



COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION  
TO THE EUROPEAN PARLIAMENT

pursuant to the second subparagraph of Article 189 b (2) of the EC-Treaty

**ON THE COMMON POSITION ADOPTED BY THE COUNCIL WITH A VIEW TO  
THE ADOPTION OF A EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE  
CONCERNING CROSS-BORDER CREDIT TRANSFERS**

## 1. BACKGROUND

- (a) On 18 November 1994, the Commission adopted a proposal for a European Parliament and Council Directive<sup>1</sup> on cross-border credit transfers. This was sent to the Council by letter dated 18 November 1994. The Council subsequently forwarded this text to the European Parliament, to the European Monetary Institute and the Economic and Social Committee. In January 1995, it began its own examination of the proposal.
- (b) The European Monetary Institute (EMI) rendered its opinion on the Commission proposal on 20 March 1995. In particular, it called for an exclusion of large value transfers as well as transfers in third country currencies from the scope of application of the proposed directive. It also suggested amendments of a technical nature pertaining to the regime of responsibilities in Articles 5 to 7.  
  
The Economic and Social Committee adopted its opinion at its sitting on 1st June 1995<sup>2</sup>.
- (c) The European Parliament adopted the legislative resolution embodying its opinion on the Commission proposal at its sitting on 19 May 1995<sup>3</sup>.
- (d) On 6 June 1995, the Commission adopted an amended proposal<sup>4</sup> in the light of the consultations of Parliament, the European Monetary Institute and the Economic and Social Committee. It was sent to Council by letter of 7 June 1995.
- (e) On 4 December 1995 the Council adopted the common position which is the subject of this communication.

## 2. PURPOSE OF THE COMMISSION PROPOSAL

The present Directive deals with aspects pertaining to the transparency and performance of cross-border credit transfers. The provisions in section II of the directive lay down general transparency requirements, which institutions offering cross-border credit transfer services will be required to respect. Member States and institutions are free to determine the precise contents of these general transparency requirements. The provisions in section III of the directive contain performance rules which are designed to give weight to the preceding transparency rules. These conditions, although of a detailed nature, allow those institutions wishing to provide cross-border credit transfer services an almost complete freedom of contract.

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<sup>1</sup> OJ No C 360, 17.12.1994, p.13.

<sup>2</sup> OJ No C 236, 11.09.1995, p.1.

<sup>3</sup> OJ No C 151, 19.06.95, p. 370.

<sup>4</sup> OJ No C 199, 03.08.95, p. 16.

### 3. COMMENTS ON THE COMMON POSITION

#### 3.1. GENERAL CONSIDERATIONS

The Commission's amended proposal of 6 June 1995, which to a large extent took account of Parliament's favourable opinion, has been taken over in substance in the common position.

Besides modifications of a drafting nature, a small number of supplementary modifications were inserted in the common position. Apart from one exception relating to the scope of application of the Directive by way of a threshold, these modifications do not impact on the overall objective of the directive.

#### 3.2. FATE OF PARLIAMENT'S AMENDMENTS (IN *ITALICS*, COMMENTARY ON ADDITIONS AND SUPPLEMENTARY MODIFICATIONS)

Parliament voted 21 amendments to the Commission's initial proposal. The Commission accepted 16 of these as proposed by Parliament and accepted partially a further 3 amendments. A large majority (16) of these amendments have been taken over integrally or in substance in the common position.

Moreover, the common position contemplates a limitation of the scope of application of the directive by way of a threshold, the principle of which had also been proposed by Parliament, although this possibility had not been incorporated by the Commission in its amended proposal.

##### **Title of the proposed directive**

The title of the amended proposal (amendment 1 of Parliament) has not, as such, been taken over to the common position. It was feared that the wording of the amended proposal, which focused on EU rather than cross-border credit transfers, might be misleading insofar as it might suggest that all transfers, and not only cross-border ones, might be covered by the directive. On the other hand, Parliament's plea for as clear a coverage as possible has been a major contributor to the simplification of the definitions needed to qualify the terms "cross-border credit transfer" (see point below, Articles 2(f) and (g) of the common position).

