usually the payment service provider (either directly or through an agent) to both the payer and payee. It would not be appropriate to grant access to third parties to these closed proprietary payment schemes.

- (5) “*payee*” means a natural or legal person who is the intended recipient of funds which have been the subject of a payment transaction;
- (6) “*payment service user*” means a natural or legal person who makes use of a payment service in the capacity of either payer or payee, or both;
- (6a) “*framework contract*” means a payment service contract which governs future execution of individual and successive payment transactions and which may contain the obligation and conditions for setting up a payment account;
- (6b) “*money remittance*” means a payment service, including bill paying services, where funds are received from a payer, without any payment accounts being created, for the sole purpose of transferring a corresponding amount to a payee or to another payment service provider acting on behalf of the payee, and/or where such funds are received on behalf of and (...) made available to the payee;¹
- (7) “*payment account*” means an account held in the name of one or more payment service users which is used for the execution of payment transactions;²
- (8) “*funds*” means banknotes and coins, scriptural money and electronic money as referred to in Directive 2000/46/EC;³

¹ In order to clarify the text.

² In order to clarify the text. Otherwise as ECON 50.

³ ECON 51.

- (9) deleted.
- (10) “*payment order*” means any instruction by a payer or payee to his payment service provider requesting the execution of a payment transaction;
- (11) “*value date*” means a reference time used by a payment service provider for the calculation of interest on the funds transferred from or into a payment account (...);¹
- (12) “*reference exchange rate*” means the exchange rate which is used as the basis to calculate any currency exchange and which comes from an independent source which can be verified by both parties of a payment service contract;
- (13) “*authentication*” means a procedure which allows the payment service provider to verify that the payment service user initiating the payment order is authorised to do so;²
- (14) “*reference interest rate*” means the interest rate which is used as the basis to calculate any interest to be applied and which comes from an independent source which can be verified by both parties to a payment service contract (...);

¹ The availability of funds will be dealt with in Title IV.

² ECON 53.

- (15) “*unique identifier*” means the combination of letters, numbers or symbols specified to the payment service user by the payment service provider and to be provided by the payment service user to identify unambiguously the other payment service user involved in a payment transaction;¹
- (16) “*agent*” means a natural or legal person which acts on behalf of a payment institution in carrying out payment services;
- (17) “*payment instrument*” means any personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used by the payment service user in order to enable the payment service provider to authenticate a payment order;
- (18) “*means of distance communication*” refers to any means which, without the simultaneous physical presence of the payment service provider and the payment service user, may be used for the conclusion of a payment services contract;
- (19) “*durable medium*” means any instrument which enables the payment service user to store information addressed personally to the payment service user in a way accessible for future reference for a period of time adequate to the purposes of the information and which allows the unchanged reproduction of the information stored;²

¹ AT Presidency: For recital: "...such as IBAN (International Bank Account Number), the BIC (Bank Identifier Code), a payment account number, a card number, a name or any other combination."

² AT Presidency: For recital: "..... in particular, durable medium covers printouts by account printers, CD-ROMs, DVDs and hard drives of personal computers on which electronic mail is stored."

[(19a) "*micro-enterprise*" means an enterprise, which at the time of conclusion of the payment service contract, is an enterprise as defined in Articles 1 and 2(1) and (3) of Title I of the Annex to Recommendation 2003/361/EC in the version of 6 May 2003;]

(19b) "*consumer*" means a natural person who, in payment service contracts covered by this Directive, is acting for purposes outside his trade, business or profession;

(20) "*business day*" means a day on which the relevant payment service provider of the payer or the payment service provider of the payee involved in the execution of a payment transaction is open for business as required for the execution of a payment transaction;

(21) "*direct debit*" means a payment service for debiting a payer's payment account, where a payment transaction is initiated by the payee on the basis of the payer's mandate to the payee, or payee's payment service provider or to the payer's own payment service provider;

(22) "*branch*" means a place of business other than the head office which (...) is a part of a payment institution, which has no legal personality and which carries out directly some or all of the transactions inherent in the business of a payment institution; (...) all the places of business set up in the same Member State by a payment institutions with (...) headquarters in another Member State shall be regarded as a single branch;¹

¹ In line with the definition in Mifid: Article 4(1)(26).

