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NOTE

from : Presidency
to : Working Party on Financial Services (payment services)

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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

This note sets out Articles 1 to 22 (including Annex) of the Presidency proposal as they stand following the working party meetings on 16 January, 15 March and 3 April 2006.

Changes and additions with respect to the Commission proposal are underlined; (...) denotes deleted Commission text.

Delegations are still examining this text.

TITLE I

Subject-matter, scope and definitions

Article 1 *Subject matter*

1. This Directive lays down the rules in accordance with which Member States shall distinguish the following five categories of payment service provider:
 - (a) credit institutions within the meaning of Article 1(1)(a) of Directive 2000/12/EC;
 - (b) electronic money institutions within the meaning of Article 1(3)(a) of Directive 2000/46/EC;
 - (c) post office giro institutions, as referred to in the second indent of Article 2(3) of Directive 2000/12/EC, which are entitled under national or Community law to provide payment services;
 - (d) (...) “payment institutions” within the meaning of this Directive;
 - (e) central banks when they do not fulfil tasks assigned to them in Article 105(2) of the Treaty establishing the European Community.
2. (...) Member States or the regional or local authorities of Member States are not considered to be payment service providers.
3. This Directive also lays down rules concerning transparency conditions, and the respective rights and obligations of payment service users and payment service providers, in relation to the provision of payment services as a regular occupation or business activity.

Article 2
Scope

1. This Directive shall apply (...) to “payment services”, where at least one of the payment service providers is located in the Community.

(...)

(...)

2. Save where otherwise provided, this Directive shall apply to payment services made in any currency.

Article 3
Negative scope

This Directive shall not apply to the following:

- (a) payment transactions consisting solely of a transfer of cash directly from the payer to the payee, without transforming the cash into scriptural money, or into electronic money within the meaning of Directive 2000/46/EC;¹
- (b) professional collection and delivery of cash, including its transport, without transforming the cash into scriptural money, or into electronic money within the meaning of Directive 2000/46/EC;
- (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 (...);

¹ Recital possibly to be added (or existing recital to be adapted) on money remittance.

- (e) money exchange business, that is to say, cash to cash operations, where the funds are not held (...) on a payment account;
- (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;
 - (iv) paper-based vouchers;
 - (v) paper-based traveller's cheques;
 - (vi) paper-based promissory notes;
- (g) payment transactions carried out within a payment or security clearing and settlement system or between clearing or settlement agents, central counterparties and/or central banks, and payment service providers, as well as their tied agents or branches thereof, without prejudice to Article 23;
- (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;

- (i) services based on non-redeemable instruments whose nominal value is fixed by the issuer and that can be used to acquire goods or services only within a limited network of (...) service providers or for a limited range of goods or services under a commercial agreement with the issuer (...);
- (ia) services based on instruments that can be used only in the premises of the issuer or within a limited network of service providers under a commercial agreement with the issuer;
- (j) payment transactions executed by means of a mobile telephone or any other digital or IT device, where (...) the digital goods or electronic communication services are provided to the device itself and payment is made directly to the service provider operating the tele-communication or IT system or network and not to a third party;¹
- (k) payment transactions carried out between payment service providers for their own account as well as between tied agents or branches for their own account (...).

Article 4
*Definitions*²

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

- (1) “*home Member State*” means any of the following:

(...)

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

¹ Footnote possibly to be added on rationale for 3(j), and referring to the review clause.

² Majority of definitions not yet discussed.

- (2) “*host Member State*” means the Member State other than the home Member State in which a payment institution has a branch or a tied agent or provides payment services;
- (2a) “*payment service*” means the business activities as listed in the Annex, consisting in the execution of payment transactions on behalf of a natural or legal person;
- (2b) “*payment institutions*” means (...) legal persons who have been granted authorisation in accordance with Article 6 of this Directive to provide and execute payment services throughout the Community;
- (2c) “*payment transaction*” means the act, initiated by the payer or by the payee, of placing (...) transferring or withdrawing funds (...), irrespective of any underlying obligations between the payer and the payee;
- (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;
- (3a) “*Open payment system*” means a payment system where the payer and the payee generally have different payment service providers, both operating within the same payment system.
- (4) “*payer*” means a natural or legal person who is the holder of a payment account or who has the right of disposal of funds 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 (...);
- (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;

- (7) “*payment account*” means an account held in the name of one or more payment service users which is used (...) for payment transactions;
- (8) “*funds*” means cash, scriptural money and electronic money as referred to in Directive 2000/46/EC;
- (9) “*availability of funds*” means that the funds on a payment account may be used by the payment service user without fees being charged;
- (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;
- (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 agreement;
- (13) “*authentication*” means a procedure which allows the payment service provider to verify that the user initiating the payment order is authorised to do so;
- (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 agreement;

- (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) “*tied agent*” means a natural or legal person which acts on behalf of a payment institution in carrying out payment services;
- (17) “*payment verification instrument*” means any personalised device(s) and/or set of procedures used by the payment service user in order to enable the payment service provider to authenticate a payment order. If it is not provided by the payment service provider, the payment service provider and the payment service user may agree on the use of any other instrument for the authentication of payment orders which may also serve other purposes;
- (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 (...) 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 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 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 (...)."