##### **Recitals**

The 3rd recital of the common position (amendment 2 of Parliament), whose contents have been simplified, largely takes into account the text of the modified proposal, notably by:

- focusing explicitly on the progressive move from the liberalisation of capital movements to the objective of full Monetary Union; and
- indicating that the directive applies to cross-border credit transfers denominated in the currencies of the Member States and the ECU.

*The 10th recital of the amended proposal (recital 7 of the common position), has been aligned to Article 1(2) of the common position, so as to take account of the limitation of the scope of application by way of a threshold (as to Article 1(2), see below). For reasons of chronological order, a separate recital (new recital 11 of the common position) deals with the further limitation concerning Article 8 of the directive (see explanation to Article 8).*

Recital 10a of the amended proposal (amendment 4 of Parliament), although in simplified format, has been taken over to the common position.

*Finally, recitals 4, 5, 9 and 12 of the initial as well as amended proposals have been eliminated, given that they were held not to be indispensable in providing background to and meaning for the directive's provisions. These do not however prejudice the directive's overall justification or goals. On the other hand, supplementary recitals have been inserted in the text of the common position, notably recitals 9 and 10 (in relation to Article 6) and recitals 12 and 13 (in relation to Article 8), which the Commission regards as useful. They are discussed in the context of the corresponding Articles to which they relate.*

### **Articles of the directive**

*Article 1(1) of the common position indicates that the directive applies to "cross-border credit transfers, ordered by persons other than those covered by Article 2(a), (b) and (c)", whereas the Commission's initial and amended proposals focused on cross-border credit transfer services, to the extent that they were supplied (by institutions) "to the public as part of their business". The common position wording of Article 1(1) aims to exclude that the directive may apply to capital markets transactions, usually of large amounts, where the ordering party is customarily one of the institutions defined in Article 2(a), (b) and (c), as against an ordinary customer. As such, it is coherent with the objective set out in the Commission's initial and modified proposals.*

Article 1(2) of the amended proposal (amendment 5 of Parliament), as regards the part which excludes from the scope of the directive transfers denominated in third country currencies, has been taken over in the common position. *On the other hand, Article 1(2) of the amended proposal did not incorporate Parliament's amendment 5, calling for a limitation of the directive to transfers which do not exceed an amount equivalent to 50.000 ECU. In the Explanatory Memorandum to its amended proposal<sup>5</sup>, the Commission justified this position by indicating that it was "not fully convinced that the setting of a ceiling would not prejudice the objective of an appropriate level of protection of consumers and SMEs." The Council's common position incorporates a limitation by way of a threshold, whose level has been set at an initial level of 25.000 ECU. This amount will be automatically raised to 30.000 ECU, two years after the date set out in Art. 11. The Commission believes that this*

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<sup>5</sup> COM 95(264) final of 06.06.1995.

*mechanism is a recognition of the need to ensure as wide a coverage as possible, also in view of the progressive growth of this market. It has accepted the common position in order to enable progress to be achieved in the legislative procedure, although not fully satisfied with the terms of the common position on this point. Finally, in the light of the Report to be provided to the European Parliament and the Council pursuant to Article 12, the Commission has undertaken to examine the question of the adequacy of the level of the threshold in Article 1, to assess the situation and present appropriate proposals. In this respect, the Commission requested that a unilateral statement be inserted in the Council Minutes, setting out its position on the issue of the limitation of the directive's scope of application (see annex 1 herewith).*

*Article 2(c) of the Council's common position introduces a new definition of "financial institution", based on Council Regulation<sup>6</sup> No 3604/93 specifying definitions for the application of the prohibition of privileged access referred to in Article 104a of the Treaty. This new definition was necessary in the light of the new text of Article 1(1) (see above), which now contemplates a limitation of the scope having regard to the nature of the ordering party.*