(23) “group” means a group consisting of a parent undertaking and its subsidiaries within the meaning of Directive 83/349/EC.¹

TITLE II

Taking up, pursuit of and the prudential supervision of the business of payment institutions and access to (...)payment systems

Chapter 1

Payment institutions

SECTION 1

GENERAL RULES

¹ A definition of group is proposed to be included for the purpose of Articles 3(l) and 4a(1).

Article 4a

Authorisation requirements

- 2. Member States shall require undertakings other than those referred to in points (a) to (ca) and (cc) to (e) of Article (...) 2a¹, who intend to provide payment services, to obtain authorisation as a payment institution before commencing provision of payment services. Authorisation shall only be granted to a legal person incorporated (...) in the Member State.
- 1. Authorisation shall be granted if the competent authorities are satisfied, on the basis of all the information required under Article 5, as to the sound and prudent management of the payment institution and if the payment institution meets the requirements laid down in paragraphs 1 to 5 of this Article and Articles 10 and 10a of this Directive. Before authorisation, competent authorities may consult the national central bank or other relevant public authorities.
- 1. A payment institutions shall have an initial capital, that comprises of the items as defined in points (a) and (b) of Article 57 of Directive 2006/48/EC of not less than [125 000 EUR]². Its own funds, as defined in Articles 57 to 61 and 63 to 66 of Directive 2006/48/EC, shall not fall below that amount. This paragraph and Article 5(1)(ba) shall not apply to payment institutions exclusively engaged in money remittance.

¹ In order to avoid the current circular definition.

² A new recital to be added: “9a) It is appropriate, in particular, to require payment institutions, which provide more sophisticated payment services, to hold a minimum amount of capital in order to cover the operational and financial risks involved in such business and in order to maintain confidence in the payment system.”

Member States shall take the necessary measures to prevent the multiple use of elements eligible for own funds where the payment institution belongs to a same group as another payment institution, a credit institution, investment firm, asset management company or insurance undertaking.¹

2. A payment institution which, under the national law of its home Member State, has a registered office shall have its head office in the same Member State as its registered office.

²3. The competent authorities shall grant authorisation only if, taking into account the need to ensure the sound and prudent management of a payment institution,

(...) (a) they are satisfied as to the suitability of the shareholders or members that have qualifying holdings in the payment institution (...);

[(b) there are at least two persons who effectively direct the business of the payment institution;³]

¹ The Presidency believes that where two payment institutions or a payment institution and another undertaking subject to regulatory capital requirements belong to a same group it is necessary to prevent the multiple use of regulatory capital.

² Compatible with ECON 84, 86, 321.

³ In line with first subparagraph of Article 11(1) of Directive 2006/48/EC.

(c) the payment institution has robust governance arrangements for its payment services business, which include a clear organisational structure with well defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks it is or might be exposed to, and adequate internal control mechanisms, including sound administrative and accounting procedures; these arrangements, procedures and mechanisms shall be comprehensive and proportionate to the nature, scale and complexity of the payment services provided by the payment institution.¹

(...) (d) (...) they are satisfied that the directors and persons responsible for the management of the payment institution and, where applicable, its branches (...) are fit and proper persons and possess appropriate knowledge and ability to perform payment services;

(...)

(...) (e) where close links as defined in Article 4(46) of Directive 2006/48/EC exist between the payment institution and other natural or legal persons, (...) if those links do not prevent the effective exercise of their supervisory functions.²

¹ In line with Article 22 of Directive 2006/48/EC. Compatible with ECON 76.

² To streamline the text. Compatible with ECON 87.

- (f) the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the credit institution has close links, or difficulties involved in the enforcement of those laws, regulations or administrative provisions, do not prevent the effective exercise of their supervisory functions.