TITLE II

Payment service providers

Chapter 1

Payment institutions

SECTION 1

GENERAL RULES

Article 4a

Initial capital requirements

Payment institutions shall have an initial capital, as defined in subparagraphs 1 and 2 of Article 34(2) of Directive 2000/12/EC, of not less than [X] EUR. Their own funds, as defined in Directive 2000/12/EC, shall not fall below that amount.

Article 5

Applications for authorisation

For authorisation as a payment institution, an (...) application shall be submitted to the competent authorities of the home Member State, together with the following:

- (a) a programme of operations, setting out in particular the type of payment service envisaged;
- (b) a business plan including a forecast budget calculation for the first three financial years which would allow the presumption that the applicant is able to employ the appropriate and proportionate systems, resources and procedures to operate soundly;
- (ba) evidence that the amount of initial capital mentioned in Article 4a is at the free and unlimited disposal of the managers;

- (bb) a description of the procedure for the legal separation of funds in accordance with Article 10a;
- (c) a description of the applicant's administrative and accounting procedures, such as would allow the competent authorities to conclude that it conducts sound and adequate procedures and controls;
- (d) a description of the internal control mechanisms which the applicant has established in order to comply with obligations in relation to money laundering and terrorist financing under Directive 2005/60/EC of the European Parliament and of the Council;
- (e) a description of the applicant's risk management procedures;
- (f) a description of the applicant's structural organisation and, where applicable, of its cooperation 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 1(10) of Directive 2000/12/EC, and the size of their effective holding;
- (h) deleted
- (i) the identity of directors and persons responsible for the management of the payment institution and evidence that they are of good repute and possess appropriate knowledge and ability to perform payment services, as determined by the home Member State of the payment institution;
- (j) the applicant's legal status and the articles of association;
- (k) the address of the head office in accordance with Article 14 (...).

For the purposes of point (c), 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.

Article 5a
Exemptions for money remitters

For payment institutions exclusively engaged in payment services according to point 7 of the Annex Articles 4a and 5(ba) shall not apply.

Article 6
Granting

Authorisation shall be granted if the information and evidence accompanying the application complies with all the requirements laid down in Article 5. Before authorisation, competent authorities may consult the national central bank or other relevant public authorities.

(...)

The competent authorities shall refuse authorisation if, taking into account the need to ensure the sound and prudent management of a payment institution, they are not satisfied as to the suitability of the shareholders or members that have qualifying holdings.

Where close links as defined in Directive 2000/12/EC exist between the payment institution and other natural or legal persons, the competent authorities shall grant authorisation only if those links do not prevent the effective exercise of their supervisory functions.

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 7
Communication of decision

Within three months of receiving the application or, should the application be incomplete, within three months of receiving the information required for the decision, the competent authority shall inform the applicant whether its application has been granted or refused.

Reasons shall be given whenever an authorisation is refused.

Article 8
Registration

Member States shall establish a register of all authorised payment institutions and their branches, as well as of all natural and legal persons, and their branches, for which a derogation has been granted in accordance with Article 21.

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

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.

Article 10
Activities

1. Payment institutions shall be entitled to engage in the following activities:
 - (a) the provision of payment services, as listed in the Annex;
 - (b) the provision of operational and closely related ancillary services such as the guaranteeing execution of payment transactions, foreign exchange services, safekeeping activities, and storage and processing of data;
 - (c) the accessing and operation of payment systems for the purposes of transferring, clearing and settling funds, including any instruments and procedures relating to the systems, without prejudice to Article 23.

2. When payment institutions engage in the provision of payment services according to paragraph 1(a), they may only hold payment accounts 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 3 of Directive 2000/12/EC, or electronic money within the meaning of Article 1(3) of Directive 2000/46/EC.

- (...)

3. The business activities of authorised payment institutions (...) shall not be restricted to payment services, having regard to the applicable national and Community law.