*Articles 2(f) and 2(g) in the common position provide for the definition of "cross-border credit transfer" and "cross-border credit transfer order". These definitions are intended to replace respectively the definitions in article 2(e) (payment), 2(f) (cross-border payment), 2(j) (payment order) and 2(k) (credit transfer) in the modified proposal. The change in structure and rationalisation in numbering, however, are without prejudice to the intended scope of the directive, i.e. cross-border credit transfers. It is also meant to take account of Parliament's request for more clarity as to the terminology used for the title. Coherently with the Commission's initial and modified proposals, these are transactions, carried out on the initiative of an originator, starting with a cross-border credit transfer order, via an institution or its branch in one Member State, with a view to making available an amount of money to a beneficiary at an institution or its branch in another Member State.*

*Article 2(l) of the amended proposal (amendment 6 of Parliament) laid down the full wording of the definition of "force majeure", rather than referring exclusively to Council directive 90/314/EEC<sup>7</sup>. In the common position, the full wording of the definition is now directly incorporated in Article 9, thus rendering any repetition in the definitions article redundant. The objective underlying Parliament's amendment, despite the difference in form, is therefore fully observed.*

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<sup>6</sup> OJ No L 332, 30.12.1993, p.4.

<sup>7</sup> OJ No L 158 of 23.06.1990, p.59.

Article 2(m) of the amended proposal (amendment 7 of Parliament) set out a new definition of "interest", based on "the rate which the institution would apply to its customer's account, for the relevant period, if that customer's account were overdrawn". Neither this definition, nor that contained in the initial proposal, based on the inter-bank offered rate as a benchmark, have been taken over in the common position, since the principle of fuller harmonisation was not considered necessary in this respect. Instead, an alternative definition of "reference interest rate" has been retained, i.e. "an interest rate representing compensation and established in accordance with the rules laid down by the Member State in which the institution which must pay the compensation to the customer is situated".

*Article 2(p) of the amended proposal (definition of "completion") has been deleted, since that term identified a different legal situation in a number of Member States' legislation, i.e. the time of the funds being made available to the beneficiary. To avoid any confusion that might arise in this respect, the full wording of the definition (i.e. "acceptance by the beneficiary's institution") has been carried directly into the relevant paragraphs of the text of the common position. The Commission considers such changes not to prejudice the mechanisms of the articles in which the definition is used.*

Article 2(q) of the amended proposal (amendment 9 of Parliament), which provides for the definition of "intermediary institution", has been taken over to the common position (Article 2(e)).

*Article 2(o) in the amended proposal, providing for the definition of "acceptance", has been slightly amended, appearing as the definition of "date of acceptance" in article 2(l) of the common position.*

*Article 2(r) in the amended proposal (definition of "business day") has been deleted. The concept of "business day", which appears in the text of the common position as "banking business day", was considered to be clear under all national legislation, and therefore not needing harmonisation at Community level.*

Save for modifications of a drafting nature, Article 3 of the amended proposal (amendment 10 of Parliament) has been integrally taken over to the common position. Thus, information is:

- to be provided in written form, including where appropriate by electronic means,
- to be provided in a readily comprehensible form;
- to include the manner of calculation, including where appropriate the rates, of any commission fees and charges payable by the customer;
- to include an indication of the complaint and redress procedures available to the customer and the method of gaining access to them.

Similarly, save for modifications of a drafting nature, Article 4 of the amended proposal (amendment 11 of Parliament) has been integrally carried over to the common position.