- 4.¹ The authorisation shall be valid in all Member States and shall allow the payment institution concerned to provide payment services throughout the Community, either under the freedom to provide services or the freedom of establishment.

Article 5

Applications for authorisation

1. For authorisation as a payment institution, an application shall be submitted to the competent authorities of the home Member State, together with the following:²
- (a) a programme of operations, setting out in particular the types of payment services envisaged;

¹ Previous (4) and (5) set out in doc. 12285/06 are deleted.

² ECON 72.

- (b) a business plan including a forecast budget calculation for the first three financial years which demonstrates (...) that the applicant is able to employ the appropriate and proportionate systems, resources and procedures to operate soundly;¹
- (ba) evidence that the payment institution has the amount of initial capital mentioned in Article 4a(1);²
- (bb) a description of the procedure for the legal separation of funds in accordance with Article 10a;³
- (c) a description of the applicant's governance arrangements and internal control mechanisms within the meaning of Art 4a(3)(d), including administrative and accounting procedures which the applicant has established in order to comply with obligations in relation to money laundering and terrorist financing under Directive 2005/60/EC;⁴
- (...)⁵

¹ ECON 76.

² Compatible with ECON 74.

³ Corresponds with ECON 75.

⁴ The amendment is consequential to the amendment proposed to Article 4a(3) and would serve to further streamline the text. Compatible with ECON 77.

⁵ The deletions are consequential to the amendment proposed to Article 4a(3). Compatible with ECON 78.

- (f) a description of the applicant's structural organisation, including, where applicable, a description of the intended use of branches and agents and a description of outsourcing arrangements;
- (fa) where applicable, a description of the applicant's participation to or involvement with a national or international payment system;
- (g) the identity of persons holding in the applicant, (...) directly or indirectly, qualifying holdings within the meaning of Article 4(11) of Directive 2006/48/EC, and the size of their effective holding and evidence of their suitability taking account the need to ensure the sound and prudent management of a payment institution;
- (ga) the identity of persons to which the applicant has close links as defined in Article 4(46) of Directive 2006/48/EC and a description of their links with the applicant;
- (h) deleted
- (i) the identity of directors and persons responsible for the management of the payment institution (...) and evidence that they are fit and proper persons and possess appropriate knowledge and ability to perform payment services, as determined by the home Member State of the payment institution;¹

¹ Compatible with ECON 80.

(j) the applicant's legal status and the articles of association;¹

(k) the address of the head office.

2. For the purposes of paragraph (1)(bb), (c) and (f), the applicant shall provide a description of its audit arrangements and the organisational arrangements it has set up with a view to taking all reasonable steps to protect the interests of its users and to ensure continuity and reliability in the performance of payment services.²
3. For the purposes of paragraph 1(...)(f)(...), the competent authorities of the home Member State shall consult the competent authorities of the host Member State.
4. Member States may not impose any prior conditions in respect of granting authorisation apart from those laid down in paragraph 1 of this Article.

Article 5a

Exceptions for money remitters

Deleted.

¹ ECON 81.

² Compatible with ECON 83.

Article 6

Granting

Deleted.

Article 7

Communication of decision

1. Within three months of receiving the application or, should the application be incomplete, within three months of receiving the complete information required for the decision under Article 5 of this Directive, the competent authority shall inform the applicant whether its application has been granted or refused.¹
2. Reasons shall be given whenever an authorisation is refused.

²Article 7a

Withdrawal of authorisation

1. The competent authorities may withdraw the authorisation issued to a payment institution only where such an institution:

¹ Compatible with ECON 88.

² In order to bring the text more in line with other financial Directives.

(a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has ceased to engage in business for more than six months, if the Member State concerned has made no provision for the authorisation to lapse in such cases;

(b) has obtained the authorisation through false statements or any other irregular means;

(c) no longer fulfils the conditions under which authorisation was granted.

2. Reasons must be given for any withdrawal of authorisation and those concerned informed thereof.

¹Article 8

Registration

1. Member States shall establish a public register of all authorised payment institutions and their branches and agents, as well as of all natural and legal persons, and their branches and agents, for which a derogation has been granted in accordance with Article 21, and the institutions mentioned in Article 2(3)². They shall be registered in the register of the Member State where they are established.