Article 10a
Safeguarding requirements

1. Funds received from payment service users and specifically accepted in connection with a payment service shall not be used by payment institutions to support business activities other than payment services. Member States shall ensure that there is a legal separation between such funds and other funds of a payment institution so that the received funds are safeguarded in the interest of payment service users, including in the event of bankruptcy or other insolvency procedure.

2. Where a payment institution receives funds with a view to the provision of payment services, these funds shall not be used for the execution of another payment transaction than the one for which they were intended. At the end of each working day, the users' funds still held by the payment institution but not delivered to the payee shall be deposited in an account opened in a credit institution established in the Community or invested in secure, liquid, low risk assets. This account or these assets shall be legally separated from any other accounts or assets of the payment institution and be out of reach of creditors other than the payment institution's users, including in the event of bankruptcy or other insolvency procedure.

Article 10b
Verification of specific requirements by the competent authorities

The competent authorities shall ensure that the calculations justifying compliance with Article 4a are made not less than twice each year, and that evidence justifying compliance with Article 10a is made on an ongoing basis, 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, tied agents or outsources*

1. In cases where a payment institution intends to provide payment services through a tied agent or a branch, it shall communicate the name and address of the tied agent or branch to be used to the competent authorities in its home Member State.
2. Where a payment institution intends to outsource some (...) of its operations, it shall inform the competent authorities of its home Member State accordingly.
3. Payment institutions shall ensure that tied 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 tied agent, branch or outsourced activity, pursuant to this Directive.

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.

Article 14
Place of the head office

Member States shall require any payment institution which (...), under the national law of its home Member State, has a registered office to have its head office in the same Member State as its registered office.

Any natural or legal person registered in accordance with Article 21 and not covered by the first paragraph shall be required to have its head office in the Member State in which it actually carries on its business.

SECTION 3

COMPETENT AUTHORITIES AND SUPERVISION

Article 15
Designation of competent authorities

1. Member States shall designate as the competent authorities responsible for implementation of 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.

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.

Article 16
Ongoing supervision

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 exposed.

In order to check compliance with this Title, the competent authorities are entitled to take (...) the following steps, in particular:

- (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, an outsourced entity, a tied agent or a branch under the responsibility of the payment institution;
- (c) to issue recommendations and guidelines and, if applicable, other binding administrative actions;
- (d) to issue warnings and impose proportionate penalties in cases of non-compliance;
- (e) to suspend or withdraw authorisation in cases, where the conditions for authorisation in accordance with Article 5, the provisions of Articles 4a, 10 or 10a are not or no longer fulfilled.

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.
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.

Article 18
Right to apply to the courts

Member States shall ensure that decisions taken by the competent authorities in respect of a payment institution in pursuance of laws, regulations and administrative provisions adopted in accordance with this Directive may be contested before the courts.

The first paragraph shall apply also in respect of failure to act.

Article 19
Exchange of information

The competent authorities of the different Member States shall cooperate and, in particular, exchange information in order to ensure proper application of this Directive.

Member States shall, in addition, allow exchanges of information between their competent authorities and the following:

- (a) the competent authorities of the host Member State responsible for the authorisation and supervision of payment institutions;
- (b) central banks, the European System of Central Banks and the European Central Bank, 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.

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 a tied 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 relevant information, in particular in the case of infringements or suspected infringements by a branch or a tied agent (...).

SECTION 4

DEROGATION

Article 21 *Conditions*

1. By way of derogation from point (d) of the first paragraph of Article 1, Member States may (...) 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, on a case by case basis, natural or legal persons to be entered in the register established under Article 8, (...) where both the following conditions are satisfied:
 - (a) the total business activities of the person concerned, including any tied agent or branch for which it assumes full responsibility, generates a total amount of funds outstanding which were accepted for the provision of payment services and which does not exceed EUR 5 million on average over a month and EUR 6 million at any given point in time;
 - (b) such registration is considered to be in the public interest for either of the following reasons:
 - (i) the person concerned plays a vital role in financial intermediation, providing access to payment services for underprivileged social groups, in particular where the provision by other providers of the services in question is unlikely or would take a long time;
 - (ii) it is necessary for the effective implementation of money laundering rules or mechanisms to prevent terrorist financing.

2. The persons referred to in paragraph 1 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 point (a) of paragraph 1.

Article 22
Notification and information

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.

In addition, it shall inform the Commission of the number of natural and legal persons concerned and shall, on an annual basis, inform the Commission of the total amount of funds outstanding, as referred to in point (a) of Article 21(1).

ANNEX

“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 services where the cash, scriptural money or electronic-money is accepted by the payment service provider from the payment service user for the sole purpose of making a payment transaction (...) and/or delivery of the funds to the payee.
- (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 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.
- (9) deleted