*A new Article 5 has been introduced into the common position. Whereas Article 3 provides for a general obligation of transparency vis-à-vis customers, Article 5 provides that where a customer requests that a cross-border credit transfer be carried out according with stated specifications, and without prejudice to the right of the institution not to deal with that customer, the latter is entitled to receive an undertaking concerning the time needed for execution and the commission fees and charges payable. Such a new Article, on whose usefulness the Commission fully agrees, is also intended to ensure a better liaison between the provisions on transparency and those on performance.*

From a presentational point of view, Article 6 of the common position is different in structure from Article 5 of the modified proposal, although its contents are broadly in line with the latter. Thus, whereas Article 5, paragraph 1 of the amended proposal dealt simultaneously with the obligations falling on each participating institution, Article 6 of the common position deals separately with the obligations falling respectively on the originator's, intermediary and beneficiary's institutions. Notwithstanding this difference in structure, the contents and effect of Article 5 of the amended proposal (amendments 12, 13 and 14 of Parliament) have, to a very large extent, been taken over in the common position. Indeed:

- the originator's institution (alternatively, the beneficiary's institution) shall execute the transfer within the agreed time scale or, in the absence of such an agreement, no later than 5 (1) banking business days after acceptance of the order (crediting of the funds to the account of the beneficiary's institution). *As a reinforcement, two new recitals have been added in this respect. The new recital 9 stresses the directive's aim to lead to a reduction of the maximum time scales for execution. Accordingly, the setting of default time scales, applicable in the absence of an agreement between institution and customer, should not encourage institutions that already offer better terms to worsen them. The new recital 10 contains an undertaking by the Commission to examine, in the context of the report to be submitted to Parliament and Council, the question and appropriateness of the default time scales, having regard to technical progress and the situation in the different Member States;*
- compensation in the form of interest is due in the event of delayed execution, whichever time scale is applicable;
- any intermediary institution to which a delayed execution is attributable shall compensate the institution from which the order originated;
- no compensation is due where the originator's institution can establish that the delay is attributable to the originator himself. *For the sake of coherence, the common position also contains a corresponding derogation for the beneficiary's institution, where failure is attributable to the beneficiary;*

- the directive is without prejudice to any supplementary rights which customers and institutions may invoke.

Save for modifications of a drafting nature, Article 6 of the amended proposal (amendments 15 and 16 of Parliament) has been taken over to the common position (Article 7). In accordance with Article 7, the credit transfer is to be executed for the full amount, "unless the originator has specified that the costs of the cross-border credit transfer are to be borne wholly or partly by the beneficiary". Where unauthorised deductions occur at the level of the originator's or an intermediary institution, the directive lays down the rules for these to be reimbursed to the beneficiary unless the originator has expressly requested that this amount be credited to him. Where such a deduction is attributable to the beneficiary's institution, it shall credit the sum so deducted to the beneficiary.

Article 7, paragraph 1 of the amended proposal (amendment 18 of Parliament) has substantially been incorporated in the common position (Article 8, paragraphs 1 and 2). Thus, for failure to credit the amount transferred to the institution of the beneficiary, the originator's institution shall credit the originator with the amount of the transfer, up to an amount equivalent to 10.000 ECU, plus interest and charges. It should be noted that a new recital 11 has been inserted in the common position, reflecting the provisions of Article 8. Reimbursement shall be made within 14 banking business days of the originator's request, such request not to be made before the expiry of the time scale for execution applicable under Article 6. Similarly, each intermediary institution likewise owes an obligation to refund the said amount to the institution which instructed it. *By derogation to the general rule, if failure to execute the transfer is attributable to an intermediary institution chosen by the beneficiary's institution, the latter will have to make the funds available to the beneficiary. The Commission viewed favourably this derogation, which it considers adherent to the underlying principle that the burden of responsibility should first lie with the customer's institution concerned, while ultimately resting with the defaulting institution.*

Article 7, paragraph 2 of amended proposal (amendment 19 of Parliament) has been partially taken over to the common position (Article 8, paragraph 3). *On the other hand, the text of the common position has also been extended to cover a second set of situations.* As to the first, the common position confirms that where failure to execute the credit transfer is attributable to the originator, institutions are only bound to a best endeavours clause and, in cases of successful recovery of funds, are entitled to make deductions of costs arising from the recovery. The Commission has favourably viewed this latter solution, which it considers compatible in spirit with the solution contained in the amended proposal, whereby an institution having recovered the funds was not obliged to reimburse interest and charges levied. *As regards the second, the common position provides that the best endeavours clause should be extended to cover the situation where failure to execute was attributable to an intermediary institution expressly chosen by the originator.*