¹ Largely compatible with ECON 90.

² Consequential to new Article 2(3).

2. This register shall identify the services and/or activities laid down in Article 10 for which the payment institution is authorised or for which the natural or legal person has been registered. It shall be publicly available for consultation, accessible online, and be updated on a regular basis.

Article 9

Maintenance of authorisation

Deleted.

Article 10

Activities

1. Payment institutions shall be entitled to engage in the following activities:
 - (a) the provision of payment services;
 - (b) the provision of operational and closely related ancillary services such as ensuring execution of payment transactions, foreign exchange services, safekeeping activities, and storage and processing of data;¹

¹ ECON 93.

- (c) the (...) ¹ operation of payment systems (...), without prejudice to Article 23;
- (d) business activities other than provision of payment services, having regard to applicable Community and national law.

1a. Payment institutions shall not be entitled to grant credit, unless

- (a) the credit is closely linked to the activities of the payment institution and
- (b) the credit is made from the payment institution's assets other than payment service users' funds held for payment services. ²

¹ Access to open payment system is not an activity.

² ECON compromise Da, amended. A new recital to be added: Whereas it is important to guarantee the financial stability of payment institutions. It is not appropriate for payments institutions to make long term loans, such as mortgage credits. However, where credit is granted in order to facilitate payments services, e.g. when issuing credit cards, or is otherwise closely linked to the businesses of the payment institution, it is appropriate to permit it where it is refinanced using the payment institution's own funds, including funds acquired from the capital markets, and not the funds held on behalf of clients for payment services.

It should be noted that by virtue of the proposed paragraph 1(d) the proposed text does not prevent Member States from continuing to limit the right of payment institutions to grant credit by instruments other than those mentioned in the Annex.

2. Payment institutions may hold payment service user's money on payment accounts only if they are exclusively used for payment transactions; any funds received by payment institutions from payment service users with a view to the provision of payment services shall not constitute a deposit or other repayable funds within the meaning of Article 5 of Directive 2006/48/EC, or electronic money within the meaning of Article 1(3) of Directive 2000/46/EC.¹

(...)

²*Article 10a*

Separation of assets

1. Member States shall ensure that that there is a legal separation between funds received by a payment institution from a payment service user on a payment account or other funds received for the purpose of carrying out future payment transactions and other funds of the payment institution so that the received funds are safeguarded in the interest of those payment service users against the claims of other creditors of the payment institution, in particular in the event of bankruptcy or other insolvency procedure.

¹ Largely compatible with ECON 95.

² New recital to be added: Adequate arrangements for a legal separation of funds received by a payment institution from a payment service user on a payment account are necessary in order to ensure safeguarding of the payment service user's money, especially in the event of the payment institution's insolvency or bankruptcy. The most efficient way to protect payment service users in such cases is to have national bankruptcy provisions in place. However, given the differences of bankruptcy law in Member States the implementation of such safeguards measures should be at the discretion of the Member States.

- 1a. Where a portion of the amount of funds referred to in paragraph 1 is used for future payment transactions with the (...) remaining amount being used for non-payment services, that portion of the funds received for future payment transactions shall also be subject to paragraph 1.
- Where this portion is variable or unknown in advance, Member States may apply this paragraph on the basis of a representative portion assumed to be used for payment services provided such a representative portion can be reasonably estimated on the basis of historical data to the satisfaction of the competent authorities.
- 1b. This Article shall not apply to payment institutions exclusively engaged in money remittance.
- 1c. The funds referred to in this Article may only be invested in secure, liquid, low risk assets as defined by Member States. These assets shall be subject to the requirements laid down in paragraph 1.

(...)

Article 10b

On-going verification of authorisation

1. Where any change affects the accuracy of information and evidence provided under Article 5, the payment institution shall without undue delay inform the competent authority of its home Member State accordingly.

