EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 15 December 2005

on a proposal for an EC regulation on information on the payer accompanying transfers of funds

(CON/2005/56)

(2005/C 336/07)

On 14 October 2005 the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a 'Proposal for a regulation of the European Parliament and of the Council on information on the payer accompanying transfers of funds' (COM(2005) 343 final) (hereinafter the 'proposed regulation') ([1]).

The ECB's competence to deliver an opinion is primarily based on the first indent of Article 105(4), in conjunction with the fourth indent of Article 105(2) of the Treaty establishing the European Community, as the proposed regulation concerns a basic task of the European System of Central Banks (ESCB), namely to promote the smooth operation of payment systems ([2]). In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. **Obligations of intermediary payment service providers**

1.1 The definition of 'intermediary payment service provider' (hereinafter the 'intermediary PSP') contained in Article 3(6) of the proposed regulation refers to a payment service provider (hereinafter the 'PSP') which is neither that of the payer nor that of the payee and which participates in the execution of transfers of funds'. Since both operators of payment, clearing and settlement systems and providers of messaging services take part in the execution of transfers of funds they appear to be covered by the scope of application of the proposed regulation.

1.2 However, such operators and service providers do not have a direct customer relationship with payers or payees and do not, therefore, hold all the information required under the proposed regulation. Therefore, obligations should only be imposed on credit institutions that are directly involved in customer contacts or on financial entities that are part of the payment chain for the execution of funds, since such entities would possess the necessary information ([3]).

([1]) This opinion is based on the version of the proposed regulation on which the ECB was formally consulted, namely the version of 26 July 2005. The ECB is, however, aware that the proposed regulation has undergone further elaboration at Council working group level during the UK Presidency.

([2]) In addition, the ECB's competence to deliver an opinion is based on Article 22 of the Statute of the European System of Central Banks and of the European Central Bank concerning the task of the ECB and the national central banks to, *inter alia*, ensure efficient and sound clearing and payment systems within the Community and with other countries.

([3]) I.e. the information required under Chapters II and III of the proposed regulation. A similar comment was made by the ECB in paragraph 12 of ECB Opinion CON/2005/2 of 4 February 2005 at the request of the Council of the European Union on a proposal for a directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing (OJ C 40, 17.2.2005, p. 9). In that opinion, the ECB pointed to the fact that payment system operators can only check the mere presence of some information in a field; they cannot check the quality, completeness, accuracy or meaningfulness of that information. The ECB recommended that payment system operators be exempted from a requirement to identify beneficial owners, without prejudice to the payment system operators' obligation to ensure that the payment orders entered into payment systems can be effectively traced by means of an appropriate identification of the system participants.

1.3 In view of the above, the ECB strongly recommends inserting an explicit exemption from the scope of application of the proposed regulation for both operators of payment, clearing and settlement systems and providers of messaging services, plus an explanatory recital. This exemption would be without prejudice to the obligation of such system operators to ensure that the payment orders entered into these systems can be effectively traced by means of an appropriate identification of the system participants. In this regard, the ECB notes that the Third Money Laundering Directive contains a recital clarifying that any natural or legal person that provides credit or financial institutions solely with a message or other support systems for transmitting funds or with clearing and settlement systems does not fall within the scope of that Directive ([1]).

1.4 Moreover, Article 13(2) of the proposed regulation concerns the obligations of an intermediary PSP in cases where it does not receive complete information on the payer. Paragraphs 12 and 13 of the Revised Interpretative Note to Special Recommendation VII: Wire Transfers ([2]) (hereinafter the 'Interpretative Note') of the Financial Action Task Force (FATF) does not contain a similar information requirement. In this respect, the ECB advises against the proposal to make the intermediary PSP responsible for informing the PSP of the payee that the information is incomplete. It would be more appropriate for this obligation to fall upon the parties who are directly involved, namely the PSP of the payer and the PSP of the payee, since they would in any event possess the required information pursuant to the provisions of Chapters II and III of the proposed regulation. The only obligations of an intermediary PSP should be those under Article 12 and Article 13(1) of the proposed regulation, which require that all information on the payer received as part of the transfer is retained with the transfer and that such information is kept on record for five years. Therefore, Article 13(2) of the proposed regulation should be deleted altogether.

2. **Definitions**

2.1 As a general comment, it would be desirable to ensure as much consistency as possible between the definitions in Article 4 of the proposed directive on payment services in the internal market ([3]) and the definitions in the proposed regulation, in particular the definition of 'payment service user' in Article 3(8) of the proposed regulation.