Article 7, paragraph 3 of the amended proposal (amendment 20 of Parliament), which laid down explicitly an option for Member States to provide for an obligation to refund for amounts exceeding 10.000 ECU, has not been carried over to the common position. Such a possibility, it was thought, could lead to difficulties of a systemic nature, with different sections of the cross-border credit transfer chain subject to different reimbursement requirements. For instance, problems could arise where the originator's institution was bound by its Member State's legislation to reimburse for higher amounts than it would be able to recover from defaulting intermediary institutions subject to other Member States' requirements. It was also considered that this could create confusion among both institutions and customers, neither of which would easily understand which rules were applicable. The Commission, though less convinced about the force of that preoccupation, accepted this deletion, it being intended that the directive should be without prejudice to national provisions relating to the responsibility of an institution, where failure is attributable to such institution. *A new recital 12 has been inserted to this effect, emphasising this principle, whereas it was not felt necessary to retain this idea in the main legal text.*

Article 7a of the amended proposal (amendment 21 of Parliament) has been taken over to the common position (Article 9), *with the addition that Article 9 is without prejudice to directive 91/308/EEC. It should also be noted that, as anticipated above in respect of definitions, the definition of "force majeure", as laid down in Article 4 of directive 90/314/EEC, is now added to the text of the present article, so as not exclusively to refer to the definition contained in Article 4 of directive 90/314/EEC. A new recital 13 has been inserted, as a match to Article 9.*

Article 7b of the amended proposal (amendment 22 of Parliament) has been taken over to the common position (Article 10), although in simplified form. The Commission believes however that the fundamental goals underlying this Article have been preserved. Indeed, the text of the common position enshrines the crucial principle that adequate and effective means should exist in all the Member States for the settlement of any disputes between customer and institution, the responsibility of which rests with the Member States. The explicit requirement that the addresses of any settlement offices be available at institutions offering cross-border credit transfer services has been dropped from this Article, since this is now directly covered by a specific provision in Article 3.

*Finally, Article 11 of the common position has been aligned to take account of recent procedures on drafting techniques. Accordingly, the common position does not set out an explicit ultimate date for implementation, as was the case in the Commission's initial and amended proposals, but rather allows for a maximum period of 30 months for implementation, running from the publication of the directive in the Official Journal of the European Communities. The length of this period was considered to be justified by the complexity of the subject dealt with by the proposed directive and of the national procedures for implementation. The Commission would be inclined to prefer as short an implementation period as possible and, in any event, is adamant that the directive be implemented ahead of Economic and Monetary Union.*

### 3.3 CONCLUSIONS

Taking into account all of the above considerations, the Commission takes the view that the text of the common position retains unchanged the essence of the Commission's initial proposal. Parliament's amendments, on the whole, are treated in a manner equivalent in substance to that followed by the Commission in the amended proposal.

With regard to the scope of application of the directive, the Commission, as already noted before, would prefer as high a ceiling as possible. Thus, it decided to have inserted in the Council minutes a unilateral statement. The statement, which reflects the substance of its position (see Annex 1 enclosed), **emphasises the desirability of as wide a coverage as possible.**

**DECLARATION**

The acceptance of the compromise suggested by the Presidency has not changed the Commission's fundamental conviction that a higher threshold for the application of the directive would better serve its objective of creating a fully functioning Internal Market for cross-border credit transfer services.

The decision to raise the threshold for the application of the directive automatically, from 25,000 ECU to 30,000 ECU, two years after the date set out in Art. 8, is therefore a step in the right direction, confirming the Commission's long run approach.

In any case, the Commission will continue to re-examine the question of the adequacy of the level of the threshold in Article 1 in order to assess the situation and present the appropriate proposals, in the light of the Report to be provided under Article 9.