(...)¹

2. The competent authorities shall ensure that the calculations justifying compliance with Article 4a(1) are made not less than twice each year either by payment institutions themselves, which shall communicate them, and any component data required, to the competent authorities, or by competent authorities, using data supplied by the payment institutions.

SECTION 2

OTHER REQUIREMENTS

Article 11

Use of branches, agents, (...) or entities to whom activities are outsourced²

1. When a payment institution intends to provide payment services through an agent or a branch, it shall communicate the following information to the competent authority in its home Member State:

a) the name and address of the agent or branch;

¹ It seems more consistent to include this provision in Article 11.

² Compatible with the idea of ECON 104.

b) a description of the internal control mechanisms the agent or branch has in place in order to comply with the obligations in relation to money laundering and terrorist financing under Directive 2005/60/EC;

c) the identity of persons holding in the agent [or branch], directly or indirectly, qualifying holdings within the meaning of Article 4(11) of Directive 2006/48/EC, the size of their effective holding, and evidence that they are fit and proper persons;

d) the identity of directors and persons responsible for the management of the agent or branch to be used in the provision of payment services and evidence that they are fit and proper persons.

1a. The competent authority of the home Member State shall only allow the agent or branch to be entered in the register established under Article 8 if they are satisfied that the use of the agent or branch does not endanger the sound and prudent management of the payment institution.

1b. For the purposes of this article, the competent authorities of the home Member State shall in advance inform and consult the competent authorities of the host Member State.

2. Where a payment institution intends to outsource payment services operations, it shall inform the competent authorities of its home Member State accordingly.

Outsourcing of important operational functions may not be undertaken in such way as to impair materially the quality of its internal control and the ability of the competent authority to monitor the payment institution's compliance with all obligations laid down by this Directive.

3. Payment institutions shall ensure that agents or branches acting on their behalf inform payment service users accordingly.

Article 12

Liability

1. Member States shall ensure that, where payment institutions rely on third parties for the performance of operational functions, those payment institutions take reasonable steps to avoid undue operational risk.
2. Member States shall require that payment institutions remain fully liable for any acts of their managers, employees, or any agent, branch or entity to which activities are outsourced (...), pursuant to this Directive.¹

¹ ECON 109, 339 and IMCO 25 modified.

Article 13

Record-keeping

Member States shall require payment institutions to keep all appropriate records for the purpose of this Title for at least five years, without prejudice to Directive 2005/60/EC or other relevant Community or national legislation.¹

Article 14

Place of the head office

Deleted.

SECTION 3

COMPETENT AUTHORITIES AND SUPERVISION

¹ ECON 110.

Article 15

Designation of competent authorities

1. Member States shall designate as the competent authorities responsible for the authorisation and prudential supervision of payment institutions under this Title either public authorities, or bodies recognised by national law or by public authorities expressly empowered for that purpose by national law.

The competent authorities shall be such as to guarantee independence from economic actors and to avoid conflicts of interest. They shall not be payment institutions, credit institutions, electronic money institutions, or post office giro institutions.¹

The Member States shall inform the Commission accordingly.

2. Member States shall ensure that the competent authorities designated under paragraph 1 possess all the powers necessary for the performance of their duties.
3. Where there is more than one competent authority for matters covered by this Title on its territory, Member States shall ensure that those authorities cooperate closely so that they can discharge their respective duties effectively.

¹ It should be clear that this provision does not exclude central banks from being competent authorities.

Article 15a

Responsibility for supervision

The tasks of the competent authorities, as laid down in Article 15(1), shall be the responsibility of the competent authorities of the home Member State.

Article 16

Ongoing supervision¹

1. Member States shall ensure that the controls exercised by the competent authorities for checking continued compliance with this Title are proportionate, adequate and responsive to the risks to which payment institutions are or might be exposed.
2. In order to check compliance with this Title, the competent authorities shall be entitled to take the following steps, in particular:²

¹ ECON 115.