2.2 Special Recommendation VII on wire transfers (hereinafter 'SR VII') of the FATF explicitly covers financial institutions, including money remitters. There is no express reference to money remitters in the proposed regulation. It is highly likely that the definition of 'payment service provider' in Article 3(5) of the proposed regulation would cover money remitters, but a reference to money remitters could be inserted therein to ensure that the proposed regulation is explicitly consistent with SR VII.

2.3 Furthermore, a definition for 'unique identifier' should be added, which should reflect the various possible combinations of data required for identifying the payer.

3. **Commercial transactions**

3.1 The ECB notes that recital 6 to the proposed regulation concerns the exemption, under certain conditions of, *inter alia*, transfers of funds that flow from 'commercial transactions'. There is no definition of the term 'commercial transaction', but Article 2(2) specifies that the proposed regulation does 'not apply to transfers of funds which flow from a commercial transaction carried out using a credit or debit card or any other similar payment instrument'.

([1]) Recital 34 to Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).

([2]) Available on the FATF's website at www.fatf-gafi.org.

([3]) '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', 1 December 2005, COM(2005) 603 final; available on the Commission's website at www.europa.eu.int.

3.2 Paragraph 10.a of the Interpretative Note does not specifically use the term 'commercial'. Rather, it states that SR VII does not cover transfers that flow from transactions carried out using a credit or debit card so long as the credit or debit card number accompanies all transfers flowing from the transaction. However, paragraph 10.a also states that when credit or debit cards are used as a payment system to effect a money transfer, they are covered by SR VII, and the necessary information should be included in the message. This implies that SR VII draws a distinction between using cards to pay for goods and services (which is not covered by SR VII) and using cards to make credit transfers (which is covered). The ECB suggests redrafting recital 6 and the first subparagraph of Article 2(2) of the proposed regulation to ensure greater consistency with the Interpretative Note ([1]).

3.3 In general, Article 2(2) of the proposed regulation seems to be based on the assumption that it is always possible for the PSP of the payer and/or the payee to identify whether debit and credit cards have been used to pay for goods and services or to make credit transfers. However, this assumption is not always correct, as all types of payment instrument can be used for such transactions. When a payment is made by credit or debit card only the owner/operator of the credit or debit card scheme receives information from which it can deduce the underlying purpose of the transaction. The PSPs of the payer and of the payee only receive the information necessary to settle the transaction on their customer's account, i.e. they receive no information on the underlying purpose of the transaction. Imposing a regime on PSPs that would require them to check the purpose of such transactions would therefore not be conducive to the smooth operation of payment systems. Thus, while the ECB understands the desire to exempt transactions carried out using a credit or debit card to pay for goods and services from the requirement to include full information on the payer, the proposal seems impracticable as the entities subject to the proposed regulation have no means which would in all circumstances allow them to identify the underlying reason for a payment. However, the intention behind Article 2(2) may be that the settlement (via the PSP of the payer) of the bill relating to the underlying credit card transactions made by the payer is not part of any credit transfer that could have been initiated using the credit card, but a completely separate credit transfer from the payer to the credit card company. If this is the case, the ECB agrees with the content of Article 2(2) but, in the interests of legal certainty, would suggest making this intention clearer in the proposed regulation.

4. **Batch file transfers**

Article 7(2) of the proposed regulation governs batch file transfers to payees outside the Community. Such transfers concern individual transfers from one payer to different payees, which have been bundled and are then usually 'unbundled' by the first PSP in the process or a payment system operator and subsequently sorted according to the PSP of the payee. Therefore, neither the payee nor its PSP will be able to identify that the funds received have originally been transferred via a batch file. If the payee is situated in a country which is a member of the FATF, the country in question must also apply SR VII. Consequently, the PSP of the payee would need to contact the PSP of the payer within the Community or the first intermediary PSP to obtain the relevant information. Therefore, it is noted that the use of batch file transfers at a cross-border level will generate a large number of requests for provision of information on the payer.

5. **Agreements with territories or countries outside the Community**

Article 18 of the proposed regulation states that the European Commission may authorise agreements between Member States and countries or territories outside the Community which contain derogations from the proposed regulation. Such authorisation requires fulfilment of a number of conditions. In view of

([1]) At the same time, the ECB points to the slightly confusing terminology of the Interpretative Note, which refers to the use of cards as 'payment systems' when it states that card payments used for credit transfers are covered by SR VII.

the consolidation of financial markets in the EU and the development of the Single Euro Payments Area, the first and third conditions (i.e. that the country or territory shares a monetary union with the Member State concerned or forms part of the currency area of the Member State concerned and that it requires PSPs under its jurisdiction to apply the same rules as those established under the proposed regulation) seem to be sufficient to achieve the aims of the authorisation requirement. Therefore, the second condition (that the country or territory is a member of the payment and clearing systems of the Member State concerned) could be deleted.