² ECON 116. Add a new recital: "Even though the Directive does not provide for an exhaustive list of supervisory measures this should not be interpreted as allowing for further measures in addition to those provided for under the provisions of Chapter 1 of Title II; in particular, further supervisory steps taken by competent authorities should not affect in any case the core parts of authorisation requirements as stated in Articles 4a and 5."

- (a) to require the payment institution to provide any information needed to monitor compliance;
- (b) to carry out on-site inspections with the payment institution, any entity to whom payment services operations are outsourced, any agent and any branch providing payment services under the responsibility of the payment institution;¹
- (c) to issue recommendations and guidelines and, if applicable, binding administrative (...) provisions;²
- (d) to issue warnings and impose proportionate penalties in cases of non-compliance;
- (e) to suspend or withdraw authorisation in cases (...) referred to in Article 7a³.

Article 17

Professional secrecy

1. Member States shall ensure that all persons working or who have worked for the competent authorities, as well as experts acting on behalf of the competent authorities, are bound by the obligation of professional secrecy, without prejudice to cases covered by criminal law.

¹ ECON 117 slightly amended.

² ECON 118 slightly amended.

³ Consequential to the proposed new Article 7a.

2. In the exchange of information in accordance with Article 19, professional secrecy shall be strictly applied to ensure the protection of individual and business rights.
3. Member States may apply this Article taking into account, mutatis mutandis, the provisions laid down in Articles 44 to 52 of the Directive 2006/48/EC.

Article 18

Right to apply to the courts

1. Member States shall ensure that decisions taken and penalties imposed by the competent authorities in respect of a payment institutions and applicants for authorisation as a payment institution in pursuance of laws, regulations and administrative provisions adopted in accordance with this Directive may be contested before the courts in the Member State of the authorities which adopted them.
2. The first paragraph shall apply also in respect of failure by the competent authorities to act.

Article 19

Exchange of information

1. The competent authorities of the different Member States shall cooperate with each other and, where appropriate, with the European Central bank and the national central banks of the Member States and other relevant competent authorities designated under Community or national legislation applicable to payment service providers.
2. Member States shall, in addition, allow exchanges of information between their competent authorities and the following:
 - (a) the competent authorities of other Member States responsible for the authorisation and supervision of payment institutions;
 - (b) the European Central Bank and the national central banks of Member States, in their capacity as monetary and oversight authorities, and, where appropriate, other public authorities responsible for overseeing payment and settlement systems;
 - (c) other relevant authorities designated under this Directive and other Community legislation applicable to payment service providers, such as legislation applicable to money laundering and terrorist financing.

Article 20

Exercise of the right of establishment and freedom to provide services

1. Any authorised payment institution wishing to carry on its activities for the first time in a Member State other than its home Member State, in exercise of the right of establishment or the freedom to provide services, shall so inform the competent authorities in its home Member State.

Within one month of receiving that information, the competent authorities in the home Member State shall inform the competent authorities in the host Member State of the name and address of the payment institution and of the kind of payment services it intends to provide on the territory of the host Member State.

2. In order to carry out the controls and take the necessary steps provided for in Article 16 in respect of a branch or an agent of a payment institution located in the territory of another Member State, the competent authority of the home Member State shall cooperate with the competent authorities in the host Member State.
3. By way of cooperation in accordance with paragraphs 1 and 2, the competent authority of the home Member State shall notify the competent authority of the host Member State whenever it wishes to carry out an on-site inspection within the territory of the latter.

However, if both authorities so wish, the competent authority of the home Member State may delegate to the competent authorities of the host Member State the task of carrying out on-site inspections with the institution concerned.

4. Competent authorities shall provide each other with all essential and/or relevant information, in particular in the case of infringements or suspected infringements by a branch or an agent. In this regard, the competent authorities shall communicate on request all relevant information and shall communicate on their own initiative all essential information.
- 4a. Without prejudice to the foregoing, the competent authorities of the host Member State shall be responsible for the supervision of compliance with obligations in relation to money laundering under Directive 2005/60/EC and regulations regarding counter terrorism.¹

SECTION 4

DEROGATION

Article 21

Conditions for derogation

1. By way of derogation from Article 2(-1)(d), Member States may waive or allow their competent authorities to waive the application of all or part of the procedure and conditions set out in Sections 1 and 2 and allow natural or legal persons to be entered in the register established under Article 8, where

¹ ECON 351, 352 slightly amended.

(...) the total business activities of the person concerned, including any agent or branch for which it assumes full responsibility, generates payment services with a total amount (...) not exceeding EUR 5 million on average over a month and EUR 6 million at any given point in time.

deleted

(...)

- 1b. Any natural or legal person registered in accordance with this Article shall be required to have its head office in the Member State in which it actually carries on its business.
2. The persons referred to in paragraph 1 and 1a shall be treated as payment institutions. However, they shall be allowed to provide payment services within the Community only within the Member State of registration.

Member States may also provide that they may engage only in certain of the activities listed in Article 10.

3. The persons referred to in paragraph 1 shall notify the competent authorities of any change in their situation which is relevant to the condition specified in paragraph 1.

Article 22

Notification and information

1. If a Member State avails itself of the derogation provided for in Article 21, it shall notify the Commission accordingly by the date specified in the first paragraph of Article 85(1) at the latest and shall notify it forthwith of any subsequent change.
2. In addition, it shall inform the Commission, on an annual basis, of the number of natural and legal persons concerned and of the total amount of payment services, as referred to in Article 21(1).

Chapter 2

Common provisions

Article 23

Access to (...) open payment systems¹

1. Member States shall ensure that rules on access of authorised or registered payment service providers [that are legal persons] to (...) payment systems shall be objective, non-discriminatory and proportionate and shall not inhibit access more than is necessary to safeguard against specific risks and to protect the financial and operational stability of the payment system.

In any event, (...) payment systems may not impose on payment service providers, on payment service users or on other payment systems any of the following requirements:

- (a) restrictive rules on effective participation in other payment systems;

¹ AT Presidency: Recital to be added: "Article 23 should be without prejudice to the competences of the ECB and the ESCB as laid down in Article 105(2) of Treaty and Article 3.1 and Article 22 of the Statute of the ESCB, concerning access to payment systems."

- (b) a rule which discriminates between authorised payment service providers, between registered payment service providers or between authorised and registered payment service providers in relation to the rights, obligations and entitlements of participants;
- (c) any restriction on the basis of institutional status.

¹2. Paragraph 1 shall not apply to (...):

- (a) payment systems designated under Directive 98/26/EC, and
- (b) payment systems exclusively composed of payment service providers belonging to a group composed of entities linked by capital where one of the linked entities enjoys effective control over the other linked entities, and
- (c) closed payment systems.

¹ In order to clarify the scope of application.

“PAYMENT SERVICES” UNDER ARTICLE 4

(1) Cash placed on a payment account as well as all the operations required for operating a payment account.

(2) Cash withdrawals from a payment account as well as all the operations required for operating a payment account.

(3) Execution of payment transactions, including transfer of funds, on a payment account with the user's payment service provider or with another payment service provider:

- execution of direct debits, including one-off direct debits;
- execution of payment transactions through a payment card or a similar device;
- execution of credit transfers, including standing orders.

(4) Execution of payment transactions where the funds are covered by a credit line for a payment service user:

- execution of direct debits, including one-off direct debits;
- execution of payment transactions through a payment card or a similar device;
- execution of credit transfers, including standing orders.

(5) Issuing of payment cards which allow the payment service user to transfer funds.

(6) Execution of payment transactions where the funds are electronic money within the meaning of Directive 2000/46/EC.

(7) Money remittance.

(8) Execution of payment transactions by any means of communication at a distance such as mobile telephones or other digital or IT devices where the service provider operating the telecommunication or IT system or network is either facilitating the payment of goods or services that are not digital goods or electronic communication services and so are not provided to the device itself or other such device¹, or simply arranging the transfer of funds to a third party for the payment of digital goods or electronic communication services provided to the device itself or other such device².

(9) deleted

¹ Consequential to amendment in Article 3(j).

² Consequential to amendment in Article 3(j).