6. **Drafting proposals**

Where the above advice would lead to changes in the proposed regulation, drafting proposals are enclosed in the annex.

Done at Frankfurt am Main, 15 December 2005.

The President of the ECB

Jean-Claude TRICHET

ANNEX

DRAFTING PROPOSALS

TEXT PROPOSED BY THE COMMISSION [1]	AMENDMENTS PROPOSED BY THE ECB [2]
Amendment 1	
Recital 6	
[Proposal to insert a new recital 6 and renumber the subsequent recitals accordingly.]	**The requirements of this Regulation should be fulfilled by those entities in the payment chain ensuring the execution of transfers of funds that have a customer relationship with the payer and the payee. As neither operators of payment, clearing and settlement systems nor providers of messaging services have such a customer relationship, they are exempted from the scope of application of this Regulation.**
Justification — See paragraphs 1.1-1.3 of the opinion	
Amendment 2	
Recital 6	
(6) *Due to the lower risk of money laundering or terrorist financing associated with transfers of funds that flow from a commercial transaction or where the payer and the payee are payment service providers acting on their behalf, it is appropriate to exempt such transfers from the scope of this Regulation, under the condition that it is always possible to trace them back to the payer.*	(6) **Where there is a lower risk of money laundering or terrorist financing associated with transfers of funds it is appropriate to exempt such transfers from the scope of this Regulation. These exemptions cover credit or debit cards, ATM withdrawals, direct debits, truncated cheques, payments of taxes, fines or other levies, and where the payer and payee are payment service providers acting on their own behalf.** **In addition, in order to reflect the characteristics of national payment systems, Member States may choose to exempt electronic 'giro' payments providing that it is always possible to trace the transfer back to the payer. Where Member States have applied the derogation for electronic money in Directive 2005/60/EC that derogation should also be applied in this Regulation provided the amount transacted does not exceed EUR 1 000.**
Justification — See paragraphs 3.1-3.3 of the opinion	
Amendment 3	
Article 2(2), first subparagraph	
2. This Regulation shall not apply to transfers of funds which flow from a *commercial* transaction carried out using a credit or debit card or any other similar payment instrument, provided that a unique identifier, allowing the transaction to be traced back to the payer, accompanies all transfers of funds flowing from that *commercial* transaction.	2. This Regulation shall not apply to transfers of funds which flow from a transaction carried out using a credit or debit card or any other similar payment instrument, **except when a credit or debit card is used to effect a credit transfer**, provided that a unique identifier, allowing the transaction to be traced back to the payer, accompanies all transfers of funds flowing from that transaction.
Justification — See paragraphs 3.1-3.3 of the opinion	

[1] Italics in the body of the text indicate where the ECB proposes deleting text.
[2] Bold in the body of the text indicates where the ECB proposes inserting new text.

Amendment 4

Article 2(2), second subparagraph

[Proposal to insert a new second subparagraph of Article 2(2) and renumber the existing second subparagraph of Article 2(2) so that it becomes the third subparagraph thereof.]	**This Regulation shall not apply to operators of payment, clearing and settlement systems or to providers of messaging services.**

Justification — *See paragraphs 1.1-1.3 of the opinion*

Amendment 5

Article 3(5)

5. 'payment service provider' means a natural or legal person whose business includes the provision of payment services to payment service users;	5. 'payment service provider' means a natural or legal person**, including money remitters**, whose business includes the provision of payment services to payment service users;

Justification — *See paragraph 2.2 of the opinion*

Amendment 6

Article 3(8)

8. 'payment service user' means a natural or legal person who makes use of a payment service, in the capacity of payer or payee;	8. '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**;

Justification — *See paragraph 2.1 of the opinion*

Amendment 7

Article 3(10)

[There is no current Article 3(10) — the proposal is to insert an extra definition.]	10. **'unique identifier' means a combination of letters, numbers or symbols, determined by the payment service provider, in accordance with the protocols of the payment and settlement system or messaging system used to effect the transfer.**

Justification — *See paragraph 2.3 of the opinion*

Amendment 8

Article 13(2)

2. If, in the case referred to in paragraph 1, an intermediary payment service provider does not receive complete information on the payer, it shall inform the payment service provider of the payee accordingly, when transferring the funds.	[Delete.]

Justification — *See paragraph 1.4 of the opinion*

Amendment 9

Article 18(1), second subparagraph, point b)

b) *it is a member of the payment and clearing systems of the Member State concerned;*	b) [Delete.]

Justification — *See paragraph 5 of the opinion*